



Australian
Competition &
Consumer
Commission

ULLS Access Dispute

Telstra / Agile

Reasons for Final Determination

April 2010



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Abbreviations

| | |
|------------|---|
| ABS | Australian Bureau of Statistics |
| ADSL | Asymmetric Digital Subscriber Line |
| CAM | Customer Access Module |
| CAN | Customer Access Network |
| CCWP | Co-ordinated Capital Works Program |
| CRA | Customer Relationship Agreement |
| DA | Distribution Area |
| DAC | Data Activation Centre |
| DSL | Digital Subscriber Line |
| DSLAM | Digital Subscriber Line Access Multiplexer |
| ENMU | Emergency Network Modernisation and Upgrade |
| ESA | Exchange Service Area |
| FCCs | Fixed and Common Costs |
| FTTN | Fibre To The Node |
| FTTP | Fibre To The Premises |
| GAST | General Access Service Terms |
| HFC | Hybrid Fibre-Coaxial |
| IDS | Integrated Deployment Solution |
| ISDN | Integrated Services Digital Network |
| IULLS | In-use Unconditioned Local Loop Service |
| LCS | Local Carriage Service |
| LI | Line Interface |
| LOLO/LOLIG | Linx On Line Ordering (LOLO) and Linx On Line Interactive Gateway (LOLIG) |
| LNP | Line Number Portability |
| LSS | Line Sharing Service |

| | |
|----------|--|
| LTIE | Long Term Interests of End-users |
| LTNR | Long Term Notification Report |
| MNM | Managed Network Migration |
| MNMU | Major Network Modernisation & Upgrades |
| NAB rate | National Australia Bank Business Indicator Rate |
| NPAMS | National Plant Assignment Management System |
| NBN | National Broadband Network |
| PSTN | Public Switched Telephone Network |
| PSTN OTA | Public Switched Telephone Network Operating / Terminating Access |
| RBA | Reserve Bank of Australia |
| SQ | Service Qualification |
| TOW | Ticket Of Work |
| TSLRIC+ | Total Service Long-run Incremental Cost Plus Indirect Costs |
| TULLS | Transfer Unconditioned Local Loop Service |
| ULLCIS | Unconditioned Local Loop Carrier Interface System |
| ULLS | Unconditioned Local Loop Service |
| VULLS | Vacant Unconditioned Local Loop Service |
| WLR | Wholesale Line Rental |
| 3P | Third Party |

Glossary

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|-------------------------------------|--|
| Access dispute | Is a dispute between an access seeker and an access provider about terms of access relating to a declared service that is notified to the ACCC under section 152CM of the Act. |
| Access Provider | A carrier or carriage service provider who supplies declared services to itself or other persons as defined under subsection 152AR(2) of the Act. |
| Access Seeker | Defined in section 152AG of the Act as a service provider who makes, or proposes to make, a request for access to a declared service under section 152AR of the Act (which deals with standard access obligations). |
| Act | <i>Trade Practices Act 1974 (Cth)</i> |
| Call Diversion | Occurs where an end-user customer wishes to keep their existing phone number after switching providers and is activated around the time that the line over which the relevant service is supplied is cutover to an access seeker. |
| Customer access network | The network which enables the connection of telephones and other customer premises equipment to switching technology. It consists of a network of conduits and pipes in the ground with a mixture of cables containing copper wires and optical fibres. |
| DULLS | Is a call diversion that is used in the ULLS connection process where an end-user customer wishes to keep their existing phone number after switching providers and is activated around the time that the line over which the relevant service is supplied is cutover to an ULLS access seeker. Call diversion allows the end-user to receive phone calls made to their phone number during the physical cutover process. This type of ULLS connection is referred to as a DULLS connection. |
| Integrated Services Digital Network | The ISDN is a network that has evolved from the PSTN. ISDN services enable end users to send and receive information at faster speeds and with greater reliability than is possible using the standard PSTN service. ISDN services are used for the carriage of information such as voice, data, high quality sound, text, still images and video. |
| Line Sharing Service (LSS) | The LSS is a declared service and is defined by its service declaration. The LSS allows access seekers to share the use of a single metallic pair or line. The higher frequency part of the line is used by the access seeker to supply |

| | |
|---|--|
| | <p>broadband services while another provider supplies a PSTN voice service over the lower frequency part of the same line.</p> |
| Local access switch | <p>This equipment provides ring current, dial tone and battery feed to end-users, as well as switching calls locally to other local access switches. It also provides number analysis for call routing and call charge recording, and enhanced (or supplementary) services such as call waiting and call diversion.</p> |
| Managed Network Migration | <p>Is a transfer or migration of services that is achieved by the project management of Telstra in coordinating the cancellation and connection of services.</p> |
| 2008 Model Terms | <p>Section 152AQB requires the ACCC to make a written determination setting out model terms and conditions relating to access to core services. Under subsection 152AQB(9), the ACCC must have regard to any model terms and conditions determination that it has made in arbitrating an access dispute.</p> |
| Monthly charges | <p>Annual charges are ongoing rental charges payable for the supply of the ULLS or LSS. They are paid on a monthly basis.</p> |
| Pricing Principles | <p>Under subsection 152AQA(1) of the Act the ACCC must by writing determinate principles relating to the price of access to a declared service. Under subsection 152AQA(6), the ACCC must have regard to any determination that it has made in arbitrating an access dispute.</p> |
| Service Qualification | <p>The process of checking whether a particular line is capable of supporting a service.</p> |
| Single Connection / Disconnection | <p>Occurs when Telstra's standard ordering system and processes are used, and comprise all ULLS or LSS connections that occur outside of a MNM process.</p> |
| Unconditioned Local Loop Service (ULLS) | <p>The ULLS is a declared service and is defined in the service description. The ULLS involves the use of unconditioned communications wire between the boundary of a telecommunications network at an end-user's premises and a point on a telecommunications network that is a potential point of interconnection located at or associated with a customer access module and located on the end-user side of the customer access module.</p> |

Dictionary of Reports & Instruments

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|--------------------------------------|--|
| 2007 ULLS Pricing Principles | <i>ACCC, Unconditioned Local Loop Service- Final pricing principles, November 2007</i> |
| 2008 ULLS Pricing Principles | <i>Pricing Principles for the Unconditioned Local Loop Service Amendment Determination 2008 (No. 1)</i> |
| 2009 Draft Indicative Prices | Draft Pricing Principles and Indicative Prices for LCS, WLR, PSTN OTA, ULLS, LSS - 2009 |
| 2009 LSS Pricing Principles | <i>Pricing Principles for the Line Sharing Service (LSS) Determination 2009 made 3 December 2009</i> |
| 2009 ULLS Pricing Principles | <i>Pricing principles for the Unconditioned Local Loop Service (ULLS) Determination 2009 made 3 December 2009</i> |
| Access Dispute Guidelines | <i>ACCC, Resolution of Telecommunications Access Disputes – A Guide (Revised) – March 2004</i> |
| Access Pricing Principles Guidelines | <i>ACCC Access Pricing Principles – Telecommunications: A guide, July 1997</i> |
| ACIF Code | The ACIF C569:2005, ULLS Ordering and Provisioning Code |
| Chime Decision | Publication of final determination and associated statement of reasons – Chime Communications/Telstra ULLS access dispute – March 2008 |
| Consultel report | Analysis of ULLS and LSS undertakings and subsequent submissions – February 2006 |
| Layer 10 report | Analysis relating to ULLS access disputes – Primus, Chime, Optus, XYZed, Request, PowerTel and Telstra – January 2008 |
| 2008 Model Terms | <i>Model Non-Price Terms and Conditions, Determination 2008</i> |
| Optus Decision | ULLS access dispute between Telstra and Optus Networks – Statement of reasons for final determination - March 2008 |

Primus Decision

Publication of Final Determination and
associated statement of reasons – Primus
Telecommunications/Telstra ULLS
connection charges - March 2008

1. Introduction

1.1. Purpose

1. Agile Pty Ltd (Agile) and Telstra Corporation Limited (Telstra) are in dispute over certain terms of access to the ULLS (Agile-Telstra dispute). This dispute was notified to the ACCC for arbitration, and the ACCC has made a final determination. This document sets out the reasons for making this final determination.

1.2. Background to arbitration and final determination

2. The ACCC received Agile's dispute notification on 2 November 2007 (notification dated 30 October 2007). The parties remained unable to resolve the dispute, and raised the following terms of access for consideration in the final determination:

- monthly charges (Schedule 1)
- single connection charges (Schedule 2)
- late withdrawal charges (Schedule 3)
- network modernisation and upgrade terms (Schedule 4)

1.3. Consultation process

3. The consultation process for the Agile-Telstra dispute can be classified into two stages.
4. The first stage of the arbitration commenced on 2 November 2007 when the ACCC received notification of Agile's dispute with Telstra in relation to a number of terms of access in relation to the ULLS. The second stage of the arbitration commenced in December 2008 when the dispute was merged into a joint hearing. It was following this that consultation on specific issues in dispute was carried out.
5. A full chronology of the consultation process is outlined in Appendix A.

2. Preliminary Matters

2.1. The Unconditioned Local Loop Service (“ULLS”)

6. The ULLS is an unconditioned cable (typically a copper pair) which facilitates access between an end-user customer and a telephone exchange. Access to the ULLS essentially gives an access seeker the use of the entire copper pair, without any functionality provided by Telstra. The access seeker can use the line in conjunction with its own equipment in the exchange to provide a range of services, including traditional voice services and high-speed xDSL broadband internet access.
7. The ULLS is a declared service. After 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 *Trade Practices Act 1974* (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).
8. 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.¹

2.2. Access obligations and existence of dispute relating to access

2.2.1. Introduction

9. The ACCC sought the parties’ views on whether access obligations are owed; whether a dispute exists in relation to access and whether the ACCC has jurisdiction to arbitrate.

2.2.2. Submissions

10. Telstra submits that Agile has not demonstrated that it is unable to agree with Telstra about the issue of late withdrawal charges, given the meagre extent of previous correspondence between the parties in relation to that issue.²

¹ ACCC, *Pricing Principles for the Unconditioned Local Loop Service (ULLS) Determination 2009*, 3 December 2009.

² Telstra Letter, *Preliminary Issues*, 7 December 2007, p. 4.

11. Agile acknowledges that the issue of late withdrawal charges has not been subjected to considerable negotiation efforts, and submits that it was unable to fully negotiate on this term as Telstra had rejected the pricing proposals put to it by Agile.³

2.2.3. ACCC view

12. The ACCC has formed the view that, with respect to the access dispute, the requirements of subsection 152CM(1) of the Act are satisfied. That is:
 - Telstra is a carrier,
 - Telstra supplies the declared ULLS,
 - Telstra has an obligation under subsection 152AR(3) of the Act to supply the ULLS to the access seeker, and
 - the access seeker is unable to agree with Telstra about the terms and conditions of access to the ULLS addressed in the final determination.
13. The ACCC is satisfied that a dispute exists in relation to access between the parties, including late withdrawal charges, as evidenced by the history of negotiations between the parties as set out by Agile in Annexure 3(a) of their backdating submissions.⁴

2.3. Whether the ACCC has jurisdiction to arbitrate the access dispute

2.3.1. Introduction

14. The ACCC asked the parties to provide submissions on whether the ACCC has jurisdiction to arbitrate the access dispute.

2.3.2. Submissions

15. Telstra disputes the Commission's jurisdiction because of its proceedings in the High Court challenging the validity of Part XIC.⁵ However, as the High Court dismissed Telstra's challenge on 6 March 2008, this argument is no longer applicable to the current arbitration.⁶
16. Telstra submits that the ULLS declaration is of no effect by virtue of the operation of section 31 of the *Legislative Instruments Act 2003* (Cth) (LIA), because the declaration has not been registered.⁷ However, as subsection 152AL(9) of the Act has subsequently been inserted to clarify that a declaration is not, "and is taken never to have been", a legislative instrument which needs to be registered under the LIA; this argument is no longer applicable.

³ Agile Letter, *Preliminary Issues – Telstra – Agile ULLS*, 14 December 2007, p. 2.

⁴ Herbert Geer Submission, *Backdating- Agile and Telstra – Annexure 3(a)*, p. 3.

⁵ Telstra Submission, *Preliminary Issues*, 7 December 2007, p. 2.

⁶ *Telstra Corporation Limited v The Commonwealth [2008] HCA 7* (6 March 2008).

⁷ Telstra Submission, *Preliminary Issues – Agile Telstra*, 7 December 2007, p. 3.

17. Telstra submits that it is impermissible to attempt to include an additional issue of network modernisation to this access dispute under subsection 152CP(2) of the Act. Telstra submits that subsection 152CP(2) is concerned with what the ACCC, not the access seeker, may do.⁸ Subsection 152CP(2) empowers the ACCC to “*deal with any matter relating to access by the access seeker... including matters that were not the basis for notification of the dispute*”. Telstra submits that it is not, and was not, intended to be a means by which an access seeker could notify further issues and add them to those being considered in the arbitration and that any legitimate dispute concerning network modernisation must be dealt with via a separate notification pursuant to section 152CM.
18. Agile submits that the ACCC has jurisdiction to arbitrate this access dispute,⁹ and that network modernisation may be added as a disputed term to the arbitration under subsection 152CP(2) of the Act.¹⁰

2.3.3. ACCC view

19. The ACCC considers that it has jurisdiction to arbitrate this access dispute pursuant to Part XIC of the Act.

2.4. Whether to proceed to make a final determination

2.4.1. Introduction

20. The ACCC sought submissions from the parties as to whether it is appropriate for a final determination to be made in this access dispute.

2.4.2. Submissions

21. Telstra submits that it may be appropriate in the resolution of these disputes for oral hearings to take place.¹¹
22. While Agile has not explicitly commented on whether it was appropriate for the ACCC to proceed to make a final determination in this access dispute, they have confirmed that they are unable to agree with Telstra about the terms and conditions of access to the ULLS which the ACCC proposes to address in the final determination.¹²

2.4.3. ACCC view

23. As discussed in detail in section 4.2 in the Statement of Reasons, the ACCC is satisfied that it has conducted the arbitration properly, met the relevant procedural fairness requirements in reaching a final determination in this

⁸ Telstra, *Agile and Telstra LSS and ULLS Arbitrations – Response to request for variation of Interim Determinations*, 28 April 2009, p. 2.

⁹ Agile Letter, *Telecommunications Access dispute: Agile – Telstra Unconditioned Local Loop Service – Preliminary Issues*, 7 December 2007, p. 2.

¹⁰ Agile, *Agile Pty Ltd – Telstra LSS and ULLS – Additional Issue in Dispute – ‘Network Modernisation’ – Request for Variation of Interim Determinations*, 9 April 2009, p. 4.

¹¹ Telstra, *ULLS Submission, Preliminary Matters and General Approach*, 18 May 2009, p. 13.

¹² Herbert Geer Primary Submission, *General and Preliminary Matters- Agile*, 18 May 2009, p. 1.

dispute and that the parties have been given a reasonable opportunity to be heard on the issues in dispute in this matter.

24. The ACCC does not consider that it is necessary to conduct an oral hearing as it would not bring a material benefit to the ACCC's decision-making. Any question of how an arbitration is to be conducted is for the ACCC to determine.¹³ It considers that it has fulfilled its obligations to conduct a proper arbitration hearing by conducting the hearing on the papers. In coming to this view, the ACCC has had regard to the experience of the parties in the arbitrations, the time allowed for the provision of written submissions (including submissions in reply) on relevant issues, and the manner in which the ACCC sought and obtained information relating to its decision.
25. The ACCC is of the view that it is appropriate for it to make a final determination in this access dispute.

¹³ *Trade Practices Act 1974 (Cth)* ss 152DB(3) and (4).

3. Matters in dispute

3.1. Terms in dispute

26. The following sections set out the primary position in relation to the facts of the dispute and the ACCC's decision.

3.1.1. Price Terms

Monthly charges

27. Agile sought the following from Telstra regarding monthly rental charges:¹⁴

| Band | 1 | 2 | 3 |
|-----------------------|------------------|-------------------|-------------------|
| Monthly Rental Charge | \$5.00 per month | \$15.00 per month | \$30.00 per month |

28. Agile submit that in negotiations Telstra sought to charge ■■■ per month.¹⁵

29. The ACCC concluded the following charges were applicable:

| Band | 1 July 2008 – 31 July 2009 | 1 Aug 2009 – 31 Dec 2010 |
|-------------|-----------------------------------|---------------------------------|
| 1 | \$6.60 | \$6.60 |
| 2 | \$16.00 | \$16.00 |
| 3 | \$31.30 | \$31.30 |

30. The views of parties and reasons for the ACCC's decision in relation to ULLS monthly charges are discussed in chapter 5 of the Statement of Reasons.

Single Connection Charges

31. Agile sought a single connection charge of \$40.00 excluding GST.¹⁶

32. Agile submit that in negotiations Telstra sought to charge:¹⁷

¹⁴ Agile, *Telecommunications Access Dispute: Agile – Telstra Unconditioned Local Loop Service*, 30 October 2007, p. 6.

