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Australian Competition & Consumer Commission
Attention – Alex Elith

By email **alex.elith@accc.gov.au**
accessdeterminations@accc.gov.au

Dear Sirs

Submission in relation to WDSL Final Access Determination

Introduction

This submission is made by Vocus Communications Limited (**Vocus**) in response to the Australian Competition and Consumer Commission's discussion paper of February 2012 entitled: *Public Inquiry to Make a Final Access Determination for the Wholesale ADSL Service* (**the Discussion Paper**). Vocus welcomes the opportunity to make a submission in response to the Discussion Paper. In this submission, Vocus addresses:

- the application of the statutory test;
- pricing methodology;
- important non price issues that the Wholesale DSL Service (**WDSL**) final access determination (**FAD**) should address; and
- Telstra's request for geographic exemptions.

Application of the statutory test

In making the WDSL FAD the Australian Competition and Consumer Commission (**ACCC**) must consider the mandatory considerations set out in section 152BCA(1) of Part XIC of the *Competition and Consumer Act 2010* (**the CCA**). Part XIC of the CCA sets out the telecommunications specific access regime. Section 152AB(1) of the CCA sets out the object of Part XIC as follows:

> *The object of this Part is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.*

Section 152AB(2) provides that for the purposes of Part XIC, in determining whether a particular thing promotes the long-term interests of end-users of carriage services and services supplied by listed services, regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:

- promoting competition;
- achieving any-to-any connectivity;
- encouraging the economically efficient use of, and investment in, infrastructure.

As mentioned above, the sole object of Part XIC is to promote the long term interests of end users (**LTIE**)[1]. As regards the particular outcome that promotes the LTIE, the following comments by the Australian Competition Tribunal (**the Tribunal**) are relevant:[2]

> *the interests of end-users lie in obtaining lower prices (than would otherwise be the case), increased quality of service and increased diversity and scope in product offerings.*

Given the nature of the outcome that the LTIE test is intended to achieve, and the fact that access prices will ultimately be recovered from end users, adopting an approach to setting access prices which is overly generous to Telstra cannot be in the LTIE because it will not achieve an outcome whereby end users can obtain the best possible services at the lowest possible prices. Furthermore, in assessing the LTIE, it is important for the ACCC to look beyond copper based WDSL and to take into account the desirability of creating an environment that will best promote the LTIE in the transition to the NBN. Cost based WDSL is likely to encourage the provision of cheaper, better, and more diverse broadband services to consumers. This is so particularly with regard to consumers in regional and rural areas. This will assist in ensuring that a range of service providers vigorously compete to win these customers prior to and during transition to the NBN.

Pricing methodology

In the *Inquiry to make final access determinations for the declared fixed line services, Final Report* of July 2011, the ACCC stated:

> *A building block model (BBM) pricing methodology estimates prices that reflect efficient costs. The ACCC considers that adopting a BBM approach to setting prices for the declared fixed line services meets the objectives of promoting the LTIE because setting prices that reflect efficient costs will*

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[1] See section 152AB(1) of the CCA.
[2] *Re Seven Network Limited (No 4)* [2004] ACompT 11, at [120]

promote competition in the markets for carriage services and encourage efficient use of and investment in infrastructure.

Access prices that reflect efficient costs, and do not include any monopoly profits, will facilitate access to the infrastructure services required by access seekers to provide a range of communications services to end-users.

In addition, the ACCC considers that adopting a BBM approach will promote the LTIE for the following reasons:

- *Locking-in a value for the RAB fosters predictable revenue and price paths, thereby minimising the likelihood of windfall gains or losses. This certainty promotes efficient use of and investment in infrastructure.*
- *The BBM approach ensures the access provider is adequately compensated for the cost of providing the declared fixed line services over time. The estimated revenue requirement allows the access provider to recoup its efficiently incurred costs, including a commercial return on its investments. Determining prices through a transparent and cost-based pricing model will provide regulatory certainty for both the access provider and access seekers about the way in which the ACCC will set prices. Such certainty promotes efficient investment and competition in the markets for carriage services.*
- *Using a BBM approach will ensure that prices for the declared fixed line services are based on the costs of providing access. This will promote a level playing field for access to the services needed to provide downstream services and promote competition in downstream markets*[3]*.*

Vocus considers that that the conclusions reached by the ACCC with regard to other fixed services apply equally to WDSL pricing. Accordingly, the most obvious ways of setting the WDSL port charge seem to be either:

- *BBM and/or;*
- *a WDSL specific cost charge that operates in the same way that the LSS charge is currently set. That is, where a WDSL has an underlying PSTN service, then all network related costs are recovered via the WLR charge. In this situation there is no need to allocate network costs to the WDSL and the WDSL charge would likely be similar to the LSS charge plus the other costs that Telstra incurs to provide WDSL such as capex and opex relating to its*

[3] *Inquiry to make final access determinations for the declared fixed line services, Final Report ' July 2011,* at p.133.

