

**ACCESS DISPUTE BETWEEN**  
**AGILE PTY LTD (ACCESS SEEKER)**  
**AND TELSTRA CORPORATION LIMITED (ACCESS PROVIDER)**  
**UNCONDITIONED LOCAL LOOP SERVICE (ULLS)**

Access Dispute Notified under section 152CM of the  
*Trade Practices Act 1974* on 2 November 2007.

**Final Determination under Section 152CP of the**  
***Trade Practices Act 1974***

**Background**

1. On 2 November 2007, the Australian Competition and Consumer Commission (the ACCC) received a written access dispute notification (the notification) from Agile Pty Ltd (Agile) that an access dispute existed in relation to the supply by Telstra Corporation Limited (Telstra) of the Unconditioned Local Loop Service (ULLS). Agile's notification was provided to the ACCC pursuant to section 152CM of the *Trade Practices Act 1974* (the Act).
2. The ULLS is an access service involving the use of unconditioned cable, primarily copper pairs, between end-users and a telephone exchange where the unconditioned cable terminates. The ULLS is used by access seekers in conjunction with their own infrastructure in the exchange to provide services, including traditional voice services and high speed internet and data services, to end-users.
3. After holding a public inquiry, the ACCC declared the ULLS, pursuant to subsection 152AL(3) of the Act on 4 August 1999. The declaration was published in the *Commonwealth of Australia Gazette* GN32 on 11 August 1999. Since this time, the ACCC has re-declared the service twice:
  - From 1 August 2006 to 31 July 2009 - *Commonwealth of Australia Gazette* GN31 on 9 August 2006 (pursuant to subsection 152ALA(4) of the Act);
  - From 1 August 2009 to 31 July 2014 - *Commonwealth of Australia Gazette*, GN28 on 22 July 2009 (pursuant to subsection 152ALA(4) of the Act).
4. The ACCC made pricing principles on 3 December 2009 - *Pricing Principles for the Unconditioned Local Loop Service (ULLS) Determination 2009* - for the declared ULLS pursuant to section 152AQA of the Act.<sup>1</sup>
5. The ACCC has formed the view that, with respect to the notification, the requirements of subsection 152CM(1) of the Act are satisfied. That is,
  - Telstra is a carrier;
  - Telstra supplies the declared ULLS;

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<sup>1</sup> *Pricing Principles for the Unconditioned Local Loop Service (ULLS) Determination 2009*

- Telstra has an obligation under subsection 152AR(3) of the Act to supply the ULLS to Agile; and
  - Agile is unable to agree with Telstra about terms and conditions of access to the ULLS, including the charges and other terms and conditions that are the subject of this final determination.
6. On 26 June 2008, the ACCC made an interim determination. The interim determination was extended on 22 June 2009 until 1 July 2010.
  7. Pursuant to subsection 152CP(1) of the Act, this instrument is the final determination relating to the terms and conditions of access by Agile to the ULLS provided by Telstra.

### **Terms and conditions of access**

8. This Final Determination specifies:
  - ULLS monthly charges, as per Schedule 1
  - ULLS single connection charges, as per Schedule 2
  - ULLS late withdrawal charges, as per Schedule 3
  - ULLS network modernisation and upgrade terms, as per Schedule 4.
9. Subject to clause 10, other terms and conditions upon which Telstra and Agile have agreed for the supply of the ULLS are to continue to apply.
10. Except where the parties expressly agree otherwise, in the event of any inconsistency between the terms and conditions upon which Telstra and Agile have agreed for the supply of the ULLS and the intended operation of this determination, this determination is taken to apply and overrides any pre-existing agreement to the extent of any inconsistency.
11. All charges expressed in this Final Determination are expressed on a GST exclusive basis.

### *Settlement of over or under paid amounts and interest*

12. The total amount that arises from the difference between charges that have been paid by Agile and the charges specified in this determination ('the settlement amount') is to be paid:
  - (a) where the charges paid by Agile are less than the charges specified in this determination, by Agile to Telstra; or,
  - (b) where the charges paid by Agile are more than the charges specified in this determination, by Telstra to Agile.

*Note: For calculating the amount of money required to be paid, parties must take into account the charges paid by Agile under the interim determinations.*

13. Interest is payable on the settlement amount, compounded daily at the applicable monthly rate specified in the Small Business Variable Other Overdraft Indicator Rate published by the Reserve Bank of Australia, for the period commencing on the date that the charge specified in this determination commences, and ending on the date that this determination takes effect.