¹⁵ Ibid, p.2.

¹⁶ Ibid, p.5.

¹⁷ Ibid, p.2.

| Band | 1 | 2 | 3 | 4 |
|---------------------------|----------|----------|----------|----------|
| Single connections | ■ | ■ | ■ | ■ |

33. The ACCC concluded the following single connection charges are appropriate except where the parties subsequently agree otherwise.

| Band | 1 | 2 | 3 |
|-----------------------------------|----------|----------|----------|
| 1 July 2008 – 31 July 2009 | \$50.40 | \$53.10 | \$57.70 |
| 1 Aug 2009 – 31 Dec 2010 | \$50.40 | \$53.10 | \$57.70 |

34. The views of parties and reasons for the ACCC's decision in relation to ULLS single connection charges are discussed in chapter 6 of the Statement of Reasons.

Late Withdrawal Charges

35. Agile sought the following late withdrawal charges (ex GST):¹⁸

| Band | 1 | 2 | 3 |
|---------------|----------|----------|----------|
| Charge | \$23.60 | \$23.60 | \$23.60 |

36. Agile submit that in negotiations Telstra sought to charge:

| Band | 1 | 2 | 3 | 4 |
|------------------------|----------|----------|----------|----------|
| Late withdrawal | ■ | ■ | ■ | ■ |

37. The ACCC concluded the following late withdrawal charges are appropriate:

- From 1 July 2008 to 30 June 2009 \$17.30
- From 1 July 2009 to 30 June 2010 \$17.90

3.1.2. Non-price terms

38. Agile seeks final determination in relation to the following non-price terms.

Network modernisation

39. Agile submit that the current notice period for network modernisation is not sufficient.¹⁹

¹⁸ Ibid.

40. The ACCC addressed terms of network modernisation in the final determination. Terms include different types of upgrades including Major Network Modernisations and Upgrades, Coordinated Capital Works Programs and terms to apply to Emergency Network Modernisations and Upgrades.
41. The views of the parties and reasons for the ACCC's decision on network modernisation are discussed in chapter 8 of the Statement of Reasons.

3.2. Period for final determination

3.2.1. Commencement date

42. The ACCC's general approach on whether to backdate, and if so, to when, and the parties' submissions on this issue are discussed in the Statement of Reasons at section 4.4.1. The ACCC has applied the principles of backdating as set out in the Statement of Reasons to the facts of this dispute. This reflects the ACCC's view that those principles are applicable to the arbitration of this dispute.
43. The following timeline sets out the efforts made by parties to reach a settlement of the dispute in regards to the ULLS charges:²⁰
 - 10 August 2006 – Agile proposed revised monthly rental charges to Telstra
 - 17 October 2006 – Agile proposed revised single connection charge to Telstra.
 - 31 October 2006 – Telstra rejected Agile's proposals in regards to monthly charges and single connection charges
 - 14 November 2006 – Agile and Telstra held a teleconference during which Telstra indicated that it was not willing to move on pricing for ULLS.
 - 20 June 2007 – Agile and Telstra varied CRA 167 and CRA 168 (Telstra [REDACTED]). Agile indicated that it was signing the contract for operational requirements. Agile also sought [REDACTED].
 - 2 July 2007 – Telstra signed variation and noted Agile's concerns.
 - 25 October 2007 – Agile's first ULLS connection
 - 2 November 2007 - the ACCC received Agile's notification dated 30 October 2007 of an access dispute in relation to ULLS access terms

¹⁹ Agile, *Request for ID variation*, 9 April 2009.

²⁰ Agile, *Telecommunications Access Dispute: Agile – Telstra Unconditioned Local Loop Service*, 30 October 2007, pp. 3– 4; Herbert Geer Submission, *Backdating and Evidence of Negotiations between Agile and Telstra – Annexure 3(a)*, p. 1.

44. Agile sought a commencement date of 25 October 2007, the date of Agile's first ULLS connection.²¹
45. The ACCC considers a commencement date of 25 October 2007 is appropriate as this was the date of Agile's first ULLS connection and there is evidence of negotiations prior to this date.

3.2.2. Expiry date

46. The ACCC's general approach on whether to specify an expiry date, and if so, what it should be, and the parties' submissions on this issue are discussed in the Statement of Reasons at section 4.4.2.
47. Both Agile and Telstra support an expiry date of 31 December 2010. The ACCC notes that Telstra caveats this view on the basis that the ACCC must roll-over all 2008-09 indicative prices for its fixed network services and apply these prices in arbitrations to all access seekers.²²
48. Accordingly for the reasons set out in the Statement of Reasons at section 4.4.2, the ACCC has specified an expiry date of 31 December 2010 to apply to the price terms of the final determination in this dispute.

3.2.3. Interest

49. The ACCC's general approach on whether to require interest and the parties' submissions on this issue are discussed in the Statement of Reasons at section 4.4.3. The ACCC has adopted this approach in the FD of this dispute because it is satisfied that this approach is appropriate for the purposes of this dispute.
50. Consequently, the ACCC has specified that interest is to be paid on any over/under payments that have occurred. Further, interest is to be calculated daily and compounded, and the rates of interest used over time are to be taken from the Small Business Variable Other Overdraft Rate time series as published by the RBA.²³

²¹ Herbert Geer Submission, *Backdating and Evidence of Negotiations between Agile and Telstra – Annexure 3(a)*, 18 May 2009.

²² Herbert Geer Submission, *Procedural Issues*, 13 November 2008, p. 4. Telstra, *re ULLS/LSS Joint Hearing: Price Terms-Rollover Options*, 2 November 2009.

²³ Reserve Bank of Australia, *Reserve Bank Bulletin, Table F05, Indicator Lending Rates, Small Business Variable Other Indicator Rate*, Referenced from <http://www.rba.gov.au/statistics/tables/xls/f05hist.xls>.

4. General Approach

4.1. Relevant Legislation

4.1.1. Introduction

51. This chapter of the Statement of Reasons deals with the general and preliminary matters which are relevant to the making of the final determination in respect of the ULLS access disputes. During the course of finalising these matters, PowerTel, Primus and Request have withdrawn their notifications. However, these parties have made earlier submissions, and these submissions have been taken into account.
52. In its Consultation Paper²⁴ issued in April 2009, the ACCC identified provisions of the *Trade Practices Act 1974* (the Act), which it considered relevant to the making of the final determination. Parties' views were sought.
53. Parties in dispute with Telstra on the ULLS are:
 - Chime, Amcom, Network Technology, Agile and Adam (represented by and referred to as Herbert Geer parties)
 - Primus (provided its own submissions, however due to their similarities with the Hebert Geer parties submissions, Primus' submissions have been referred as a Herbert Geer party, unless otherwise specified)
 - Request, NEC, TPG, TransACT, PowerTel, and Macquarie Telecom, (represented by and referred to as Nicholls Legal parties)
 - Optus and XYZed (referred to as Optus).

4.1.2. Submissions

54. The parties identify Part XIC of the Act and predominantly Division 8, as relevant to the making of the Final Determination (FD).
55. Telstra submits that there are two other pieces of legislation which are relevant to the ACCC's decision making process: *Utilities (Network Facilities Tax) Act 2006 (ACT)* (Utilities Act) and *A New Tax System (Goods and Services Tax) Act 1999 (Cth)* (GST Act).²⁵
56. Telstra outlined their views concerning the Utilities Act in their ULLS Annual Charges submission and the ACCC's views on these submissions are discussed in section 5.4.2 of the Statement of Reasons.

²⁴ ACCC, Consultation Paper on Final Determination, *Preliminary Matters and General Approach*, April 2009 (Consultation Paper).

²⁵ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 14.

57. Telstra did not state why they considered the GST Act to be of relevance to the ACCC's decision making process. Accordingly, the ACCC has not formed a view on the relevance of the GST Act for the ULLS, although notes all charges are specified excluding GST.

4.1.3. ACCC view

Applicable sections of the Act

58. The ACCC considers that Part XIC of the Act is relevant to the making of the FD. The ACCC considers that the following sections are of direct relevance to the making of a FD in this dispute:
- Subsection 152CP(1) of the Act, which provides that unless the ACCC terminates the arbitration, the ACCC must make a written determination on access by the access seeker to the declared service.
 - Subsection 152CP(2) of the Act, which provides that the determination may deal with any matter relating to access by the access seeker to the declared service, including matters that were not the basis for notification of the dispute.
 - Subsection 152CP(4) of the Act, which requires that before making a determination, the ACCC must give a draft determination to the parties.
 - Subsection 152CP(5) of the Act, which requires that when the ACCC makes a determination it must give the parties to the arbitration its reasons for making the determination.
 - Section 152CQ of the Act, which sets out restrictions on access determinations.
 - Subsection 152CR(1) of the Act, which requires that in making a final determination, the ACCC must take certain matters into account, including the long-term interests of end-users (LTIE), which is defined in section 152AB of the Act.
 - Subsection 152CR(2) of the Act, which provides that the ACCC may take into account any other matters that it thinks are relevant.
 - Subsection 152AQA(6) of the Act, which requires that the ACCC must have regard to a pricing principles determination (made in accordance with subsection 152AQA(1)) if the ACCC is required to arbitrate an access dispute under Division 8 in relation to the declared service.
 - Subsection 152AQB(9) of the Act, which requires that the ACCC must have regard to a model terms determination (made in accordance with subsection 152AQB(2)) if the ACCC is required to arbitrate an access dispute under Division 8 in relation to a core service.

4.2. Preliminary Matters

4.2.1. Submissions

59. Telstra submits that the ACCC is obliged to comply with the requirements under Division 8 of Part XIC of the Act; accord procedural fairness; act within

its powers and where necessary make further inquiry.²⁶ Specifically Telstra submits:

- The ACCC must ensure that Telstra has an opportunity to know the case sought to be made against it and be given the opportunity to reply to it. In this respect Telstra submits that if the ACCC intends to rely upon something, it must bring that to the attention of Telstra.
- It is neither efficient nor workable for Telstra to be expected to provide evidence on all possible issues. Telstra should only be expected to provide material on issues raised by the ACCC as being relevant.
- The ACCC must consult with the parties prior to issuing further schedules to the draft final determinations (DFDs) on certain outstanding issues.²⁷

60. Telstra is also of the view that the ACCC must give fundamental weight to the consideration of mandatory relevant factors.²⁸ In its view, none of the mandatory relevant considerations is entitled to a fixed weighting, but the consideration of each matter must be given fundamental weight in order for the ACCC to produce a valid decision.²⁹ Telstra submits that the ACCC is required to:

- weigh up each relevant factor and cannot give a factor a cursory consideration only in order to put it to one side;
- in its reasons for its decision, set out its findings on all material questions of fact and refer to the evidence on which those findings are based;
- give reasons for any rejection of Telstra's evidence;
- make inquiries or undertake further analysis where information is lacking;
- exercise its investigative and inquisitorial powers where necessary in making the FD;
- in appropriate cases, not confine itself to the information placed before it, and "inform itself" in relation to relevant matters.³⁰

61. Telstra submits that the ACCC must have regard, in making an FD for a core service such as the ULLS, to any model terms and conditions determined under subsections 152AQB(2) and 152AQB(9).³¹

62. Telstra also submits that that there should be oral hearings conducted especially in circumstances where there are competing economic models.³²

²⁶ Ibid, p. 4.

²⁷ Ibid, pp. 4–10.

²⁸ Ibid, p. 7.

²⁹ Ibid.

³⁰ Ibid, pp. 8–10.

³¹ Ibid, p. 8.

63. The Herbert Geer parties in reply agree with Telstra insofar as the ACCC is obliged to accord procedural fairness to the parties.³³ However, the Herbert Geer parties submit that Telstra's arguments relating to the application of procedural fairness appear to be designed to delay and frustrate the dispute process rather than ensuring a process that facilitates resolution based upon a fair exchange of submissions.³⁴ The Herbert Geer parties submit that the ACCC must consider its obligation at paragraph 152DC(f) of the Act when arbitrating disputes to generally give all such directions, and do all such things, as are necessary or expedient for the speedy hearing and determination of the access dispute.³⁵ The Herbert Geer parties submit that the ACCC should have regard to this in evaluating any request from Telstra to add additional steps to the arbitration.³⁶
64. The Herbert Geer parties also submit that procedural fairness applies to both parties, and not solely Telstra.³⁷ The Herbert Geer parties submit that it is for the ACCC to determine the periods that are reasonably necessary for fair and adequate presentation of the parties' cases.³⁸
65. The Herbert Geer parties do not agree with Telstra's argument that the ACCC must clearly set out its reasons for rejecting any of Telstra's evidence or material, and submit this will depend upon the relevance of the evidence to the issues at hand.³⁹
66. The Herbert Geer parties consider that the parties have been given a fair opportunity to present their cases and that Telstra's request for an 'iterative' process appears designed to impose circular rounds of submissions that would delay final determinations and as such is contrary to paragraph 152DC(1)(f).⁴⁰
67. The Herbert Geer parties agree with Telstra that the ACCC has the power to investigate matters beyond the simple reliance on submissions provided by the parties to the dispute.⁴¹ The Herbert Geer parties consider that confirmation of the third party (3P) contractor quotes provided by Telstra and independent assessment of any costs that Telstra claims it will incur in implementing a final determination is required.⁴²
68. The Herbert Geer parties also submit, in reply, that Telstra has attempted to reframe the ACCC's discretionary right to choose how it gathers information relevant to an arbitration into a mandatory obligation.⁴³ The Herbert Geer parties submit that this is incorrect.⁴⁴ The Herbert Geer parties consider that

³² Ibid, p. 13.

³³ Herbert Geer Reply Submission, *General and Preliminary Matters*, 18 May 2009, p. 1.

³⁴ Ibid.

³⁵ Ibid, pp. 1–2.

³⁶ Ibid.

³⁷ Ibid, p. 4.

³⁸ Ibid.

³⁹ Ibid, p. 2

⁴⁰ Ibid, p. 4.

⁴¹ Ibid, p. 2.

⁴² Ibid.

⁴³ Ibid, p. 7.

⁴⁴ Ibid.

the ACCC has gathered information, such as its previous engagement of Layer 10 to provide expert reports, that goes beyond the information provided by the parties and has clearly assisted the ACCC's consideration of the disputes.⁴⁵

69. The Herbert Geer parties also highlight that contrary to Telstra's claim, the ACCC has a considerable amount of material relating to the outstanding issues in dispute, which have been previously considered in a large number of previous access disputes that have involved Telstra and most of the access seekers involved in the joint hearing.⁴⁶
70. The Nicholls Legal parties submit that they reject all of Telstra's submissions, unless expressly stated otherwise in their submissions.⁴⁷ In relation to procedural fairness, the Nicholls Legal parties note that Telstra seeks to rely on dicta by Rares J in *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 to construct the argument that paragraph 152DB(1)(b) imposes a positive duty on the ACCC to undertake extensive investigations into those particular matters which are of interest or importance to Telstra.⁴⁸ The Nicholls Legal parties submit that this contention by Telstra is clearly wrong and could not be the intention of Parliament, as it would set the ACCC "off on one wild goose chase after another".⁴⁹
71. The Nicholls Legal parties consider that paragraph 152DB(1)(b) is about balancing competing considerations, and imposes a primary duty on the ACCC to "act as speedily as a proper consideration of the dispute allows".⁵⁰ The Nicholls Legal parties submit that the subordinate phrase in that provision, to have regard to the need to carefully and quickly make certain inquiries and investigations to the extent that such enquiries and investigations "affect the merits and fair settlement of the dispute" should not be construed as imposing an extra onus on the ACCC to make additional inquiries and investigations at the behest of one of the parties.⁵¹ The Nicholls Legal parties state that there is nothing in the judgement of Rares J which takes the matter as far as Telstra contends.⁵²
72. The Nicholls Legal parties also submit that Telstra is fundamentally incorrect in submitting a position which would require the ACCC to make Telstra's case for it.⁵³ The Nicholls Legal parties submit that Telstra is responsible for putting forward its best evidence and submissions.⁵⁴
73. The Nicholls Legal parties also submit that Telstra should specifically set out or put the ACCC or the Access Seekers on notice as to the manner in which

⁴⁵ Ibid.

⁴⁶ Ibid, p. 4.

⁴⁷ Nicholls Legal Reply Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 1.

⁴⁸ Ibid, p. 2.

⁴⁹ Ibid.