DSLAMs, or the LSS + port costs. This also seems a reasonable way to address the WLR/WDSL bundling issue as it would not matter which service provider supplies the end user's phone line.

Vocus considers that AGVC/VLAN charges should also be cost based and that BBM modelling remains appropriate.

Important non price terms

Vocus submits that in order to address competition issues relating to the provision of WDSL by Telstra and better promote the LTIE, the WDSL FAD needs to address the following issues:

- forced bundling of the AGVC;
- forced bundling of PSTN voice services; and
- the restriction on reselling the WDSL service to wholesale customers.

Forced bundling of the AGVC

Vocus acknowledges that the AGVC cannot be excluded from the WDSL service description and must have a set regulated charge, as in many areas Telstra is the sole backhaul provider. However, this does not mean that it should be mandatory for an access seeker to acquire AGVC from Telstra when acquiring WDSL. Vocus submits that allowing access seekers to choose whether or not to acquire AGVC from Telstra in locations where competitive backhaul is available will substantially promote competition.

Forced bundling of PSTN voice services

Vocus submits that there should not be a requirement that WDSL can only be provided on lines with an underlying PSTN service. Vocus believes that if a retail broadband service can be provided via WDSL without the end user also being required to purchase a PSTN voice service, the LTIE will be better promoted than if PSTN bundling is forced. Vocus considers that any limitations that Telstra has built into its systems that force end-users serviced by WDSL to also acquire a PSTN service should be removed. Vocus believes that the technology that Telstra uses to deliver WDSL is comparable to the technology that access seekers use to provide retail 'naked' DSL services via the ULLS. Accordingly, Telstra is not limited from removing what is in effect forced bundling of two services at both the wholesale and retail level, with the extra costs of a voice service frequently not wanted or required by the end user. Given the requirements of the LTIE, Vocus submits that it is the requirements of the end user that should be paramount rather than the requirements of Telstra. Allowing Telstra to continue to force WDSL/PSTN voice bundling limits consumer choice and impedes the development of innovative competition over WDSL in the transition to the NBN.

The restriction on reselling the WDSL service to wholesale customers

Vocus believes that it is important for the FAD to address Telstra's ability to:

- restrict an Access Seeker's ability to resell the WDSL service; and
- dictate the terms on which an Access Seeker can resell the WDSL service.

Allowing Access Seekers to resell WDSL without having to obtain Telstra's permission and without having any restrictions imposed by Telstra, will promote competition in wholesale markets. This will have flow on effects in the downstream retail markets. Stimulating competition in this way will obviously better promote the LTIE than stifling competition by allowing restrictions on reselling. Vocus notes that the Interim Access Determination for the WDSL service expressly allows an Access Seeker to acquire the WDSL service for the purpose of supplying to a reseller without the need to obtain Telstra's consent to do so[4]. For the reasons given above, Vocus fully supports the inclusion of this term in the FAD.

Telstra's request for geographic exemptions

In January 2012 Telstra submitted that WDSL declaration should exclude exchange service areas (**ESAs**) that met certain specified criteria[5]. Vocus considers that the ACCC correctly decided that WDSL should be declared on a national basis. Vocus submits that it is not appropriate to exempt any ESAs from the WDSL FAD. Vocus submits that any consideration into whether to grant the exemptions requested by Telstra should have close regard to the experience of the WLR/LCS and PSTN OA exemptions, which proved to be detrimental to competition and provided no benefit to the LTIE.

In December 2011, the ACCC varied the FADs for WLR, LCS and PSTN OA to remove geographic exemptions after reaching the conclusion that:[6]

> *removing the exemptions will promote competition, the efficient use of and investment in infrastructure, and the long term interests of end-users*.

The ACCC further stated that:[7]

> *[a]fter analysing the submissions and information provided to it, the ACCC has found clear evidence that the exemptions have not promoted competition*

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[4] Schedule 10 - Interim Access Determination No. 1 of 2012 (WDSL).

[5] Telstra submission, Pub, pp18-20

[6] ACCC, Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services, Final Version, December 2011, at p. 6.

[7] ibid

in the exempt areas and are unlikely to do so in the future. In addition, the ACCC has concluded that the exemptions have the potential to undermine efficiency in the use of, and investment in, infrastructure.

In light of this conclusions, Vocus cannot see how the granting of the exemptions sought by Telstra will promote the LTIE.

Yours faithfully

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