*Note: This Indicator Rate series can be obtained from the Reserve Bank of Australia <http://www.rba.gov.au/statistics/tables/xls/f05hist.xls>*

14. Except where the parties agree otherwise, the settlement amount is to be paid within 42 days after the date on which this determination is made.

*Commencement and expiry*

15. This determination comes into effect 21 days after the date it is made.

16. The determination will remain in force until 31 December 2010 for the following schedules:

- ULLS Monthly charges (Schedule 1)
- ULLS single connection charges (Schedule 2)
- ULLS Late withdrawal charges (Schedule 3)

unless the ULLS ceases to be a declared service, in which case this determination will cease to have effect on that day.

**Definitions**

17. For the purpose of this Final Determination, the following definitions apply:

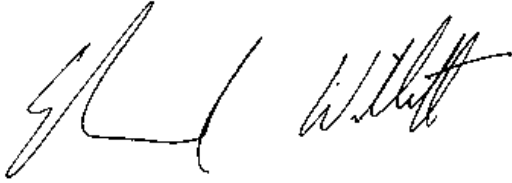
- (i) 'Band' refers to the geographic classification of exchange service areas (ESAs).
- (ii) 'Band 1' means the following central business districts:
  - (a) NSW (City South, Dalley, Haymarket, Pitt, Kent)
  - (b) QLD (Charlotte, Edison, Roma Street, Spring Hill)
  - (c) South Australia (Flinders, Waymouth)
  - (d) Victoria (Batman, Exhibition, Lonsdale)
  - (e) WA (Bulwer, Pier, Wellington).
- (iii) 'Band 2' means an exchange service area with more than 108.4 services in operation in a square kilometre area at the time this determination is made, which is not a Band 1 area;
- (iv) 'Band 3' means an exchange service area with 6.56 or more, but less than 108.4, services in operation in a square kilometre area at the time this determination is made;
- (v) 'Band 4' means an exchange service area with 6.55 or less services in operation in a square kilometre area at the time this determination is made.

*Note 1: These Band definitions are taken from Annexure A (Key Performance Indicators Operational Document) to Telstra's Service Quality Strategy dated 23 June 2006 (available at [http://telstrawholesale.com//dobusiness/customer-commitment/docs/op\\_sep\\_quality\\_strategy.pdf](http://telstrawholesale.com//dobusiness/customer-commitment/docs/op_sep_quality_strategy.pdf)).*

*Note 2: The applicable Band is the Band in which the relevant service lies as at 31 August 2007.*

*Note 3: Brief descriptions of the four Bands are:*

- *Band 1 – central business districts in New South Wales, Queensland, South Australia, Victoria and Western Australia*
- *Band 2 – metropolitan*
- *Band 3 – provincial*
- *Band 4 – rural*



Edward Campbell Willett  
Presiding Member



Joseph Dimasi  
Commissioner

DATED: 7 April 2010

### Schedule 1 - ULLS Monthly Charges

1. Except where the parties subsequently agree otherwise, the ULLS Monthly Charges payable by Agile to Telstra per ULLS, per month are as follows:

Band	2007-08	1 July 2008 – 31 July 2009	1 August 2009 – 31 December 2010
Band 1	\$6.20	\$6.60	\$6.60
Band 2	\$14.30	\$16.00	\$16.00
Band 3	\$28.50	\$31.30	\$31.30

2. Except where the parties subsequently agree otherwise, there is no minimum period for which a ULLS must be acquired, and ULLS Monthly Charges are not payable for a ULLS following Agile ceasing to acquire it.
3. Except where the parties subsequently agree otherwise, this determination does not include any reasonable amount which Telstra may impose in order to recover tax paid by Telstra pursuant to the *Utilities (Network Facilities Tax) Act 2006* (ACT).

#### *Application*

4. The charges specified in this Schedule do not apply to:
  - (a) the ULLS supplied in Band 4; or
  - (b) the supply of the ULLS before 25 October 2007; or
  - (c) the supply of the ULLS after 31 December 2010.