⁵⁰ Ibid, p. 3.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

Telstra contends the ACCC has failed to satisfy paragraph 152DB(1)(b).⁵⁵ The Nicholls Legal parties submit that, for instance, Telstra could specify the materials or matters that it thinks the ACCC has failed to have regard to or what enquiries the ACCC should have made.⁵⁶ The Nicholls Legal parties submit that if Telstra fails to identify its specific concerns regarding the approach and procedures adopted by the ACCC, having seen the ACCC's Consultation Papers, then it should be estopped from complaining about these matters in the future.⁵⁷

74. Optus submits in reply that Telstra is being transparent in its attempt to render the arbitration process impossible by suggesting hurdles that cannot be met.⁵⁸
75. While Optus do not take a firm position in response to Telstra's submissions on procedural fairness, they make a number of general observations in relation to procedural fairness which they consider will assist the ACCC.⁵⁹
- Procedural fairness principles are not tied to inflexible procedures but are concerned with preventing parties from suffering "practical injustice";
 - Principles of procedural fairness do not dictate that the ACCC must put its thought processes or preliminary conclusions to the parties for comment;
 - Common law principles of procedural fairness apply in the context of the ACCC's statutory obligation under subsection 152CLA(1), – the resolution of the dispute in a timely manner.
76. In response to Telstra's submission that it is entitled to know the case being made against it, Optus states that on 16 October 2008, Telstra was notified of the ACCC's intention to conduct a joint hearing and therefore has had 8 months notice since.⁶⁰
77. Optus also submits that Telstra have more than 30 people working on the joint arbitration hearing, and that this should be taken into account by the ACCC in considering Telstra's claim that it has not had a reasonable opportunity to respond and prepare submissions within the timeframes set.⁶¹
78. Optus submits that it disagrees with Telstra's submission that if a particular issue is not referred to in the ACCC's consultation paper, the parties can assume that the issue will not be one which the ACCC's determination is likely to turn on and that no submission from the parties is required.⁶² Optus submits that this approach might fail to accord procedural fairness to the

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Optus and XYZed Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009.

⁵⁹ Ibid, pp. 1–2.

⁶⁰ Ibid, p. 2.

⁶¹ Ibid, p. 3.

⁶² Ibid.

parties, as it will restrict the FD to issues identified only by the ACCC.⁶³ Optus also submits that Telstra's proposed approach would also:

- restrict parties' opportunity to provide further submissions relating to other relevant issues; and
- impose an onerous burden on the ACCC, since it would require the ACCC to identify all issues upfront.⁶⁴

79. In response to Telstra's submission that the ACCC must consult with the parties prior to issuing further schedules to the DFDs on certain outstanding issues, Optus submits that there is nothing in the legislation which restricts the ACCC from moving straight to issuing DFDs on the issues in dispute.⁶⁵
80. Optus submits that Telstra is incorrect to say that the ACCC has no relevant material before it on which to base the DFDs, since the ACCC made its final *Model Non-Price Terms and Conditions Determination* in November 2008, given that the ACCC invited submissions from parties (including Telstra) when it issued its draft final model terms and conditions in September 2008.⁶⁶
81. Optus submits that it does not agree with Telstra that an oral hearing is necessary.⁶⁷ Optus does not consider Telstra's reason that there are competing economic models should justify an oral hearing, as the TEA model has already been rejected by the ACCC.⁶⁸

4.2.2. ACCC view

Procedural Fairness

82. The ACCC conducts an arbitration pursuant to subsection 152DB(1) of the Act. This section:
- (a) provides that the ACCC is not bound by technicalities, legal forms or rules of evidence;
 - (b) requires that the ACCC must act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute; and
 - (c) allows the ACCC to inform itself of any matter relevant to the dispute in any way it thinks appropriate.
83. The ACCC notes that subsection 152DB(1) does not circumvent the ACCC's duty to accord procedural fairness to the parties.
84. The duty to accord a party procedural fairness arises where a decision-maker exercises a power that might prejudice the party's rights, interests or legitimate

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid, p. 4.

⁶⁷ Ibid, p. 7.

⁶⁸ Ibid.

expectations: *Annetts v McCann* (1990) 170 CLR 596 at 598. The party should also be provided with details of any credible, relevant and significant adverse information which the decision-maker has, and which may affect the decision to be made, and be given an opportunity to respond: *Kioa v West* (1985) 159 CLR 550.

85. The ACCC considers that the measures that it has taken in arbitrating this access dispute are in accordance with its procedural fairness obligations. The ACCC has presented the parties with the information that it intends to rely upon in making its decision; by way of the Consultation Papers issued to the parties, and is of the view that Telstra and access seekers have had sufficient information about the nature of the disputes before it.
86. The ACCC agrees with the views submitted by the Nicholls Legal parties that section 152DB of the Act should not require the ACCC to embark upon extensive, yet unspecified extraneous enquiries, with the objective of requiring the ACCC to make out Telstra's case for it.
87. Throughout the arbitration process, the ACCC has inquired about issues where, in the ACCC's view, information was centrally relevant to the ULLS arbitration and the ACCC was able to readily obtain that material. Therefore, the ACCC considers it has made a proper investigation and inquiry into matters which it perceives are in dispute and fulfilled its role as an arbitrator. The ACCC further notes that all parties to the access disputes have an obligation to provide information to the ACCC if in the party's opinion it is relevant to the particular dispute.⁶⁹
88. The requirements of section 152CP of the Act impose upon the ACCC an obligation to make a written determination (unless the arbitration has been terminated). Subsection 152CP(4) requires the ACCC to provide parties with a draft determination before it makes a [final] determination. Accordingly, before any final determination is made, parties to the arbitration are given an opportunity to be heard on the content of the draft determination. In this case, the parties were provided with consultation papers, along with DFDs and specifically invited to comment on all issues relevant to the access disputes. Parties were also given an opportunity to provide general submissions on any matter it thought relevant.
89. The ACCC is satisfied that it has taken into account all submissions received, including those received following additional consultation with parties and that it is entitled to inform itself in any way it thinks appropriate. As outlined above, the ACCC is satisfied that parties have been given a reasonable opportunity to be heard on the issues in dispute in this arbitration.

Production of Evidence

90. In a number of submissions provided to the ACCC, Telstra has indicated that it does not resile from its submissions that it has previously provided in other ACCC processes, in relation to some of the issues in dispute and, to the extent

⁶⁹ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

that they concern issues which Telstra continues to contest, requests that the ACCC have regard to those submissions in the present arbitrations pursuant to subsection 152CR(2) of the Act.⁷⁰

91. The Herbert Geer parties submit, in reply, that it is impossible for access seekers to respond to Telstra's previous submissions as Telstra has not indicated the specific submissions or parts thereof that they are referring.⁷¹ The Herbert Geer parties submit that it is also impossible to know fully the case that Telstra is seeking to argue as the access seekers may not be privy to Telstra's previous submissions as received by the ACCC.⁷² The Herbert Geer parties submit that the ACCC is unable to know fully the case that Telstra is seeking to argue in these arbitrations unless the ACCC undertakes the unreasonable task of reviewing all submissions that the ACCC has received from Telstra.⁷³
92. The Herbert Geer parties submit that the ACCC issued directions requiring submissions to include as attachments copies of any extraneous material that is relied on with the relevant referenced sections clearly marked.⁷⁴ The Herbert Geer parties submit that as Telstra has not complied with this direction as regards the introduction of its previous submissions; those previous submissions should not be taken to be before the ACCC for the purposes of these arbitrations.⁷⁵
93. The Herbert Geer parties consider that Telstra's attempt to introduce its previous submissions in such a "global way" may be an attempt to provide grounds for review on the basis of an allegation that the ACCC failed to consider all of the evidence put before it - particularly as the ACCC is provided with such vague references by Telstra.⁷⁶ The Herbert Geer parties submit that Telstra's claim that the ACCC is not entitled to draw any negative inference from Telstra's decision not to supplement information previously provided to the ACCC should be disregarded.⁷⁷ The Herbert Geer parties consider that if Telstra has relevant information, then it should provide it to the ACCC, otherwise the ACCC is entitled to consider that Telstra does not have the information or it does not support Telstra's arguments.⁷⁸
94. The ACCC agrees with the views outlined by the Herbert Geer parties that it is not possible for access seekers to respond to submissions which Telstra have made in previous arbitrations and that the directions require parties to attach extraneous materials. The ACCC has considered all of the evidence that has been put before it by the parties in these arbitrations, and will have regard to previous ACCC decisions where relevant and where it has identified it would

⁷⁰ See Telstra's Primary Submission, *Single Connection and Disconnection Charges*, 18 May 2009, p. 1 and Telstra's Primary Submission, *Service Qualification Charges*, 2 July 2009, p. 1.

⁷¹ Herbert Geer Reply Submission, *Single Connection Charges*, 4 June 2009, p. 1.

⁷² Ibid, pp. 1-2.

⁷³ Ibid.

⁷⁴ Ibid, p. 2.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

do so in its Consultation Papers. However, previous submissions put forward by the parties to the ACCC in separate regulatory processes will not be regarded as being before the ACCC for the purposes of this arbitration unless these submissions have been distributed to the parties and the ACCC as an attachment with the applicable sections marked. As outlined above, the ACCC cannot be held responsible for making Telstra's case for it.

95. The Federal Court has also stated that paragraph 152DB(1)(b) recognises a “need to carefully and quickly inquire into and investigate the dispute and all matters affecting the merits, and fair settlement, of the dispute” although it does not in terms impose on ACCC an obligation so to act”.⁷⁹ In this particular case, Lindgren J held that it was incumbent upon Telstra to provide information to the ACCC concerning LSS churn, and that it is not for the ACCC to guess what information Telstra would be seeking to rely upon.⁸⁰
96. The ACCC may have regard to, and rely upon, information used in previous ACCC processes, such as expert economic reports. However, the ACCC does not accept blanket submissions from parties referring to their previous views unless such submissions have been reproduced and distributed to both the ACCC and other parties to the dispute, with the applicable views that are to be relied upon clearly marked.
97. In a number of submissions made to the ACCC, Telstra has raised concerns regarding the ACCC's timetable for responses to its consultation papers. Telstra states that the timetable has been very short, and consequently it has been forced to abbreviate the material that it submits, and claims that it is neither efficient nor workable for Telstra to be expected to provide all of the evidence on all issues.
98. The Herbert Geer parties submit in reply that the ACCC's timetable was short but that Telstra was not disadvantaged because the same timetable was imposed on all of the parties.⁸¹
99. The ACCC considers that, whilst the timetables for submissions for some parts of the hearing have been relatively tight, all parties have been subject to the same timeframes and consequently, no one party has been disadvantaged when compared to the others.
100. The ACCC also notes that Telstra has made a number of submissions outside of the consultation process. It is the ACCC's view that submissions made outside of the consultation period may not be given equal weight. However in this instance, due to the length of the arbitration process all submissions have been taken into account and given equal weighting in this FD.

Oral Hearing

⁷⁹ *Telstra Corporation Limited v ACCC* [2008] FCA 1436 at [464].

⁸⁰ *Ibid.*

⁸¹ Herbert Geer Reply Submission, *Parity Mechanisms and Variation of Operational Documents*, 9 July 2009, p. 2.

101. While the ACCC has no in-principle objection to holding oral hearings, the ACCC does not consider it is necessary in this instance. The ACCC does not consider that requiring the parties to prepare for and participate in oral hearings would bring material benefit to the ACCC's decision making.
102. In addition, the ACCC has conducted a number of inquiries regarding the ULLS, leading up to and following the original declaration of the ULLS, and is well acquainted with the issues that have been raised by the parties in their written submissions in the current arbitration. The ACCC also considers that oral hearings would add considerable delay and expense to the parties and the ACCC.
103. Accordingly, in this instance the ACCC has conducted these hearings on the papers.

Conclusion

104. The ACCC considers that it has conducted the arbitrations in this joint hearing in accordance with procedural fairness requirements in reaching a FD in this dispute, for the following reasons:
 - The ACCC has provided the parties with details of any credible, relevant and significant adverse information which it has, and which may affect the decision to be made, and given the parties an opportunity to respond; and
 - the ACCC is satisfied that the parties have been given a reasonable opportunity to be heard on the issues in dispute in this matter.

4.3. Subsection 152CR(1) criteria

4.3.1. Introduction

105. The ACCC must have regard to the criteria specified in subsection 152CR(1) of the Act in making a FD. These criteria are:
 - (a) whether the determination will promote the LTIE of carriage services or of services supplied by means of carriage services;
 - (b) the legitimate business interests of the carrier or provider and the carrier's or provider's investment in facilities used to supply the declared service;
 - (c) the interests of all persons who have rights to use the declared service;
 - (d) the direct cost of providing access to the declared service;
 - (e) the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else;
 - (f) the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility;

- (g) the economically efficient operation of a carriage service, a telecommunications network or a facility.
106. The ACCC provided the parties with its preliminary views on how these criteria should be interpreted and sought the parties' comment.
107. The ACCC is satisfied with its approach towards the interpretation of the criteria listed in subsection 152CR(1) of the Act. Each of the criteria listed in that subsection has been taken into account in making the FDs.
108. The Federal Court has recognised the potential tension between the subsection 152CR(1) criteria and the need for the ACCC to give each of them varying weight in the decision-making process.⁸²

4.3.2. Paragraph 152CR(1)(a)

Submissions

109. Telstra submits that paragraph 152CR(1)(a) requires the ACCC to take into account the overall object of Part XIC in making a FD on access to a declared service.⁸³ Telstra submits section 152AB provides that this object has three component objectives, and relies on the Full Federal Court to support its view that each one of the objectives is a mandatory, relevant consideration in its own right.⁸⁴ Telstra sets out the objectives as being:
- promoting competition in markets for carriage services and services provided by means of carriage services: s152AB(2)(c) (**competition objective**);
 - achieving any-to-any connectivity in relation to carriage services that involve communication between end-users: s152AB(2)(d); and
 - encouraging economically efficient use of and investment in the infrastructure by which carriage services and services provided by means of carriage services are supplied, are capable of being supplied or are likely to become capable of being supplied: s152AB(2)(e) (**investment objective**).⁸⁵
110. Telstra also submits that in having regard to whether its FD will promote the LTIE, the ACCC must give fundamental weight to the consideration of each of these objectives in its decision making process.⁸⁶ Telstra also submits that

⁸² Lindgren J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1436 at [311]-[312]; Rares J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1758 at [108] – [112].

⁸³ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 14.

⁸⁴ *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 at [260-270] cited in Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 14.

⁸⁵ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 14.

⁸⁶ *Ibid.*

each criterion in subsection 152CR(1) is not entitled to a fixed weighting in itself,⁸⁷ and that tensions or apparent tensions between different criteria need to be resolved through a careful weighing of each of them in the particular circumstances of the dispute.⁸⁸

111. The Herbert Geer parties submit that some elements of the subsection 152CR(1) criterion are to have primacy over other elements. The Herbert Geer parties submit that it was acknowledged by Lindgren J that:

The factor that should be given “fundamental weight” as against the others is the LTIE mentioned in para (a) of s152CR(1) because s152AB(1) provides that the object of Part XIC is “to promote the [LTIE]...”⁸⁹

112. The Herbert Geer parties submit that Lindgren J’s statement stands for the proposition that the ACCC should give “fundamental weight” to the LTIE over all other subsection 152CR(1) criterion and that the approach of his Honour is to be preferred.⁹⁰
113. The Nicholls Legal parties submit that they accept the propositions set out in the ACCC’s Consultation Paper concerning paragraph 152CR(1)(a), and make a number of general observations in relation to the LTIE taken from *Re Application by Seven Network Limited* [2004] AComp 11 (the “Seven Network case”).⁹¹ These general observations concern the literal meanings of the words within the LTIE formulation. The Nicholls Legal parties also included an extract from the Seven Network case, which accepted the ACCC’s interpretation of the LTIE test in applying TSLRIC pricing principles, and provide a summary of the LTIE test.
114. Optus submits that they generally agree with the approach as stated by the ACCC in its Consultation Paper.⁹² The approach as outlined by the ACCC in the Consultation Paper requires the ACCC to assess the likely impact of particular terms and conditions of access on the LTIE, and to have regard to whether the terms and conditions are likely to result in promoting competition in markets for carriage services and services supplied by means of carriage services, achieving any-to-any connectivity and encouraging the economically efficient use of and economically efficient investment in infrastructure by which listed carriage services are supplied and any other infrastructure by which listed services are, or are likely to become, capable of being supplied.⁹³ Additional views provided by Optus in relation to the interpretation of the phrase LTIE – in particular, the interpretation of “long term” and “short term” are discussed below.

⁸⁷ Telstra Reply Submission, *ULLS Preliminary Matters and General Approach*, 4 June 2009, p. 2.

⁸⁸ Ibid, p. 3.

⁸⁹ *Telstra Corporation v Australian Competition and Consumer Commission* [2008] FCA 1436 at [122] as cited in Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 5.

⁹⁰ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 5.

⁹¹ Nicholls Legal Primary Submission, *General and Preliminary Matters*, 18 May 2009, pp. 3–6.

⁹² Optus and XYZed Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 4.

⁹³ ACCC Consultation Paper, p. 7 and subsections 152AB(2) and (4) of the Act.