## **Schedule 2 - ULLS single connection charges**

### *ULLS single connections— IULLS and TULLS*

1. Except where the parties subsequently agree otherwise, and subject to clause 2, the charge payable per connection for the making of an IULLS connection or TULLS connection outside a Managed Network Migration is as follows:

#### **From 1 July 2007 to 30 June 2008**

Band 1: \$50.10  
Band 2: \$52.80  
Band 3: \$57.40

#### **From 1 July 2008 to 31 July 2009**

Band 1: \$50.40  
Band 2: \$53.10  
Band 3: \$57.70

#### **From 1 August 2009 to 31 December 2010**

Band 1: \$50.40  
Band 2: \$53.10  
Band 3: \$57.70

2. Except where the parties subsequently agree otherwise, where cutover testing is performed by Telstra at the request of Agile for a particular IULLS connection or TULLS connection, the following additional amount is payable for that connection:

\$10.80

### *Application -*

3. The terms specified in this Schedule do not apply to ULLS connections:
  - (a) in Band 4;
  - (b) where the line on which the ULLS is to be connected is being used to supply LSS; or
  - (c) which were made prior to 25 October 2007 or after 31 December 2010.
4. This Schedule does not specify charges payable for VULLS connections.

### *Definitions –*

5. For the purposes of this Schedule:
  - (i) a reference to the connection of an IULLS or TULLS outside a Managed Network Migration refers to all instances of ULLS connections other than those that are made as part of a 'Managed Network Migration' (MNM).

- (ii) a MNM is the transfer or migration of services that is achieved by the project management of Telstra in coordinating the cancellation and connection of services.
- (iii) 'IULLS' connection refers to an 'in-use' ULLS connection where the ULLS is to be provided on a copper pair that was being used by Telstra, immediately prior to the request for access, to provide PSTN-based services on a wholesale or retail basis.
- (iv) 'TULLS' connection refers to a 'transfer' ULLS connection where the ULLS is to be provided on a copper pair that was being used immediately prior to the request for access, to supply a ULLS to another carrier or carriage service provider (for the avoidance of doubt, this may include Telstra as the access provider).
- (v) 'VULLS' refers to a 'vacant' ULLS connection on a line that at the time of the order is not being used to supply any service.

### **Schedule 3 – ULLS Late Withdrawal Charges**

1. Except where the parties subsequently agree otherwise, the ULLS Late Withdrawal Charges payable by Agile to Telstra for a ULLS 'single' order are as follows:

From 1 July 2007 to 30 June 2008	\$16.70 per order
From 1 July 2008 to 30 June 2009	\$17.30 per order
From 1 July 2009 to 30 June 2010	\$17.90 per order
From 1 July 2010 to 31 December 2010	\$17.90 per order

#### *Application*

2. The terms specified in this Schedule do not apply to ULLS Late Withdrawal Charges:
  - (a) in Band 4; or
  - (b) which were made prior to 25 October 2007; or
  - (c) which were made after 31 December 2010.

#### *Definitions*

3. For the purpose of this Schedule:
  - (i) A reference to the 'withdrawal' is the cancellation of a 'single' order (request) for a ULLS service;
  - (ii) A 'late withdrawal', in the context of a ULLS 'single' order (i.e., not an order submitted as part of a managed network migration (MNM)), is a withdrawal that occurs less than two clear Business Days from the scheduled cutover date;
  - (iii) 'Business Day' means any day other than Saturday or Sunday or a day which is a gazetted public holiday in the place concerned.



## Schedule 4 – ULLS Network Modernisation and Upgrade Terms

### *Notice to be provided where Telstra undertakes a Major Network Modernisation and Upgrade*

1. Except where the parties agree otherwise, Telstra may make a Major Network Modernisation and Upgrade by:
  - (a) providing Agile with notices in writing in accordance with clauses 2 and 4 (**General Notification**) and clauses 3 and 5 (**Individual Notification**); and
  - (b) consulting with Agile, and negotiating in good faith, any reasonable concerns of Agile, in relation to the Major Network Modernisation and Upgrade.

This clause 1 does not apply to an Emergency Network Modernisation and Upgrade.

2. The period of notice given under a General Notification provided by Telstra to Agile:
  - (a) must be an Equivalent Period of Notice; and
  - (b) in any event, must not be less than thirty weeks before the Major Network Modernisation and Upgrade is scheduled to take effect.
3. An Individual Notification must be provided by Telstra to Agile as soon as practicable after the General Notification, but, in any event, not less than twenty-six weeks prior to the anticipated commencement date of the Major Network Modernisation and Upgrade.