Long Term and Short Term Effects

115. Telstra submits that, in consideration of each objective under section 152AB, the ACCC must direct its attention to the “long term”, being:

*the period over which the full effects of the ... decision will be felt, with players adjusting to the decision, including by entering or exiting the relevant markets.*⁹⁴

116. Telstra submits the concept of ‘long term’ should be interpreted in light of the duration of the investment by the access provider as well as the access seeker.⁹⁵ Telstra considers the critical issue is that an efficient provider of access recovers its costs from access prices and that below cost pricing has an adverse impact on long-term investment and, hence, on long term competition.⁹⁶ Telstra states that below cost pricing:

- undermines the incentives for access providers to continue to invest and discourages competitive build
- promotes free riding
- leads to unsustainable short term competition
- does not promote dynamic efficiency, and
- in the long run, results in allocative and productive inefficiencies.⁹⁷

117. Telstra submits that the Part XIC concept of “long term” should be equated with the economic concept of “long run”,⁹⁸ and therefore the short term effects on either the access provider or the access seeker are irrelevant in the consideration of this criterion.⁹⁹

118. Optus submits that short term effects are relevant in the consideration of the LTIE criterion.¹⁰⁰ Optus refers to the following statement from the Full Federal Court:

*In any given case, this may well involve consideration of the existing state of the market and the future impact of the particular thing under consideration, both in the immediate future and over the longer term...*¹⁰¹

119. Optus also cites, as support for their view, the Australian Competition Tribunal case on Telstra’s exemption application in respect of Optus’ HFC network where the Tribunal said:

⁹⁴ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, pp. 14–15

⁹⁵ Ibid, p. 15.

⁹⁶ Ibid.

⁹⁷ Ibid, pp. 15–16.

⁹⁸ Ibid, p. 15.

⁹⁹ Ibid.

¹⁰⁰ Optus and XYZed Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 7.

¹⁰¹ *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 (11 March 2009) at [244] cited in the Optus and XYZed Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 7.

In terms of commercial reality, the long term is but an iteration or evolution of successive short terms...

and

... [M]easurement of the effect of a regulatory change on the LTIE in a practical sense necessitates of the likely series of short-term outcomes as the market evolves over time, responding to changing market forces of supply and demand.¹⁰²

120. Optus submits that these statements demonstrate that the short term is relevant to the consideration of the LTIE criteria.
121. The Nicholls Legal parties submit that Telstra has provided no authority or evidence to support its assertions that the ACCC must pay “particular regard to the long-term effects of its decision” and that a determination by the ACCC would encourage “short term profiteering and free riding”.¹⁰³ In their reply submission, the Nicholls Legal parties emphasise that the ACCC must have proper regard to the risk that a price that is set too high will discourage investment by access seekers and will have an adverse effect on competition and the long-term interests of end-users.¹⁰⁴
122. The Herbert Geer parties submit that the ACCC must have regard to the long term effects of its decision but notes that in light of the Federal Government’s National Broadband Network (NBN) proposal, long term or continued investment in Telstra’s CAN is increasingly unlikely except to the extent that maintenance is required to ensure continued operational integrity until superseded by the NBN.¹⁰⁵

Promotion of competition and economically efficient use of, and investment in infrastructure

123. Telstra notes¹⁰⁶ the observation of the Australian Competition Tribunal in *Telstra Corporation Ltd (No 3)* [2007] ACompT 3, regarding the competition objective:¹⁰⁷

[I]n this context we are considering the likelihood of the promotion of ‘competition’, not the promotion of competitors.

124. Telstra notes Rares J’s¹⁰⁸ observations, in relation to the investment objective, that competition cannot be promoted, and thus the LTIE may not be attained,

¹⁰² *Application by Telstra Corporation Ltd* [2009] ACompT 1 (22 May 2009) at [79], as cited in Optus and XYZed Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 8.

¹⁰³ Nicholls Legal Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 5.

¹⁰⁴ *Ibid.*

¹⁰⁵ Herbert Geer Reply Submission, *General and Preliminary Matters*, 4 June 2009, p. 2.

¹⁰⁶ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 16.

¹⁰⁷ *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 (17 May 2007) at [95].

¹⁰⁸ *Telstra Corporation v ACCC* [2008] FCA 1758 at [111] as cited in Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 16.

if an infrastructure investment is not economically feasible for an efficient service provider to make or support.¹⁰⁹ Telstra is of the view that the clear implication of his Honour's observation is that the LTIE will not be promoted where the access provider is unable to recover the costs of providing access to its infrastructure.¹¹⁰

125. Optus, in its reply submission, noted the following remarks made by the Australian Competition Tribunal in relation to the objective of "promotion of competition":

*...competition is a process and is generally not concerned with the position or protection of individual competitors. However, this does not mean the Tribunal should ignore the position of individual competitors... there may be circumstances in which the impact of an action or thing on a particular competitor may have implications for the promotion of competition generally...*¹¹¹ [Optus' emphasis added].

126. Optus submits that Telstra's commercial interests will be served so long as Telstra is able to recover its costs of supplying the relevant services and achieves a normal return on its investment.¹¹² Optus relies on the following statement from the Australian Competition Tribunal in regard to the LSS to support this view:

*We consider that Telstra will have the incentive for investment so long as it receives a normal return on its investment.*¹¹³

127. The Nicholls Legal parties' submit that the Rares J's statement cited by Telstra is merely an endorsement of the principle that an access provider is "required to charge access prices at a level which both promotes competition and is economically efficient (in the sense that the access provider is not required to make a loss on its investment)".¹¹⁴
128. The Nicholls Legal parties' submit that both the competition requirement and the efficiency requirement in section 152AB of the Act are intended to be a balancing act,¹¹⁵ and that the "long-term interests of end-users" test should focus on the interests of end-users, not the interests of the access provider.¹¹⁶ These parties further submit that in order to satisfy the LTIE test, the prices

¹⁰⁹ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 16.

¹¹⁰ Ibid.

¹¹¹ *Application by Telstra Corporation Ltd* [2009] ACompT 1 (22 May 2009), at [8], as cited in the Optus and XYZed's Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 9.

¹¹² Optus and XYZed Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 6.

¹¹³ *Re Telstra Corporation Limited (No 3)* [2007] ACompT 2 at [147] as cited in Optus and XYZed Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 6.

¹¹⁴ Nicholls Legal Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 7.

¹¹⁵ Ibid.

¹¹⁶ Ibid, p. 8.

claimed by an access provider should be based on the forward-looking efficient cost of providing the service.¹¹⁷ In their view, costs which are based on actual costs, rather than forward-looking costs of an efficient operator, are likely to lead to over-investing in the relevant network, i.e. “gold-plating” the network.¹¹⁸

129. Telstra submits that the ACCC should ensure that it does not set prices which do not enable the access provider to recover its costs from the prices of access services, even in the short term.¹¹⁹ Telstra further submits that while lower access prices may stimulate short-term but inefficient competition; this is not in the LTIE due to the significant adverse impact on future infrastructure build.¹²⁰
130. Telstra submits that lower prices may promote certain competitors but such prices will not necessarily promote competition.¹²¹ Telstra seeks to rely on the Australian Competition Tribunal to support its view, where the Tribunal considered the LTIE and said, “*it is just as important that [Telstra] is able to compete on the basis of its own efficiencies in telecommunications markets as it is that other competitors are able to compete on the basis of their own efficiencies in these markets.*”¹²²
131. Optus submits that Telstra’s submissions in relation to investment in infrastructure may be misleading, unless they are read in conjunction with the recent Government announcements on the NBN.¹²³ Optus indicates in both their primary and reply submissions that, one key implication of the NBN is that it is no longer efficient for Telstra to make further significant infrastructure investments in its copper access network (CAN) infrastructure.¹²⁴
132. The Herbert Geer parties submit that, given the NBN will eventually supersede Telstra’s CAN, economical operation of the CAN requires maintenance to ensure continued operation until it is replaced by the NBN (as opposed to further investment to expand the CAN).¹²⁵ In response to Telstra’s submission that ‘below cost pricing’ damages the LTIE, the parties submit that they are seeking charges based on efficient costs and not below cost pricing.¹²⁶ Their view is that charges that are set above efficient cost recovery are

¹¹⁷ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 12.

¹¹⁸ *Ibid.*, p. 13.

¹¹⁹ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 16.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *Telstra Corporation Ltd (No 3)* [2007] A Comp T 3 at [101] as cited in Telstra Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 16.

¹²³ Optus and XYZed Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 9.

¹²⁴ Optus and XYZed Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009 pp. 13–16; Optus and XYZed Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 9.

¹²⁵ Herbert Geer Reply Submission, *General and Preliminary Matters*, 4 June 2009, p. 2.

¹²⁶ *Ibid.*

contrary to the LTIE by impeding the development of competition, resulting in inefficient use of the infrastructure used to provide services, higher prices, and less diversity in services.¹²⁷

133. Optus submits that the consideration of subparagraph 152AB(6)(a)(i) is not relevant in these access disputes.¹²⁸ The ACCC notes that Optus did not provide any further information to substantiate this view.
134. Aside from the issues raised above, the Herbert Geer parties,¹²⁹ the Nicholls Legal parties¹³⁰ and Optus agree with the ACCC's assessment and discussion of this criterion in its Consultation Paper.¹³¹

ACCC view

LTIE

135. The ACCC has published a guideline explaining what it understands by the phrase 'long-term interests of end-users' in administering its declaration responsibilities.¹³² The ACCC considers that a similar interpretation is appropriate in making a FD in this arbitration.
136. In the ACCC's view, terms and conditions of access promote the interests of end-users if they are likely to contribute towards the provision of goods and services at lower prices, higher quality or towards the provision of greater diversity of goods and services. In the context of making model non-price terms and conditions, the ACCC has expressed the view that:

*. . . as a general proposition, terms and conditions of access will best promote the LTIE where they facilitate access seekers obtaining core services that are equivalent to the services that the access provider supplies to itself, in terms of technical and operational quality of services and the manner and timing of access.*¹³³
137. As noted by the Nicholls Legal parties, the Tribunal has offered guidance in its interpretation of the phrase 'long term interests of end-users' (in the context of access to subscription television services):

Having regard to the legislation, as well as the guidance provided by the Explanatory Memorandum, it is necessary to take the following matters into account when applying the touchstone – the long-term interests of end-users:

¹²⁷ Ibid, p. 3.

¹²⁸ Optus and XYZed Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 6.

¹²⁹ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 3.

¹³⁰ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 3.

¹³¹ ACCC Consultation Paper, p. 7.

¹³² ACCC, *Telecommunications services — Declaration Provisions: A Guide to the Declaration Provisions of Part XIC of the Trade Practices Act*, July 1999.

¹³³ ACCC Report, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 7.

**End-users: “end-users” include actual and potential [users of the service] ...*

**Interests: the interests of the 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. ... [T]his would include access to innovations ... in a quicker timeframe than would otherwise be the case ...*

**Long-term: the long-term will be the period over which the full effects of the ... decision will be felt. This means some years, being sufficient time for all players (being existing and potential competitors at the various functional stages of the ... industry) to adjust to the outcome, make investment decisions and implement growth – as well as entry and/or exit – strategies.¹³⁴*

138. It is the ACCC’s view that the consideration of the long-term does not necessarily exclude consideration of short term effects.
139. To consider the likely impact of particular terms and conditions on the LTIE, the Act requires the ACCC to have regard to whether the terms and conditions are likely to result in the achievement of the following objectives:
- promoting competition in markets for carriage services and services supplied by means of carriage services (listed services)
 - achieving any-to-any connectivity, and
 - encouraging the economically efficient use of, and economically efficient investment in:
 - the infrastructure by which listed services are supplied, and
 - any other infrastructure by which listed services are, or are likely to become, capable of being supplied.¹³⁵

Promoting competition in markets for ULLS

140. In determining the extent to which terms and conditions of access are likely to result in the objective of promoting competition, regard must be had to the extent to which the terms and conditions contained in the final determination will remove obstacles to end-users of gaining access to listed services.¹³⁶
141. Regarding the relevant market for the ULLS, the ACCC considers that terms and conditions of access have consequences for end-users gaining access to xDSL broadband services and fixed-line voice services. This is because, when combined with xDSL technology and an access seeker’s own network infrastructure, the ULLS facilitates the supply of high bandwidth xDSL

¹³⁴ *Seven Network Limited (no 4)* [2004] ACompT 11 at [120].

¹³⁵ *Trade Practices Act 1974*, subsection 152AB(2).

¹³⁶ *Ibid*, subsection 152AB(4).

services and fixed-line voice services.¹³⁷ This approach is consistent with views expressed by the Australian Competition Tribunal in its decision on Telstra's appeal of the ACCC's rejection of Telstra's ULLS 2006 undertaking where it stated:

*The ULLS can be used to provide a range of telecommunications services, including fixed-line voice services (such as the provision of line rental, local call and long distance call services) and broadband internet services. We consider the markets for these services to be the relevant markets...*¹³⁸

142. The ACCC considers that, in assessing whether particular terms and conditions of access will promote competition, it is relevant to consider the ULLS market as set out above and to consider whether the terms and conditions will remove obstacles to end-users gaining access to the services supplied in those markets.
143. The ACCC also considers that promotion of competition should allow the access provider to recover their efficiently incurred costs, whilst allowing the access seekers to compete on their respective merits downstream. This is likely to provide an incentive for access seekers to compete – otherwise, if costs are too high, then access seekers will not have the means or the incentive to compete.
144. The ACCC agrees with Telstra's view that the LTIE will not be promoted where the access provider is unable to recover the costs of providing access to its infrastructure. However, the ACCC also agrees with access seekers views that the recovery of such costs should be limited to those that are efficiently incurred.
145. The ACCC considers that its approach promotes ULLS competition, as it removes obstacles to service providers in gaining access, and facilitates prices that reflect efficient costs of supply which will best promote effective competition in the supply of ULLS services. Prices based on efficient costs of supply best enable access seekers to compete on an equal footing with other suppliers, including the access provider, in the supply of downstream ULL services.

Achieving any-to-any connectivity

146. In determining whether the particular terms and conditions of access achieve the objective of any-to-any connectivity, the ACCC is required to consider whether the terms and conditions contained in the FD permit each end-user who is supplied with a carriage service that involves communication between end-users is able to communicate, by means of that service, with each other

¹³⁷ ACCC, *Declaration inquiry for the ULLS, PSTN OTA and CLLS – final determination*, July 2006, p. 13.

¹³⁸ *Telstra Corporation Ltd (No 3)* [2007] ACompT3 at [92].

end-user who is supplied with the same service or a similar service, whether or not the end-users are connected to the same telecommunications network.¹³⁹

147. All of the access seekers submit that they agree with the ACCC's view that this criterion is unlikely to be of direct relevance in determining the terms and conditions of access in these arbitrations.¹⁴⁰ Telstra disagreed, and submits the ACCC must give fundamental weight to each of the three component objectives of the LTIE (including any-to-any connectivity)¹⁴¹
148. The ACCC considers that this criterion is relevant to ensuring that the terms and conditions it determines would not create obstacles for the achievement of any-to-any connectivity. Whilst the ACCC's role is not to promote any-to-any connectivity, for each of the terms and conditions in the FD, the ACCC has undertaken an assessment against this criteria and has determined that the terms and conditions do not negatively impact the achievement of any-to-any connectivity.

Encouraging economically efficient use of, and investment in infrastructure

149. In determining the extent to which terms and conditions of access are likely to result in the achievement of the objective of encouraging the economically efficient use of and investment in infrastructure, regard must be had to:
- whether it is, or is likely to become, technically feasible for the services to be supplied and charged for, having regard to:
 - the technology that is in use, available or likely to become available
 - whether the costs involved in supplying and charging for, the services are reasonable or likely to become reasonable, and
 - the effects or likely effects that supplying and charging for the services would have on the operation or performance of telecommunications networks
 - the legitimate commercial interests of the supplier or suppliers of the services, including the ability of the supplier or suppliers to exploit economies of scale and scope
 - incentives for investment in the infrastructure by which services are supplied; and any other infrastructure by which services are, or are likely to become, capable of being supplied, and
 - the risks involved in making the investment.¹⁴²
150. The objective of encouraging the 'economically efficient use of, and economically efficient investment in ... infrastructure' requires an

¹³⁹ *Trade Practices Act 1974*, subsection 152AB(8).

¹⁴⁰ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 12; Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 3.

¹⁴¹ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 4.

¹⁴² *Trade Practices Act 1974*, subsections 152AB(6) and (7A).

understanding of the concept of economic efficiency. Economic efficiency consists of three components:

- Productive efficiency – This is achieved where individual firms produce the goods and services that they offer at least cost;
- Allocative efficiency – This is achieved where the prices of resources reflect their underlying costs so that resources are then allocated to their highest valued uses (i.e. those that provide the greatest benefit relative to costs); and
- Dynamic efficiency – This reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities.

151. On the issue of efficient investment, it has been stated by the Australian Competition Tribunal that:

*...An access charge should be one that just allows an access provider to recover the costs of efficient investment in the infrastructure necessary to provide the declared service.*¹⁴³

*...efficient investment by both access providers and access seekers would be expected to be encouraged in circumstances where access charges were set to ensure recovery of the efficient costs of investment (inclusive of a normal return on investment) by the access provider in the infrastructure necessary to provide the declared service.*¹⁴⁴

*...access charges can create an incentive for access providers to seek productive and dynamic efficiencies if access charges are set having regard to the efficient costs of providing access to a declared service.*¹⁴⁵

152. The ACCC considers that in the context of the present arbitrations it should set access charges at a level which promotes efficient investment in infrastructure by both the access provider and access seeker.