### *Information to be provided in the notices*

4. A General Notification must include information on:
  - (a) the exchange service area affected by the proposed Major Network Modernisation and Upgrade;
  - (b) the distribution area affected by the proposed Major Network Modernisation and Upgrade; and
  - (c) a general description of the proposed Major Network Modernisation and Upgrade, including the indicative timing for the implementation of the Major Network Modernisation and Upgrade.
5. An Individual Notification must include the following information in addition to the information provided in the relevant General Notification:
  - (a) the anticipated commencement date for implementing the Major Network Modernisation and Upgrade;
  - (b) details of Agile's ULLS activated or in the process of being activated at the date of the notice that are likely to be affected by the Major Network Modernisation and Upgrade;

- (c) the likely action required by Agile as a result of the Major Network Modernisation and Upgrade (including the possible impact of the Major Network Modernisation and Upgrade upon Agile's ULLS); and
  - (d) details of who Agile may contact to obtain further information about the Major Network Modernisation and Upgrade.
- 6. An Individual Notification only needs to be given where a ULLS has been activated or Telstra is in the process of activating a ULLS as at the date of the Individual Notification, and:
  - (a) the Major Network Modernisation and Upgrade will require Agile to take particular action in order to continue to use the ULLS; or
  - (b) the Major Network Modernisation and Upgrade will result in the ULLS no longer being supplied.
- 7. Where Telstra has provided Agile with an Individual Notification, Telstra must provide Agile with:
  - (a) updates about the Major Network Modernisation and Upgrade covered by the notice, including:
    - (i) any update or change to the information provided in the Individual Notification;
    - (ii) any new information available at the time of the update about:
      - (A) services provided by Telstra in the relevant exchange service area that may be available to Agile;
      - (B) how Agile may be impacted by the Major Network Modernisation and Upgrade; and
      - (C) what steps Agile will be required to take to facilitate the Major Network Modernisation and Upgrade; and
  - (b) weekly reports about the anticipated cutover dates for Agile's affected services, beginning no less than five weeks prior to the anticipated commencement date for the Major Network Modernisation and Upgrade.
- 8. The updates referred to in subclause 7(a) are to be provided regularly (which is not required to be any more frequently than monthly) after the Individual Notification.

*Emergency Network Modernisation and Upgrade*

- 9. In the event of an Emergency, Telstra may conduct an Emergency Network Modernisation and Upgrade, and:
  - (a) will use its best endeavours to provide Agile with an Individual Notification prior to the Emergency Network Modernisation and Upgrade being implemented; or

- (b) where it is not practicable for prior notice to be given, Telstra will provide Agile with an Individual Notification as soon as reasonably practicable after the Emergency Network Modernisation and Upgrade is implemented.

*Coordinated Capital Works Program forecast*

- 10. Telstra must provide Agile with a written three year Coordinated Capital Works Program forecast in accordance with clause 11 on the date this determination commences (**Coordinated Capital Works Program Forecast**).
- 11. The Coordinated Capital Works Program Forecast will:
  - (a) be for the three year period commencing on the date the forecast is provided;
  - (b) describe generally Telstra's indicative investment plans (as at the date of the forecast) for its Coordinated Capital Works Program over the next three years;
  - (c) include an evaluation of the impact that Telstra's indicative investment plans may have on individual exchange service areas and distribution areas; and
  - (d) specify anticipated timeframes for implementation.
- 12. Telstra must update the Coordinated Capital Works Program Forecast (and provide the updated forecast in writing to Agile) regularly, at not less than six months intervals.
- 13. At the same time as Telstra provides a Coordinated Capital Works Program Forecast under clause 10, Telstra must provide a copy of the Coordinated Capital Works Program Forecast to the ACCC.

*Coordinated Capital Works Program schedule*

- 14. Telstra must provide a written Coordinated Capital Works Program schedule to Agile by giving notice not less than 12 months before the anticipated commencement date of the Coordinated Capital Works Program in accordance with clause 15 (**Coordinated Capital Works Program Schedule**).
- 15. Telstra must provide the Coordinated Capital Works Program Schedule and make its best endeavours to identify:
  - (a) the exchange service areas and distribution areas affected;
  - (b) Telstra's plan for the Coordinated Capital Works Program for each exchange service area;
  - (c) Agile's ULLS in that exchange that will be affected and the expected impact of the Coordinated Capital Works Program on Agile's ULLS; and
  - (d) the anticipated timeframe for the implementation of the Coordinated Capital Works Program.