153. The ACCC considers that it is relevant in these arbitrations to consider the use of and investment in infrastructure used to supply the ULLS, as well as the infrastructure used to supply carriage and/or content services over the ULLS, for example DSL access multiplexers ('DSLAMs') and/or voice switches. This is consistent with the approach adopted by the Australian Competition Tribunal in its consideration of the ULLS¹⁴⁶ and LSS.¹⁴⁷

¹⁴³ *Telstra Corporation Ltd (No. 3)* [2007] ACompT 3 at [159].

¹⁴⁴ *Ibid* at [164].

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid* at [158] to [161].

¹⁴⁷ *Re Telstra Corporation Ltd* ACompT 4 [2006] at [104].

Other matters

Issues of Weighting of subsection 152CR(1) criterion

154. The ACCC notes the Herbert Geer parties' submission that Lindgren J in *Telstra Corporation v Australian Competition and Consumer Commission* is advocating that the LTIE is to be given "fundamental weight" as against the other criteria because subsection 152AB(1) provides that the object of Part XIC "is to promote the [LTIE]". The Herbert Geer parties also submit this view in relation to the weight to be given to paragraph 152CR(1)(d) – the direct costs of providing access to the declared service.¹⁴⁸
155. However, the ACCC considers that the Federal Court has confirmed that the weight given to all the relevant considerations in the subsection 152CR(1) criterion is not fixed, and the weighting of each factor will depend upon the circumstances of the access dispute.¹⁴⁹ On this basis, the ACCC is of the view that the LTIE criterion in paragraph 152CR(1)(a) should not be given "fundamental weight" in the consideration of the subsection 152CR(1) criteria.
156. The ACCC agrees with Telstra's view that the ACCC's consideration of the three component objectives of section 152AB is not to be given a fixed weighting, and the consideration of each objective requires careful weighing of each of them in the particular circumstances of the access dispute.¹⁵⁰

Impact of the NBN

157. The ACCC notes the Herbert Geer parties' views that future investment in the CAN is likely to be limited to maintenance. However, the ACCC must conduct these arbitrations on the factual material and evidence before it and not on the basis of a proposed rollout.

Conclusion

158. The Federal Court has recognised the potential tension between the paragraph 152CR(1)(a) matters and the need for the ACCC to give each of them varying weight in the decision-making process.¹⁵¹
159. The ACCC is satisfied with its approach towards the interpretation of the criteria listed in paragraph 152CR(1)(a) of the Act. In summary, this approach is as follows:
1. Not to give fundamental weight to paragraph 152CR(1)(a) in the LTIE criteria – but rather give weighting based on the circumstances of the access dispute

¹⁴⁸ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 3.

¹⁴⁹ *Telstra Corporation Ltd* [2008] FCA 1758 at [112].

¹⁵⁰ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 8.

¹⁵¹ Lindgren J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1436 at [311] – [312]; Rares J in *Telstra Corporation Ltd v Australian Competition and Consumer Commission* [2008] FCA 1758 at [108] – [112].

2. To only consider the factual information which is before the ACCC in the assessment of the impact of the NBN
3. To not discount short term effects in the consideration of the LTIE, and
4. To have regard to whether the terms and conditions of the FD will remove obstacles to service providers gaining access to services.

4.3.3. Paragraph 152CR(1)(b)

Submissions

160. Telstra notes its agreement with the Australian Competition Tribunal statement that:

*When looked at through the prism of a charge term and condition of access and its relationship to a carrier's cost structure, [the expression 'legitimate business interest'] is a reference to the interest of a carrier in recovering the costs of its infrastructure and its operating costs and obtaining a normal return on its capital.*¹⁵²

161. Telstra also states that:

*An access provider would not invest in infrastructure if it was unable to achieve a return that recovered its costs and enabled it to make a return commensurate with the risk involved.*¹⁵³

162. Optus agrees with the approach expressed by the ACCC in its Consultation Paper.¹⁵⁴ The ACCC approach as outlined in the Consultation Paper is that it is a legitimate interest for an access provider to earn a normal commercial return on its investment, and that an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.¹⁵⁵
163. Optus also submits that the ACCC has to reconcile Telstra's legitimate business interests with the pricing principles to be applied.¹⁵⁶
164. The Herbert Geer parties submit that while they agree that Telstra should be able to recover returns from its investment, access charges that are in excess of normal commercial returns are an abuse of Telstra's dominant position and should not be regarded as legitimate.¹⁵⁷ The Herbert Geer parties also submit that non-price terms which unnecessarily limit the access seekers ability to utilise the ULLS or LSS or to compete with Telstra should not be regarded as

¹⁵² *Re Telstra Corporation Ltd* [2006] ACompT 4 at [89].

¹⁵³ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 17.

¹⁵⁴ Optus and XYZed Primary Submissions, *General Approach and Preliminary Matters*, 18 May 2009, p. 3.

¹⁵⁵ ACCC Consultation Paper, p. 11.

¹⁵⁶ Optus and XYZed Primary Submission, *General Approach and Preliminary Matters*, 18 May 2009, p. 7.

¹⁵⁷ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 3.

legitimate even if such terms are likely to be of considerable benefit to Telstra's commercial interests.¹⁵⁸

165. The Nicholls Legal parties agree with the ACCC's views as expressed in the Consultation Paper, that the carrier should be able to earn a normal commercial return on its investment, though not compensation for loss of any monopoly profits.¹⁵⁹ The Nicholls Legal parties submit that it is not a legitimate business interest of Telstra, within the meaning of the Act, to continue to derive supra-normal profits from the ULLS.¹⁶⁰

ACCC view

166. As outlined in the ACCC's Access Dispute Guidelines, the ACCC considers it is a legitimate interest for an access provider to earn a normal commercial return on its investment.¹⁶¹ In this regard, the ACCC is of the view that the concept of 'legitimate business interests' should be interpreted in a manner consistent with the phrase 'legitimate commercial interests' used elsewhere in Part XIC of the Act.¹⁶² For completeness, the ACCC notes that it would be a legitimate interest for an access provider to seek to recover its costs as well as a normal commercial return on investment having regard to the relevant risk involved.
167. The ACCC also considers that an access price should not be inflated to recover any profits the access provider (or any other party) may lose in a dependent market as a result of the provision of access.¹⁶³
168. Similarly, the Australian Competition Tribunal has stated that:

*The expression "legitimate business interests" is a general expression and is somewhat open-textured. What is "legitimate" conduct or a "legitimate" interest in business may be open to a number of differing interpretations. We consider that a carrier's "legitimate business interests" is a reference to what is regarded as allowable and appropriate in commercial or business terms. In the context of s 152AH(1)(b), the expression connotes something which is allowable and appropriate when negotiating access to the carrier's infrastructure. When looked at through the prism of a charge term and condition of access and its relationship to a carrier's cost structure, it is a reference to the interest of a carrier in recovering the costs of its infrastructure and its operating costs and obtaining a normal return on its capital.*¹⁶⁴

¹⁵⁸ Ibid.

¹⁵⁹ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 18.

¹⁶⁰ Ibid.

¹⁶¹ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (Revised), ('Access Dispute Guidelines'), p. 56.

¹⁶² Ibid.

¹⁶³ Ibid, p. 10.

¹⁶⁴ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [89].

169. The Tribunal expressly affirmed this approach in its consideration of the ULLS.¹⁶⁵

170. As the ACCC has previously stated in the context of model non-price terms and conditions, it considers that:

*...this consideration supports the view that model terms and conditions should not unduly constrain an access provider's ability to conduct its overall business operations.*¹⁶⁶

171. The ACCC generally agrees with the parties submissions that it is in the legitimate interest for an access provider to be able to earn a normal economic return on its investment. The ACCC considers that the FD is consistent with Telstra's legitimate business interests.

4.3.4. Paragraph 152CR(1)(c)

Submissions

172. The Herbert Geer, Optus and Nicholls Legal parties agree with the ACCC's views as set out in its Consultation Paper¹⁶⁷ that:

- access seekers have an interest in being able to compete for end-users on their relative merits, and
- terms and conditions that favour one or more service providers over others distorts competition.

173. Optus submits that the paragraph 152CR(1)(c) criterion requires the ACCC to have regard to the interests of access seekers in relation to their ability to compete on their merits in downstream markets.¹⁶⁸

174. The Herbert Geer parties submit that access seekers have a right to use the ULLS to compete directly with Telstra in the broadband market.¹⁶⁹ The Herbert Geer parties also submit that terms and conditions that favour one or more service providers over others distort the competitive process and affect access seekers' legitimate business interests, as they are unable to win customers, utilise the declared services to their full potential or recoup the returns that should be possible under a competitive environment.¹⁷⁰

¹⁶⁵ *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [180].

¹⁶⁶ ACCC Report, Final determination – Model Non-price Terms and Conditions, November 2008, p. 8.

¹⁶⁷ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 4, Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 19; Optus and XYZed Primary Submission, *General Approach and Preliminary Matters*, 18 May 2009, p. 7.

¹⁶⁸ Ibid.

¹⁶⁹ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 4.

¹⁷⁰ Ibid.

175. The Nicholls Legal parties submit that access seekers' ability to compete in the market for services supplied by means of the ULLS would be enhanced by access prices set in accordance with TSLRIC pricing principles.¹⁷¹
176. Telstra contends that paragraph 152CR(1)(c) contemplates a balancing of interests between the rights of end-users and the rights of access seekers as the criterion refers to "all persons" which would suggest that it contemplates persons beyond access seekers.¹⁷²
177. Telstra submits that although it is arguably in the short term-interests of persons who have rights to use the declared service for the ULLS to be supplied at below-cost prices, this is not in the long-term interests of either access seekers or end-users.¹⁷³ Telstra contends that if access seekers do not have to bear the full costs of the ULLS they acquire from Telstra (and therefore will be disincented from building alternative infrastructure that may deliver alternative services), Telstra will be disincented from maintaining, improving or investing in further networks.¹⁷⁴ This, in Telstra's view will mean that in the long-term, investment in infrastructure will be hampered, and end-users will not receive the new services and technologies that proper investment incentives would bring.¹⁷⁵

ACCC view

178. The *Access Dispute Guidelines* state that parties who have rights to currently use a declared service will generally use that service as an input to supply carriage services, or a service supplied by means of carriage services, to end-users. The ACCC believes that these people have an interest in being able to compete for the custom of end-users on the basis of their relative merits.¹⁷⁶
179. The ACCC does not consider, however, that this criterion calls for consideration to be given to the interests of users of 'downstream' services, as they are not access seekers. The interests of end-users are already to be considered under other criteria.
180. The Australian Competition Tribunal has also provided views on this criterion (albeit when it was discussing the same criterion at paragraph 152AH(1)(c) of the Act). In assessing whether an approach that led to a higher LSS Annual Charge should be adopted, the Tribunal stated:

...s 152AH(1)(c) requires us to have regard to the interests of persons who have rights to use Telstra's LSS, that is, access seekers. . . A higher monthly charge would not be in the interests of an access seeker because it

¹⁷¹ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 19.

¹⁷² Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 17.

¹⁷³ Ibid.

¹⁷⁴ Telstra Reply Submission, *ULLS Preliminary Matters and General Approach*, 4 June 2009, p. 3.

¹⁷⁵ Ibid.

¹⁷⁶ ACCC, *Access Dispute Guidelines*, p. 57.

would raise its costs and inhibit its ability to compete with Telstra over the provision of retail services to end-users that could be provided using the LSS.¹⁷⁷

181. In that decision, the Tribunal also stated when discussing the same criterion at paragraph 152AH(1)(c) of the Act:

*The interests of persons who have a right to use the LSS, access seekers, are served by an access price that enables them to compete on their merits (that is, on the basis of their own efficiency) in downstream markets.*¹⁷⁸

182. As the ACCC has previously stated in the context of model non-price terms and conditions, it considers that:

...this consideration *supports* the view that model terms and conditions should not place unnecessary or excessive obligations on access seekers, as these could exclude them from entering and supplying a market and displacing less efficient service providers.¹⁷⁹

183. The ACCC acknowledges that it is not in the long-term interests for access seekers or end-users to be supplied with the ULLS at below-cost prices. However, the ACCC considers that the ULLS charges that it has applied in this FD are not below cost, and that Telstra's concerns are not justified.

4.3.5. Paragraph 152CR(1)(d)

Submissions

184. Telstra notes in its submission that it agrees with the ACCC's definition of "direct costs".¹⁸⁰ Telstra submits that paragraph 152CR(1)(d) should be read consistently with the Commission's obligation under paragraph 152CQ(1)(f) of the Act to refrain from making any determination under which a party would be required to bear an unreasonable amount of the costs associated with extending or enhancing a facility.¹⁸¹
185. Telstra submits that the direct costs of providing the ULLS should also include a contribution to common costs, being the costs incurred in providing the ULLS which is incurred in common with the provision of other services. In support of this submission, Telstra cites the Tribunal's decision in *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited* (2006) ACompT 8 where the Tribunal recognised that access pricing should also incorporate an appropriate allocation of fixed and common costs efficiently incurred in the long run. The Tribunal in discussing fixed and common costs, made the following statement:

¹⁷⁷ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [91].

¹⁷⁸ *Ibid* at [138].

¹⁷⁹ ACCC Report, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

¹⁸⁰ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 17.

¹⁸¹ *Ibid*.

*[D]irect costs are a reference to the total costs of providing access to the relevant declared service which ordinarily include an appropriate allocation of FCCs [fixed and common costs] because without the existence of the assets in respect of which the FCCs are incurred, the relevant access could not be provided.*¹⁸²

186. The Herbert Geer parties agree that the costs of complying with a FD are relevant to Telstra's direct costs and therefore should be considered.¹⁸³ In the course of establishing direct costs, the Herbert Geer parties are of the view that Telstra is seeking to misconstrue Rares J's judgement in *Telstra Corporation v ACCC* [2008] FCA 1758 to firstly over-inflate the costs that it may incur and secondly, argue that anything more than minimal costs are contrary to paragraph 152CQ(1)(f).¹⁸⁴
187. The Herbert Geer parties submit that, in the course of considering subsection 152CR(1) factors, the Commission must give "fundamental weight" to the LTIE (152CR(1)(a)) and disagree with the ACCC's view that the weight given to the direct costs criterion is not fixed, and that the weighting of each factor will depend upon the circumstances of the access dispute.¹⁸⁵ The Herbert Geer parties also submit this view for the weighting to be given in the LTIE criteria. The Herbert Geer parties cite the following statement of Lindgren J in *Telstra Corporation v Australian Competition and Consumer Commission*¹⁸⁶ to support their assertion and submit that His Honour's approach is to be preferred (their emphasis):

*Section 152CR(1) provides that in making a final determination [the] ACCC must take into account the seven matters listed in paras (a)-(g) of that subsection... **The factor that should be given "fundamental weight" as against the others is the LTIE mentioned in para (a) of s 152CR(1) because s 152AB(1) provides that the object of Part XIC is "to promote the [LTIE]...***¹⁸⁷

188. The Herbert Geer parties submit this is the correct approach because Rares J approach was based on an application of the High Court decisions in *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others*¹⁸⁸ (Peko-Wallsend case) and *Foster v Minister for Customs and Justice*,¹⁸⁹ neither of which involved consideration of the effect of an equivalent provision to section 152AB. In support of this proposition, the parties rely on the judgement of Mason J in the Peko-Wallsend case where his Honour stated (their emphasis):

¹⁸² *Application by Optus Mobile Pty Limited & Optus Networks Pty Ltd* [2006] ACompT 8, at [137] cited in Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, pp. 17–18.

¹⁸³ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 4; Herbert Geer Reply Submission, *General and Preliminary Matters*, 4 June 2009, p. 2.

¹⁸⁴ Herbert Geer Reply Submission, *General and Preliminary Matters*, 4 June 2009, p. 2.

¹⁸⁵ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 4. [2008] FCA 1436 at [122].

¹⁸⁶ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 5.

¹⁸⁷ 162 CLR 24.

¹⁸⁸ 200 CLR 442.

*It follows that, in the absence of any statutory indication of the weight to be given to the various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.*¹⁹⁰

189. Optus agrees with the views expressed by the ACCC in its Consultation Paper that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access, and includes the incremental costs of complying with a FD.¹⁹¹ Optus also agrees with the ACCC's views that non-price terms and conditions should not require steps to be taken unnecessarily.¹⁹² Optus submits that whilst it is appropriate for the ACCC to take into account the direct costs of Telstra in providing access to the declared service, this should not be extended to allow Telstra to recover the loss of any "monopoly profits" that occurs as a result of increased competition.¹⁹³ Similarly, Optus submits that they agree in principle with the ACCC that indirect costs incurred by Telstra as a result of providing access should be considered but this should not extend to indirect costs that have not been legitimately incurred by Telstra.¹⁹⁴
190. The Nicholls Legal parties accept the propositions made by the ACCC in relation to this criterion but also contend that the ULLS access charges must be cost-based.¹⁹⁵ The Nicholls Legal parties also submit that the ACCC's approach in the ULLS pricing principles is the best available proxy for measuring the direct costs of providing the declared service.¹⁹⁶

ACCC view

191. The ACCC considers that paragraph 152CR(1)(d) requires the ACCC to have regard to the actual direct costs of Telstra complying with any FD the ACCC may make. The ACCC also considers that the direct costs of providing access to a declared service are those incurred (or caused) by the provision of access and includes the incremental costs of providing that access.
192. The ACCC notes the Tribunal's view that the direct costs criterion 'is concerned with ensuring that the costs of providing the service are recovered'.¹⁹⁷ The Federal Court has subsequently held that, in the context of an access dispute over price terms, the criterion inevitably raises some question of cost recovery.¹⁹⁸ However, in the context of a non-price dispute,

¹⁹⁰ *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others* 162 CLR 24 at [41] cited in Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 5.

¹⁹¹ Optus and XYZed Primary Submission, *General Approach and Preliminary Matters*, 18 May 2009, pp. 7–8.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid, p. 8.

¹⁹⁵ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p 19.

¹⁹⁶ Ibid, p. 20.

¹⁹⁷ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [92].

¹⁹⁸ *Telstra Corporation Ltd v ACCC* [2008] FCA 1436 at [309].

the Court has more recently held that this criterion requires more than considering whether direct costs would be recovered as ‘the incurring of a cost is different from its possible recovery’.¹⁹⁹

193. For this reason, the ACCC proposes to consider the level of direct costs of providing access in the prices set in this FD.

Level of direct costs

194. As the ACCC has previously stated in the context of model non-price terms and conditions, it considers that this criterion will support an approach that keeps the level of costs to the minimum necessary.²⁰⁰
195. The Federal Court has held that the direct costs criterion requires analysis and consideration of Telstra’s direct costs of compliance with a FD, and for real consideration to be given to what Telstra would be required to incur directly as the costs of implementing what the ACCC was considering.²⁰¹
196. Further, in the context of a dispute over price, the Federal Court has recognised a requirement to:

*...take [the direct costs to Telstra of providing access] into account as a factor in Telstra’s favour in the sense of a factor contributing positively to the amount of the periodic charge to be fixed.*²⁰²

197. However, it is the ACCC’s view that the direct costs criterion does not extend to permitting compensation for loss of any ‘monopoly profits’ that occurs as a result of increased competition and agrees with Optus’ submission on this point. In this regard, the Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* states:

*...the ‘direct’ costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.*²⁰³

198. The Tribunal has also confirmed that ‘the effects of competition should not be considered as a direct cost of providing access to the ULLS’.²⁰⁴
199. The ACCC acknowledges that the Tribunal and Federal Court have provided conflicting views over whether indirect costs should be considered under the direct costs criterion.

¹⁹⁹ *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [117].

²⁰⁰ ACCC Report, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

²⁰¹ *Telstra Corporation Ltd v ACCC* [2008] FCA 1758 at [117]-[118].

²⁰² *Telstra Corporation Ltd v ACCC* [2008] FCA 1436 at [309].

²⁰³ Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 43.

²⁰⁴ *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [272].

200. The ACCC notes that the Tribunal in *Optus Mobile* expressed the view that “direct costs” include not only the incremental costs of supplying a service but also a mark-up on those costs for a contribution for the indirect costs of supplying a service.²⁰⁵ The Tribunal considered it appropriate for direct costs to include the total costs of providing access to the relevant declared service which ordinarily included an appropriate allocation of fixed and common costs because without the existence of the assets in respect of which these ‘indirect’ costs are incurred, the relevant access could not be provided.²⁰⁶
201. Before the Federal Court, Telstra sought to rely upon the Tribunal’s statement in *Optus Mobile* when submitting that the ACCC is required to take into account the direct costs of providing access to the LSS under paragraph 152CR(1)(d). The Federal Court has described this passage of the *Optus Mobile* decision as ‘not helpful, if for no other reason than because it related to something that was not in issue between the parties’ in that case.²⁰⁷
202. The ACCC’s view in this arbitration is to consider costs indirectly caused by providing access. Although it is arguable whether this particular criterion requires the ACCC to have regard to indirect costs, taking these costs into account would appear consistent with other criteria, such as the legitimate business interests of the access provider.
203. The ACCC considers that proper consideration of Telstra’s direct costs requires the ACCC to critically assess the parties’ cost claims and come to its own view of the likely scale of costs to be incurred from the implementation of the FD. The ACCC notes its ability to inform itself of any matter relevant to the dispute in any way it thinks appropriate.²⁰⁸

Recoverability of direct costs

204. After the ACCC has determined the level of direct costs, it has to consider whether these direct costs could be recovered. The ACCC notes that the Tribunal and Federal Court have considered the allocation and recovery of direct costs. Both the Tribunal and Federal Court have noted that direct costs could conceivably be allocated (and hence recovered) in a number of ways and from numerous sources, and that adopting any of these approaches to recovery is consistent with the direct costs criterion.²⁰⁹ The Tribunal has stated, in the context of a dispute over price:

...Telstra’s approach to estimating a per unit cost is likely to be consistent with ensuring recovery only of direct costs. However, while direct costs will be incurred by Telstra in order to provide the declared service, there are a number of cost allocation methods other than that adopted by Telstra (including those suggested by the ACCC and other interveners in

²⁰⁵ *Re Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

²⁰⁶ *Ibid.*

²⁰⁷ *Telstra Corporation Ltd v ACCC* [2008] FCA 1436 at [308].

²⁰⁸ *Trade Practices Act 1974*, paragraph 152DB(1)(c).

²⁰⁹ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [139]; *Telstra Corporation Ltd v ACCC* [2008] FCA 1436 at [305].

*this matter) that would enable it to recover the direct costs of investment in infrastructure necessary to provide a LSS.*²¹⁰

205. Similarly, the Tribunal in its assessment of Telstra’s proposed averaged ULLS price structure noted that the pricing structure chosen would not have an impact on the direct costs criterion, as long as overall costs are recovered:

*...the direct costs of providing access to the service are likely to remain unchanged irrespective of whether Telstra were to set averaged or de-averaged charges. Averaged and de-averaged ULLS charges are merely different ways of seeking to recover these costs.*²¹¹

206. The Federal Court has confirmed that, in assessing recoverability of direct costs, other sources of revenue can be considered in addition to access charges. Lindgren J held that:

*In my opinion, there is no basis for saying, however, that ACCC misconstrued s 152CR(1)(d) by not assessing recoverability exclusively through the charge to be made by Telstra for the LSS alone. I do not accept that s 152CR(1)(d), on its proper construction, requires such an approach.*²¹²

207. The ACCC agrees with Telstra’s submission that paragraph 152CR(1)(d) should be read consistently with section 152CQ(1)(f) in determining access prices, but considers that there is already an inclusion of a contribution to common costs through the ‘+’ in TSLRIC+.

4.3.6. Paragraph 152CR(1)(e)

Submissions

208. Telstra submits that the ACCC’s statement in its Consultation Paper that “it is unlikely that this criterion will be relevant in making the final determinations in these access disputes” is incorrect.²¹³ Further, Telstra submits that this criterion is relevant to a number of terms and conditions included in the ACCC’s DFDs which, if made final, would require Telstra to make changes to its IT systems and otherwise, at a significant cost, enhance the capability of its facilities in order to comply.²¹⁴
209. The Herbert Geer parties, Nicholls Legal parties and Optus agree with the ACCC’s position that the ACCC will have regard to this criterion should it be

²¹⁰ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [139].

²¹¹ *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [274].

²¹² *Telstra Corporation Limited v ACCC* [2008] FCA 1436 at [310].

²¹³ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009 p. 18.

²¹⁴ *Ibid*; Telstra Reply Submission, *ULLS Preliminary Matters and General Approach*, 4 June 2009, p. 4.

relevant to an aspect of access that is in dispute, but that it is unlikely that this criterion will be relevant in making FDs in these access disputes.²¹⁵

ACCC view

210. As the ACCC has previously stated, it considers that:

*This criterion requires 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 service, it is legitimate for the access provider to incorporate some proportion of the cost of doing so in the access price.*²¹⁶

211. The ACCC accepts that this criterion will be relevant in determining the dispute. The ACCC acknowledges that there may be some level of cost incurred by Telstra in upgrading its IT systems in order to comply with the FDs.

4.3.7. Paragraph 152CR(1)(f)

Submissions

212. Telstra submits that the operational and technical requirements necessary for the safe and reliable operation of the ULLS have cost implications for the configuration and operation of the underlying network.²¹⁷ Telstra submits that these costs need to be recovered in access pricing so that there is sufficient funds available to Telstra to maintain safe and reliable services.²¹⁸ Telstra considers that access prices below the cost of supply risk compromising the safety and reliability of the service.²¹⁹

213. Optus submits that it agrees with the views expressed by the ACCC that this criterion requires that terms and conditions of access should not compromise the safety or reliability of carriage services and associated networks or facilities.²²⁰

214. The Herbert Geer parties accept that the costs of an efficient operator are and must be adequate to ensure the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility.²²¹ The Herbert Geer parties

²¹⁵ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 6; Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 20; Optus and XYZed Primary Submission, *General Approach and Preliminary Matters*, 18 May 2009, p. 8.

²¹⁶ ACCC, *Access Pricing Principles Guidelines*, p. 11.

²¹⁷ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 18.

²¹⁸ *Ibid.*

²¹⁹ *Ibid.*

²²⁰ Optus and XYZed Primary Submission, *General Approach and Preliminary Matters*, 18 May 2009, p. 8.

²²¹ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 6.

consider that the charges that they seek to obtain as part of this arbitration are sufficient to satisfy this criterion.²²²

215. The Nicholls Legal parties submit that they agree with the views expressed by the ACCC in its Consultation Paper.²²³

ACCC view

216. The ACCC considers that this criterion requires that terms and conditions of access should not compromise the safety or reliability of carriage services and associated networks or facilities, and that this has direct relevance when specifying any technical requirements or standards to be followed.

217. In assessing the access charges that Telstra submitted in a proposed ULLS undertaking, the Tribunal stated that this criterion calls for consideration of whether the efficient costs of the network will be recovered:

Telstra should have a sufficient incentive to ensure the safe and reliable operation of relevant carriage services, networks and facilities associated with the provision of the ULLS so long as it is able to set an access charge for the service that will enable it to recover the efficient costs (inclusive of a normal return on its investment) of its CAN [customer access network].²²⁴

218. As the ACCC has previously stated in the context of model non-price terms and conditions, it considers that:

...this consideration supports the view that model terms and conditions should reflect the safe and reliable operation of a carriage service, telecommunications network or facility. For instance, the model non-price terms and conditions should not require work practices that would be likely to compromise safety or reliability.²²⁵

219. Accordingly, the ACCC considers that Telstra's incurred costs for the safe and reliable operation of a carriage service are to be taken into account in ULLS access pricing.

4.3.8. Paragraph 152CR(1)(g)

Submissions

220. Telstra submits that it adopts its reasons given under paragraph 152CR(1)(a) and maintains that access prices should not be set below efficient cost recovery levels, as this would lead to long-term economic inefficiencies.²²⁶

²²² Ibid.

²²³ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 20.

²²⁴ *Telstra Corporation Ltd (No 3)* [2007] ACompT 3, at [277].

²²⁵ ACCC Report, *Final determination – Model Non-price Terms and Conditions*, November 2008, p. 8.

²²⁶ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. .8

Telstra states that pricing below cost access pricing creates free-riding incentives and creates economic distortion which is also likely to have a cascading and long-term spill over effect into downstream and related markets.²²⁷ By way of example, Telstra suggests that such pricing discourages the access provider from investing in its own network and third parties from efficient investment in other technologies and infrastructure which in its view is contrary to the LTIE.²²⁸ Furthermore, below cost access pricing effectively allows economic resources to be diverted away from other forms of competition and into LSS/ULLS based competition, resulting in a resource misallocation and inefficient use of Telstra's infrastructure which in the long-term is not economically efficient.²²⁹

221. The Herbert Geer parties' submit that where Telstra's access charges are in excess of the efficient forward-looking costs of the service, access seekers' costs of using the services are unnecessarily raised.²³⁰ In their view if charges reflect efficient costs, then the current infrastructure used to supply the services would be more efficiently used and provide more efficient signals for new investment by both Telstra and access seekers.²³¹
222. In their reply, the Herbert Geer parties respond to Telstra's submission that 'below cost pricing' damages the LTIE. The parties submit that they are seeking charges that are more accurately described as sustainably low prices, based on efficient costs.²³² In their view, charges that are set above efficient cost recovery are contrary to the LTIE by impeding the development of competition, resulting in inefficient use of the infrastructure used to provide services, higher prices and less diversity in services.²³³
223. The Nicholls Legal parties and Optus submit that they accept the views expressed by the Commission in its Consultation Paper.²³⁴

ACCC view

224. The ACCC's *Access Dispute Guidelines* note that the phrase 'economically efficient operation' embodies the concept of economic efficiency as discussed earlier under the LTIE criterion. Paragraph 152CR(1)(g) does not appear to be limited to the operation of carriage services, networks and facilities by the access provider supplying the declared service but would seem to include those operated by others (for example, service providers using the declared service).²³⁵

²²⁷ Ibid, pp. 18–19.

²²⁸ Ibid, p. 19.

²²⁹ Ibid, p. 18.

²³⁰ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 6.

²³¹ Ibid.

²³² Herbert Geer, Reply Submission, *General and Preliminary Matters*, 4 June 2009, p. 2.

²³³ Ibid, p. 3.

²³⁴ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 20; Optus and XYZed Primary Submissions, *General Approach and Preliminary Matters*, 18 May 2009, p. 9.

²³⁵ ACCC, *Access Dispute Guidelines*, p. 57.

225. The *Access Dispute Guidelines* note that in the context of a determination, the ACCC may consider whether particular terms and conditions of access enable a carriage service, telecommunications network or facility to be operated efficiently. This may involve, for example, examining whether they would prevent an access provider from recovering the efficient costs of operating and maintaining the infrastructure used to supply the declared service.²³⁶
226. Consistent with the approach adopted by the Tribunal, the ACCC considers that in applying this criterion, it is relevant to consider the economically efficient operation of retail services provided by access seekers using Telstra's ULLS or by Telstra itself in competition with those access seekers; and, the telecommunications networks and infrastructure used to supply these services.²³⁷
227. As the ACCC has previously stated in the context of model non-price terms and conditions, it considers that:
- ...this criterion requires consideration of services, networks and facilities of all service providers that are used to supply core services or downstream services ...model terms and conditions best meet this consideration when they strike an appropriate balance between the ability of the access provider and access seekers to operate their respective services, networks and facilities in an economically efficient manner.*²³⁸
228. The ACCC notes that Telstra's submission raises concerns about the implications of pricing "below cost".
229. The ACCC considers that where there is the economically efficient operation of infrastructure this would allow for incentives for investment in new technologies and infrastructure, as well as encouraging an access provider to invest in its network.

4.3.9. Additional matters and information to which the Commission intends to have regard in making a final determination

Pricing Principles for the ULLS

230. Subsection 152AQA(6) of the Act requires that the ACCC have regard to any relevant pricing principles in arbitrating an access dispute in relation to a declared service.
231. In November 2007, the ACCC made a determination in relation to ULLS pricing principles under section 152AQA of the Act.²³⁹ In June 2008, this pricing principles determination was varied to address additional charges and

²³⁶ Ibid.

²³⁷ *Re Telstra Corporation Ltd* [2006] ACompT 4 at [94-95].

²³⁸ ACCC Report , *Final determination – Model Non-price Terms and Conditions*, November 2008, pp. 8–9

²³⁹ ACCC, *Unconditioned Local Loop Service – Final pricing principles*, November 2007. This followed on from the Commission publishing a draft pricing principle in July 2006; ACCC, *Declaration inquiry for the ULLS, PSTN OTA and ULLS – final determination*, July 2006, Chapter 7.

include a schedule of indicative prices ('the 2008 ULLS Pricing Principles').²⁴⁰ Since that time, these pricing principles have been repealed and incorporated into the following instrument which was made on 3 December 2009:

- *Pricing Principles for the Unconditioned Local Loop Service (ULLS) Determination 2009* (2009 ULLS Pricing Principles).

232. The parties have had an opportunity to provide views on whether the ACCC should have regard to these pricing principles.
233. Accordingly, the ACCC has had regard to the parties' submissions and the 2009 ULLS Pricing Principles, as required under subsection 152AQA(6) of the Act. Parties' submissions in relation to the principles to apply are dealt with in each chapter of the Statement of Reasons.