16. At the same time as Telstra provides a Coordinated Capital Works Program Schedule under clause 14, Telstra must provide a copy of the Coordinated Capital Works Program Schedule to the ACCC.
17. For the avoidance of doubt, Telstra must also comply with clauses 1-8 when complying with clauses 10 -16.

#### *Negotiations in good faith*

18. Except where the parties agree otherwise, Telstra must not commence implementation of a Major Network Modernisation and Upgrade unless:
  - (a) it complies with clauses 1 to 8; and
  - (b) it has consulted with Agile and has negotiated in good faith, and addressed the reasonable concerns of Agile in relation to the Major Network Modernisation and Upgrade..
19. Except where the parties agree otherwise, Telstra must not commence implementation of a Coordinated Capital Works Program unless
  - (a) it complies with clauses 14 to 16; and
  - (b) it has consulted with Agile and has negotiated in good faith, and addressed the reasonable concerns of Agile in relation to the Major Network Modernisation and Upgrade.
20. Notwithstanding any continuing negotiations between Telstra and Agile pursuant to clauses 18 and 19, if Telstra has complied with this Schedule 5, a Major Network Modernisation and Upgrade may proceed twenty-six weeks after an Individual Notification has been issued, unless both parties agree otherwise.
21. In attempting to reach a mutually acceptable resolution in relation to a variation under clauses 1, 18 and 19, the parties must recognise any need that Telstra may have to ensure that the specifications for the ULLS which Telstra supplies to more than one of its customers need to be consistent (including, without limitation, having regard to the incorporation by Telstra of any relevant international standards).

#### *Dispute Resolution*

22. Existing dispute resolution procedures that have been agreed between the parties in respect of disputes over the terms of access to the ULLS are to apply to disputes arising from decisions that are made or acts done pursuant to this Schedule.

*Note: This is not intended to preclude a party from taking any other steps in respect of the matter.*

#### *Application*

23. This Schedule commences 21 days after the final determination is made.

*Miscellaneous*

24. A requirement for Telstra to provide information in written form includes provision of that information in electronic form.
25. Any information provided by Telstra in electronic form must be in a text-searchable and readable format.

*Definitions*

26. For the purposes of this Schedule:

**'Coordinated Capital Works Program'** means a planned Major Network Modernisation and Upgrade that extends across more than one exchange service area but does not include an Emergency Network Modernisation and Upgrade or an NBN Upgrade.

**'Emergency Network Modernisation and Upgrade'** means a Major Network Modernisation and Upgrade that is required and is reasonably necessary and a proportionate response to address an Emergency.

**'Emergency'** means an emergency which requires a significant and coordinated response due to an actual or potential occurrence (such as fire, flood, storm, earthquake, explosion, accident, vandalism, theft, epidemic or war-like action) that:

- (a) endangers or threatens to endanger the safety or health of persons; or
- (b) destroys or damages, or threatens to destroy or damage, property.

**'Equivalent Period of Notice'** means a period of notice commencing at the time that Telstra has approved and allocated the capital expenditure or otherwise approved and made a decision to commit to a Major Network Modernisation and Upgrade.

**'Major Network Modernisation and Upgrade'** means a modernisation or upgrade that:

- (a) involves the installation of Telstra customer access modules closer to ULLS end-users than a Telstra exchange building;
- (b) requires the truncation of ULLS provided from Telstra exchange buildings, or the establishment of a new point of interconnection (or relocation of an existing point of interconnection) for the ULLS, or alteration of deployment classes of equipment used on the ULLS; or
- (c) results in the ULLS no longer being supplied or adversely affects the quality of that service (or any services supplied by Agile to their end-users using the ULLS),

but does not mean, or include, an Emergency Network Modernisation Upgrade or an NBN upgrade.

**'NBN Upgrade'** means a planned Major Network Modernisation and Upgrade by the Commonwealth of Australia and/or NBN Co that upgrades an existing access network as part of a fibre to the premises upgrade.