Model terms

234. Subsection 152AQB(9) of the Act requires the ACCC to have regard to any model terms and conditions determination that it has made in arbitrating an access dispute that is covered by that determination.
235. The ACCC made a determination in 2003 under section 152AQB in respect of model price terms of access to the ULLS – *Final Determination for model price terms and conditions of the PSTN, ULLS & LCS services, October 2003*. The ULLS model price terms that were addressed in this determination were ULLS annual charges, which were to apply until 30 June 2006. The ACCC's view is that this determination is not relevant to the access disputes because the charges which relate to the period up to 30 June 2006 are included in the 2009 ULLS Pricing Principles.
236. In 2003 and 2008, the ACCC made determinations under section 152AQB in respect of the non-price terms of access to the:
- *ULLS – Model Non-Price Terms and Conditions Determination 2003 (October 2003)*
 - *Model Non-Price Terms and Conditions Determination 2008 (November 2008)*.
237. Optus submits that the determination on model price terms and conditions of October 2003 and determination for the model non-price terms and conditions of October 2003 are no longer relevant (or of limited relevance).²⁴¹ Optus submits that the determination for the model price terms of October 2003 only provides the indicative ULLS monthly access price for the financial years of 2003-04, 2004-05 and 2005-06, which is not the relevant period for the joint

²⁴⁰ *Pricing Principles for the Unconditioned Local Loop Service Amendment Determination 2008 (No. 1)*.

²⁴¹ Optus and XYZed Primary Submission, *General Approach and Preliminary Matters*, 18 May 2009, p. 32.

arbitration hearing.²⁴² Optus also submits that the determination for the non-price terms and conditions of October 2003 has expired (in October 2008).²⁴³ Optus considers that the October 2003 non-price terms and conditions determination may nevertheless have limited relevance in respect of the period prior to October 2008.²⁴⁴ Optus therefore submits that the ACCC should have regard to the determination on non-price terms and conditions of November 2008.²⁴⁵

238. The Nicholls Legal parties did not make any submissions in relation to the ACCC having regard to model terms with respect to the ULLS.²⁴⁶
239. The Herbert Geer parties submit that they agree with the ACCC's proposal to have regard to model terms in arbitrating the ULLS access disputes.²⁴⁷
240. Telstra submits that as the model terms and conditions relating to price have now expired, they are no longer relevant.²⁴⁸
241. The ACCC considers it is required to have regard to the 2008 Model Terms determination under subsection 152AQB(9) of the Act when determining those ULLS access disputes that raise non-price issues. The 2008 Model Terms determination revoked the determination made in 2003.

Band Definitions

242. In response to the ACCC's Consultation Paper on preliminary issues, Telstra submits that the DFD band definitions:
 - are ambiguous; and
 - would require Telstra to constantly monitor the number of SIOs in each exchange.²⁴⁹
243. Accordingly Telstra considers that the notes to the band definitions contained in the DFD should be amended to specify that the applicable band is the band which the relevant service lies as at a specified date.²⁵⁰ For the purposes of backdating, Telstra considers that the classifications supplied to the ACCC in August 2007 should apply as this would provide consistency with the band classifications used in the IDs.²⁵¹

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

²⁴⁶ Nicholls Legal Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 21.

²⁴⁷ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 6.

²⁴⁸ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, p. 4.

²⁴⁹ Telstra Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 12

²⁵⁰ Ibid

²⁵¹ Ibid

244. Telstra also submits that there is a typographical error in the definition of Band 4 and that the reference to “6.55” in this definition should read “6.56”.²⁵²
245. In response, Optus and XYZed submit that they have compared and challenge the listing provided by Telstra on 18 May 2009 with that available on Telstra’s Wholesale website as in their view some ESAs classified by Telstra as Band 2 on its website are classified as Band 3 in its submission.²⁵³
246. The Herbert Geer parties in response submit that should the ACCC adopt Telstra’s request that the band of each ESA be set during the period of the final determination, then it should be based on the most recent ESA population data available and that data should be provided to parties for assessment.²⁵⁴ The Herbert Geer parties reiterate this view in relation to backdating.²⁵⁵
247. The ACCC considers it appropriate to continue to use the classifications supplied by Telstra in August 2007 as in its view moving to the classifications supplied by Telstra in May 2009 would lead to uncertainty.
248. The ACCC considers that this uncertainty would arise from having multiple classification dates across the period of the final determination, and notes that the interim determinations utilise the August 2007 classifications.
249. However, the ACCC does accept Telstra’s submission that Note 2 to the band definitions may lead to ambiguity and has amended the note accordingly to provide that the applicable band will be the band in which the relevant service lies at a particular date.
250. The ACCC does not accept Telstra’s claim that the reference to “6.55” in the Band 4 definition should be “6.56”, noting that despite Telstra’s claim that this is a typographical error, the Telstra documents from where this reference was taken by the ACCC still contains this reference in relation to Band 4. These documents are available on Telstra’s website.²⁵⁶

Other matters

251. Subsection 152CR(2) of the Act permits the ACCC to take into account other relevant matters in making a FD.
252. The ACCC considers that it should also have regard under subsection 152CR(2) of the Act to:
- Decisions of the Australian Competition Tribunal and Federal Court which are referred to in the ACCC’s Consultation Paper dealing with general and preliminary matters, including the Tribunal’s decisions regarding ULLS annual charges;

²⁵² Ibid

²⁵³ Optus and XYZed Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, pp. 4-6

²⁵⁴ Herbert Geer Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 7

²⁵⁵ Ibid

²⁵⁶ http://telstrawholesale.com//dobusiness/customer-commitment/docs/op_sep_quality_strategy.pdf

- Submissions and other materials that parties have given to the ACCC concerning Telstra's ULLS undertakings;
- Information that a party has provided in another access dispute;
- Statements the ACCC has published in respect of approaches to ULLS pricing;
- Other decisions and publications made by the ACCC which are referred to in the ACCC's Consultation Paper on general and preliminary matters;
- Information that Telstra provides to the ACCC under record keeping rules, including:
 - the telecommunications regulatory accounting framework rule; and
 - the customer access network rules (a summary of which are published at www.accc.gov.au);
- Material already provided by the parties during the course of the arbitrations; and
- Submissions responsive to the Consultation Papers that the ACCC issued.

253. The ACCC has had regard to further materials as necessary to properly assess the parties submissions made in response to the Consultation Papers. The material which the ACCC has relied upon has been outlined in each of the respective chapters.

4.4. Period to which the final determination should apply

4.4.1. Commencement date

Introduction

254. Under subsection 152DNA(1) of the Act any or all of the provisions of a FD may be specified to take effect earlier than the date on which the determination takes effect. The specified date (which in this Statement of Reasons is referred to as the commencement date) must not be earlier than the date on which the parties to the determination commenced negotiations with a view to agreeing on the terms and conditions of access (subsection 152DNA(2)).
255. In its Consultation Paper, the ACCC proposed a commencement date for each of the terms and conditions of access which was the later of:
- the date of notification of the access dispute to the ACCC, and
 - the start of the period which is the subject of dispute.

256. Parties were advised, however, that if it could be established that they were negotiating over the relevant terms and conditions from an earlier/later date, the ACCC would consider specifying an earlier/later commencement date.
257. Accordingly, the parties were informed that the likely commencement date would be the date negotiations commenced, unless a later date would be more appropriate i.e., where the negotiations were in respect of terms and conditions to apply from a later date only, such as following the expiry of a then current contract.

Submissions

258. Telstra supports the approach that the ACCC proposed in its Consultation Paper save for the following:
- the commencement date should be no earlier than the expiry date for a previous final determination; and
 - a consistent approach should generally be taken across all access disputes.²⁵⁷
259. The Herbert Geer parties²⁵⁸ submit that the access seekers support backdating of the FD relating to disputed price terms to take effect from an earlier date than that of the FD depending on individual circumstances.
260. The Nicholls Legal parties submits that the commencement date of the FD should reflect the date that the parties commenced negotiations for price terms.²⁵⁹
261. The Nicholls Legal and Herbert Geer parties have made submissions in relation to individual access disputes regarding what the appropriate commencement date should be. Individual cases are discussed in chapter 3 of this Statement of Reasons.
262. Optus agrees with the ACCC's approach to backdating in respect of the access terms in dispute and have proposed different commencement dates for the different access terms in dispute.²⁶⁰
263. The Nicholls Legal parties in its reply submission confirms the need for backdating as in some cases negotiations commenced well before the date on which the access dispute notification was lodged and therefore, in its view the commencement date for the FD should precede the date of lodgement of the

²⁵⁷ Telstra Primary Submission, *ULLS Preliminary Matters and General Approach*, 18 May 2009, pp. 27–28.

²⁵⁸ Herbert Geer Primary Submission, *General and Preliminary Matters*, 18 May 2009, p. 6.

²⁵⁹ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 23.

²⁶⁰ Optus and XYZed Primary Submission, *General Approach and Preliminary Matters*, 18 May 2009, p. 33.

respective access dispute.²⁶¹ The Nicholls Legal parties also submit that it is the ACCC's policy to backdate unless there are compelling reasons not to.²⁶²

264. In addition to the views expressed by the ACCC in its Consultation Paper, Telstra submits two other instances where a commencement date later than the date of commencement of negotiations could be considered are as follows:
- disputes in relation to Telstra's exercise of its right to unilaterally vary terms and conditions – Telstra suggests that the commencement date would be the date that the variation was to commence; and
 - disputes in which the access seeker had not commenced acquiring the services – Telstra suggests that the commencement date should be the date on which the access seeker first acquired the relevant service.²⁶³
265. Telstra in its reply submission further states that the commencement date should be determined based on the existence of a bilateral exchange of views on the subject.²⁶⁴ Telstra also submits that another instance where a commencement date later than the date of commencement of negotiations could be applied is when disputes are notified prior to the expiry of commercially agreed terms.²⁶⁵ In this instance, Telstra submits that the FD could apply from the expiry of those agreements.²⁶⁶

ACCC view

266. Under subsection 152DNA(8) of the Act, the ACCC is required to formulate guidelines in relation to its approach to backdating and to have regard to those guidelines, as well as any such matters as the ACCC considers relevant (subsection 152DNA(7)).
267. In arbitrating these disputes, the ACCC has had regard to the Access Dispute Guidelines (the Guidelines) in deciding whether to backdate, in addition to the 2009 ULLS Pricing Principles and the section 152CR criteria.
268. As noted in the explanatory memorandum to the *Telecommunications Legislation Amendment Bill 1998*, the backdating provisions are intended to:²⁶⁷

...encourage commercial agreement and co-operation during access arbitrations by removing incentives for delay and to ensure a considered and reasonable outcome is ultimately applied to the interim

²⁶¹ Nicholls Legal Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 10.

²⁶² Ibid.

²⁶³ Telstra Reply Submission, *ULLS Preliminary Matters and General Approach*, 4 June 2009, p. 18.

²⁶⁴ Ibid.

²⁶⁵ Ibid.

²⁶⁶ Telstra Reply Submission, *ULLS Preliminary Matters and General Approach, re Network Technology*, 9 July 2009, p. 8.

²⁶⁷ Supplementary explanatory memorandum, *Telecommunications Legislation Amendment Bill 1998*, p. 33.

period which may otherwise be covered by an interim determination or a commercial agreement which one or more parties may be disputing.

269. The Guidelines provide that the ACCC will, in general, be inclined to backdate determinations.²⁶⁸ However, each case will be considered on its merits. In particular, the ACCC is likely to consider whether the manner in which the parties have conducted themselves before and during the arbitration provides grounds for not backdating the determination.
270. After considering the parties' submissions, the ACCC has applied a consistent approach to backdating. In this regard, the ACCC has identified:
- when the relevant negotiations commenced i.e., those which gave rise to the dispute over the particular terms or conditions which are to be backdated, and
 - where negotiations extended over time to include additional terms of access separate dates were identified for each.
271. However, where the negotiations were over a (then) future period, the ACCC has identified that date. For instance, parties may have commenced negotiations for prices to apply from when a current contract or determination expired. For any such access terms, the ACCC has adopted this date as the appropriate commencement date.
272. That said, the ACCC has not backdated any non-price terms as this would have no practical effect.
273. This is not to say that the same backdating date will be specified for all of the disputes, as this will depend upon the facts to which the common principles are applied, and the facts will differ by dispute.

4.4.2. Expiry date

Introduction

274. Under subsection 152DNA(4), a provision of a determination may be expressed to terminate on a specified date. Although not currently a requirement of the legislation, the ACCC would usually expect to limit the duration of a determination to a certain period for price terms.
275. The ACCC initially proposed to the parties an expiry date for the FD of 30 June 2010. The ACCC reached that preliminary view after considering the views that the parties had expressed in submissions made up until the initial consultation paper was issued in April 2009. This represented a prospective period of around fifteen months from when the initial consultation paper was given.

²⁶⁸ ACCC, *Resolution of telecommunications access disputes—a guide (revised)*, March 2004, p. 62.

276. In August 2009, the ACCC gave a further consultation paper²⁶⁹ to all of the parties in the joint hearing. This concerned annual charge terms. In that consultation paper, the ACCC proposed specifying annual charges up to and including 30 June 2012, consistent with views expressed in the 2009 Draft ULLS Indicative Prices.
277. Concurrently, the ACCC undertook an industry wide consultation in relation to the 2009 Draft Pricing Principles for the fixed network services, including prices for the ULLS. As a result of this consultation and the extensive views expressed by parties in relation to the proposed indicative prices, the ACCC wrote to parties involved in the joint arbitration hearing seeking views on the option of rolling over the 2008-09 indicative prices until 31 December 2010.²⁷⁰
278. In December 2009, after assessing all of the information the ACCC had obtained during its industry-wide consultation on the pricing principles and indicative prices for fixed network services, the decision to rollover indicative prices for fixed network services was made with consideration given to three key events that introduced a degree of regulatory, industry and pricing uncertainty, namely:
- the introduction of the *Telecommunications Legislation Amendment Bill 2009*;
 - the effect the National Broadband Network will have on the regulation of legacy assets and new telecommunication investments; and
 - the appropriateness of TSLRIC+ as a pricing methodology in light of the above.
279. Of the determinations made as a result of this decision, the ACCC notes that the 2009 ULLS Pricing Principles Determination established charges for the periods:
- Until 30 June 2006
 - 2006-07
 - 2007-08
 - 1 July 2008 - 31 July 2009
 - 1 August 2009 – 31 December 2010.
280. Parties were also asked to re-confirm their views in regard to an expiry date for FDs in a letter of 7 December 2009.²⁷¹

²⁶⁹ ACCC consultation paper on 'Annual charges', issued on 24 August 2009.

²⁷⁰ ACCC letter to Telstra, Nicholls Legal, Herbert Geer and Optus dated 27 October 2009.

²⁷¹ ACCC, Letter to parties – *Expiry date for ULLS and LSS Final Determinations*, 7 December 2009.

Submissions

281. Due to the protracted nature of the joint arbitration hearing and against a backdrop of significant change in telecommunications regulation, views on the issue of expiry date were sought from parties on a number of occasions. The following sets out parties views in response to the ACCC letter of 7 December 2009.
282. Telstra submits that it accepts an expiry date of 31 December 2010, subject to rolled over prices being applied in arbitrations. Telstra considers that if the ACCC is not minded to rollover prices, an expiry date of 30 June 2010 is appropriate.²⁷²
283. The Herbert Geer parties submit that if the ACCC applies the prices from the 2009 Pricing ULLS Principles, an appropriate expiry date would be 31 December 2010.²⁷³ However, the Herbert Geer parties maintain that it is not necessary to apply rolled over prices in the joint arbitration hearing except in respect of the ULLS monthly charge.²⁷⁴
284. In light of the ACCC's review of the conceptual underpinnings of its approach to regulated access prices for fixed network services, Optus and XYZed submit that it would be appropriate for FDs to expire on 31 December 2010.²⁷⁵
285. Nicholls Legal on behalf of NEC, PowerTel, Request Broadband and, TPG and TransACT do not oppose the rollover of indicative prices for the period until 31 December 2010 for the purposes of making FDs in the relevant arbitrations.²⁷⁶
286. Macquarie Telecom, however, submits that the ACCC should determine the indicative price for each fixed service as per the 2008-09 indicative prices provided that access seekers are no worse off ("NWO") compared to an existing commercially agreed price.²⁷⁷ In Macquarie Telecom's view, indicative prices determined on the basis of NWO based prices should apply until 31 December 2010; if not an expiry date of 30 June 2010 would be more appropriate.²⁷⁸

²⁷² Telstra, Letter to parties – *Expiry date for ULLS and LSS final determination*, 10 December 2009.

²⁷³ Herbert Geer, Letter to parties – *Expiry date for ULLS and LSS final determination*, 10 December 2009.

²⁷⁴ Ibid.

²⁷⁵ Optus, Letter to parties – *ULLS access dispute: Expiry date for final determination*, 10 December 2009.

²⁷⁶ Nicholls Legal, Letter to parties – *Expiry date for ULLS and LSS final determination*, 10 December 2009.

²⁷⁷ Nicholls Legal, Macquarie Telecom – Telstra: *Expiry date for ULLS and LSS final determination*, 10 December 2009 referring to Macquarie Telecom submission on 'Setting Indicative Prices for Fixed Services' dated 13 November 2009, p. 3.

²⁷⁸ Ibid, p. 4.

ACCC view

287. Consistent with the views of all parties, with the exception of Macquarie Telecom, the ACCC has decided an expiry date of 31 December 2010 will apply to the FDs. This is also consistent with the period for which indicative prices for the ULLS were made.
288. The ACCC notes the concerns of Macquarie Telecom, however, considers that setting arbitrated prices until 30 June 2010 would only lead to greater uncertainty for all parties involved in this joint hearing.

4.4.3. Interest

Introduction

289. Subsection 152DNA(6) of the Act provides the ACCC with a discretion to require interest to be paid in instances of backdating at a rate specified in the determination.
290. During consultation on the DFD, the ACCC sought the parties' views on whether interest should be paid on backdated amounts and if so, how interest should be calculated.
291. In previous arbitration decisions, the ACCC has nominated the Reserve Bank of Australia (RBA) Large Business Variable Indicator Rate (which was published as a monthly historical time series statistic)²⁷⁹ as the interest rate to be applied to the backdated amount. The RBA ceased publishing this particular time series in January 2008.
292. The ACCC proposed that these disputes use the Small Business Variable Other Overdraft Rate that is published by the RBA, and also drew the parties' attention to other possible time series to use. The parties were asked to comment on these options, as well to nominate any other time series that they considered more appropriate to use.

Submissions

293. Telstra submits that the appropriate rate is the Large Business Weighted Average Rate on Credit Outstanding Variable Rate (published quarterly by the RBA) as this is the rate that is applicable to large businesses.²⁸⁰
294. Telstra argues that the use of Small Business Interest rates by the ACCC would over-compensate parties, as large businesses are able to access credit at lesser interest rates.²⁸¹ Telstra considers that all parties to the current disputes are likely to be regarded as large as opposed to small businesses.²⁸²

²⁷⁹ Reserve Bank of Australia, *Reserve Bank Bulletin, Table F05, Indicator Lending Rates, Large Business Variable Indicator Rate*, referenced from <http://www.rba.gov.au/statistics/tables/xls/f05hist.xls>.

²⁸⁰ Telstra Primary Submission, *ULLS Preliminary and General Matters*, 18 May 2009, p. 28.

²⁸¹ Ibid.

²⁸² Ibid.

295. Optus submits that the interest rate should be set at a margin above the government bond yield, with the margin reflecting the individual company's credit rating.²⁸³ Optus provides a worked example for a company with an A credit rating (which would attract a margin of around 0.5% above the government bond yield).²⁸⁴
296. Optus does not consider that it would be appropriate to use the RBA Large Business Variable Indicator Rate, the RBA Small Business Variable Rate or the ABS Variable Large Business Loan Rate because, in their opinion, these rates are not representative of actual financing costs which Telstra or Optus incurs when undertaking commercial transactions.²⁸⁵
297. The Herbert Geer parties submit that the interest rate should reflect the opportunity cost of not having access to the excess funds paid to the access provider.²⁸⁶
298. The Herbert Geer parties consider that the National Australia Bank Limited Business Indicator Base Rate (NAB rate) plus 2.5% would be an appropriate rate to use, as this is a rate of interest that has been specified in the customer relationship agreement (CRA) to apply to disputed payments.²⁸⁷ These parties also consider that interest should be compounded daily and interest should be calculated based on each disputed price term, commencing from when overpayments were made.²⁸⁸
299. In the alternative, all of these parties suggest that the interest should reflect just the NAB rate.²⁸⁹
300. Telstra in response does not agree that the CRA rates (or the NAB rates) should apply in the arbitrations.²⁹⁰ Telstra submits that the interest provision in the CRA to which the Herbert Geer parties refer in its submission applies only in the event of a billing dispute which according to Telstra is resolved in favour of access seekers.²⁹¹ Telstra reiterates its position to adopt the Large Business Weighted-Average Rate on Credit Outstanding Variable Rate provided by the RBA.²⁹²
301. The Nicholls Legal parties agree to the use of the Small Business Variable Other Overdraft Rate as published by the RBA²⁹³ as the access seekers in

²⁸³ Optus and XYZed Primary Submission, *Preliminary and General Matters*, 18 May 2009, pp. 36–37.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Herbert Geer Primary Submission, *Preliminary and General Matters*, 18 May 2009, p. 12.

²⁸⁷ Ibid, pp. 9–12

²⁸⁸ Ibid.

²⁸⁹ Ibid.

²⁹⁰ Telstra Reply Submission, *ULLS Preliminary Matters and General Approach*, 4 June 2009, p. 6.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Nicholls Legal Primary Submission, *Preliminary Matters and General Approach*, 18 May 2009, p. 24.

these arbitrations consider themselves to be enterprises with less than 200 employees.²⁹⁴

302. In response to the reply submission from the Nicholls Legal parties, Telstra submits that in the past the ACCC has considered that the parties to this dispute are large businesses.²⁹⁵ Telstra contends that this view was open to the ACCC given the RBA's definition of large businesses for the purpose of its variable indicator rates, which is related to the quantum of a firm's business loan (greater than \$2 million) and not to its number of employees. Accordingly, Telstra submits that without good reason the ACCC should not depart from this view and should continue to apply the Large Business Rate, but move to a different time series.²⁹⁶

ACCC view

303. Under section 152DNA of the Act, the provisions of a FD may be expressed to take effect earlier than the date on which the determination takes effect. However, backdating is limited to the date on which the parties commenced negotiations with a view to agreeing on the terms and conditions of access as per subsection 152DNA(2).
304. As specified in the Guidelines, where interest is to be paid, it will be calculated on the amounts of money that have been overpaid (or underpaid). The over or under payment can be calculated by reference to:
- the volume of services supplied by the access provider to the access seeker over the backdating period;
 - the charges that are specified in the final determination; and
 - the charges that have been paid.
305. Further, the rate of interest should reflect the opportunity cost of the overpayment (or underpayment) and, in general, daily compounding will be appropriate. Lastly, the Guidelines also suggest that the opportunity cost could be assessed by reference to the rate applicable to debt financing.
306. In these disputes, the ACCC considers that it is appropriate to specify that interest is charged on the under/overpayments that have occurred. Given the time value of money, the party that has been disadvantaged by an under/overpayment would be denied the full benefit of the determination in the absence of an award of interest.
307. After considering the parties' submissions, the ACCC remains of the view that interest should be calculated on a daily basis and compounded. Further, the ACCC remains of the view that the RBA Small Business Variable Other Overdraft Rate should be used.

²⁹⁴ Nicholls Legal Reply Submission, *Preliminary Matters and General Approach*, 4 June 2009, p. 9.

²⁹⁵ Telstra, Letter to ACCC – *Joint Hearing of ULLS LSS Access Dispute*, 1 July 2009, p. 1.

²⁹⁶ *Ibid.*

308. The ACCC notes that the Nicholls Legal parties agreed that this rate would be appropriate, while this rate of interest falls between the lesser rates advocated by Telstra and Optus and the higher rates advocated by the Herbert Geer parties.
309. The ACCC considered using the alternative interest rates put forward by the Herbert Geer parties. The ACCC did not use the NAB rate as it is not published, and so could make the calculation of interest rates problematic. Nor did the ACCC consider that a mark up above the indicator lending rate would be appropriate. Lastly, although the ACCC accepts that this is the indicator rate cited in CRAs to apply to billing disputes, the information before the ACCC did not indicate that using the NAB lending rate would provide a more accurate measure of the interest rate that a party would face as a result of not having access to the over/under payment.
310. The ACCC also considered the alternative rate proposed by Telstra to use the RBA Large Business Weighted Average Rate on Credit Outstanding. This time series is a quarterly series and the ACCC believes that the calculations would be less precise than a monthly time series. As it is published quarterly it could delay or complicate the calculation of interest on over/under payments that occurred close to the date of the FD coming into effect. Hence, practical issues of implementation arise against using this rate.
311. Further, Telstra's position depends upon its view that the businesses involved in the dispute are large businesses, and so the Large Business Weighted Average Rate published by the RBA is the more appropriate measure.
312. The ACCC considers however that other factors in addition to the size of the business will affect the interest rate that a business will face including the size of the loan, whether the loan is secured, the risk of the business activity and the terms of the loan.

4.5. Assessment against subsection 152CR(1) criteria

4.5.1. Paragraph 152CR(1)(a)

313. The ACCC considers that specifying an expiry date of 31 December 2010 and setting access terms in regard to price to apply up to then and specifying an interest rate to be applied for under/over paid amounts by parties, would best promote the LTIE.
314. The ACCC considers that these terms will promote competition by providing compensation to parties for over (or under) paid amounts with a proper rate of interest for such amounts given the time value of charges. This is because over the long run they lead to conditions that allow the access provider and access seekers to compete in downstream markets on their relative merits, and will remove obstacles to end-users accessing services, including those of higher quality and/or lesser price.
315. Also, setting access terms to apply until 31 December 2010 would provide greater certainty to the parties of the prices to apply, given the history of failed

negotiations and the likelihood that they will be unable to agree on prices to apply until 31 December 2010. This greater certainty will of itself promote competition. Further, backdating with interest on over/under paid amounts will ensure that the access charges applied previously could now be considered fair and reasonable since the interest (compounded daily) applied to that amount reflects the opportunity cost of such payments.

4.5.2. Paragraph 152CR(1)(b)

316. The ACCC considers that addressing charges until 31 December 2010 in the FD is also likely to encourage the efficient use of and investment in infrastructure, and is consistent with Telstra's legitimate commercial interests. Doing so will not prevent Telstra from recovering its direct costs together with a normal risk-adjusted return on its investments, or exploiting economies of scale or scope. Further, by adopting an approach that promotes competition, demand for xDSL services will be encouraged, and this will further drive economies of scale and scope. Telstra remains able to exploit economies of scale and scope across all stages of production of its ADSL services.

4.5.3. Paragraph 152CR(1)(c)

317. Similarly, addressing charges until 31 December 2010 in the FD would promote incentives for investment in infrastructure, such as DSLAM networks and ULLS ordering systems provided that the charges that are specified do not preclude the recovery of efficient investments and a normal risk-adjusted return. By allowing for a risk-adjusted rate of return, the ACCC has regard for investment incentives (paragraph 152AB(6)(c)), and the risks involved in making these investments (subsection 152AB(7A)).

318. In relation to the criterion regarding the interests of all persons with rights to use the ULLS, the ACCC is of the view that access seekers' interests lie in being able to compete on their relative merits. Setting the access charges up to 31 December 2010 clearly promotes these interests. Further, setting an interest rate for backdated under/over paid amounts will ensure that incentives for delaying such payments are removed thereby securing parties' rights.

4.5.4. Paragraph 152CR(1)(d)

319. The direct costs of providing access to the ULLS is concerned with ensuring that Telstra will be able to recover its costs in providing access. Setting an expiry date of 31 December 2010 is not of itself contrary to this interest as Telstra has recovered costs associated with the ULLS in past periods and will continue to do so in future periods.

4.5.5. Paragraph 152CR(1)(e) and 152CR(f)

320. The next two matters are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirements necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility. The costs of extensions to Telstra's systems necessary to provide services to the access

seekers are taken into account in its charges. Therefore, in setting an interest rate for backdated under/over paid amounts the ACCC considers will not have an impact on this criteria. The ACCC also considers that paragraph 152CR(1)(f) does not materially impact on this decision.

4.5.6. Paragraph 152CR(1)(g)

321. In respect of the economically efficient operation of a carriage service, a telecommunication network or facility, the ACCC has considered the efficient operation of ADSL services, and Telstra's and the access seeker's networks and facilities used in the supply of those services. The ACCC considers that addressing charges until 31 December 2010 in the FD will of itself promote their economically efficient operation, by bringing greater certainty to Telstra and the access seekers concerning the terms and conditions to apply. The ACCC further considers by adopting the charges set out in the 2009 ULLS Pricing Principles in their entirety and allowing parties to settle backdated under/over paid amounts subject to a reasonable interest rate will promote economic efficiency.

5. ULLS Monthly charges

5.1. Introduction

5.1.1. Background

322. ULLS monthly charges are ongoing rental charges payable for the supply of the service. They are paid on a monthly basis.

5.1.2. Current charges

323. The following parties are each in dispute with Telstra over ULLS monthly charges:

- Adam, Agile, Amcom, Chime, Network Technology, Primus (represented by and referred to as the Herbert Geer parties)
- NEC, Macquarie, PowerTEL, Request, TPG and TransACT (represented by and referred to as the Nicholls Legal parties)
- Optus and XYZed (Optus, except where XYZed makes an unrelated submission where they will be referred to individually).

324. The ULLS monthly charges that currently apply between the parties are the subject of interim determinations (IDs). The ACCC determined the following monthly charges in the IDs:

| | |
|--------|---------|
| Band 1 | \$6.60 |
| Band 2 | \$16.00 |
| Band 3 | \$31.30 |

325. These charges are also the subject of:

- CRAs, Table 167.10 for all parties except Optus and XYZed
- Access Variation No. 163, Table 10 for Optus
- Access Agreement, Table 167.8 for XYZed.

5.1.3. Prior consideration

326. ULLS monthly charges have been considered by the ACCC in a number of proceedings including:

- ACCC, *Assessment of Telstra's ULLS Band 2 monthly charge undertaking-final decision*, April 2009

- ACCC, *ULLS access dispute between Telstra and Optus – statement of reasons for final determination*, March 2008
- ACCC, *Assessment of Telstra’s ULLS Monthly Charge Undertaking- Final Decision (confidential version)*, August 2006
- ACCC, *Assessment of Telstra's ULLS and LSS monthly charge undertakings – final decision*, December 2005
- ACCC, *Assessment of Telstra’s undertakings for PSTN, ULLS and LCS-draft decision*, October 2004.

5.2. Consultation Process

327. The ACCC undertook two consultations in relation to the proposed monthly charges. The first of these consultations, carried out by way of the ACCC issuing its Consultation Paper and accompanying DFD, related to ULLS monthly charges for the periods from 2005-06 until 2011-12.
328. Concurrently with the ULLS monthly charges consultation, the ACCC undertook an industry wide consultation in relation to pricing principles and indicative prices for the declared fixed network services, including prices for the ULLS monthly charge. As a result of this consultation and the extensive views expressed by parties in relation to the proposed indicative prices, the ACCC wrote to parties involved in the joint arbitration hearing seeking views on the option of rolling over the 2008-09 indicative prices for ULLS monthly charges.²⁹⁷
329. Having taken all the parties’ submissions into consideration the ACCC has decided to apply the indicative prices from the 2009 ULLS Pricing Principles in their totality for the period 1 July 2005 to 31 December 2010 (which includes the rollover of the 2008-09 indicative prices to apply through to 31 December 2010). In the ACCC’s opinion, the indicative prices contained in these pricing principles, were in the LTIE when first made, and are still in the LTIE taking into account the current uncertain regulatory environment. The ACCC considers that the subsection 152CR(1) criteria supports this approach and that this approach is consistent with previous ULLS pricing principles.
330. In light of the ACCC’s decision to apply the 2009 ULLS Pricing Principles, including the rollover of the 2008-09 prices for the period 1 July 2005 to 31 December 2010, submissions made in respect of the various cost models, inputs into the cost model, international benchmarking, and transition price paths are no longer relevant and have not been discussed.

²⁹⁷ ACCC letter to Telstra, Nicholls Legal, Herbert Geer and Optus dated 27 October 2009.

5.3. Consultation on rollover

5.3.1. Introduction

331. On 27 October 2009, the ACCC wrote to parties indicating its preliminary view was to rollover the 2008-09 ULLS indicative prices until 31 December 2010 and apply these prices in arbitrations. Parties' views were sought on this proposal.
332. The ACCC also provided a complete schedule of its proposed indicative prices for fixed network services for the period:
- Until 30 June 2006, and
 - 1 July 2006 through to 31 December 2010,
- reflecting the approach the ACCC had taken in respect of the 2009 ULLS Pricing Principles.
333. In December 2009, after assessing all of the information the ACCC had obtained during its industry-wide consultation on the pricing principles and indicative prices for fixed network services, the decision to rollover all indicative prices for fixed network services was made with consideration given to three key events that introduced a degree of regulatory, industry and pricing uncertainty, namely:
- the introduction of the *Telecommunications Legislation Amendment Bill 2009*;
 - the effect the National Broadband Network will have on the regulation of legacy assets and new telecommunication investments; and
 - the appropriateness of TSLRIC+ as a pricing methodology in light of the above.
334. Of the determinations made as a result of this decision, the ACCC notes that the 2009 ULLS Pricing Principles established ULLS monthly charges for the periods:
- Until 30 June 2006
 - 2006-07
 - 2007-08
 - 1 July 2008 – 31 July 2009
 - 1 August 2009 – 31 December 2010.
335. The ULLS charges are de-averaged, consistent with previous pricing principles.
336. The indicative charges do not apply to the ULLS supplied in Band 4.

5.3.2. Submissions

337. Telstra in its submissions agrees with the ACCC's position that a roll over of current indicative prices would give the industry some certainty in the current uncertain telecommunications landscape in light of the NBN and the Government's proposed reforms to Part XIC of the TPA.²⁹⁸ In Telstra's opinion, rollover will provide stability and will allow for the pricing of fixed services to be reassessed at a later date, and in circumstances in which the impact of the NBN is more fully appreciated.²⁹⁹
338. Telstra submits that if the ACCC was not minded to adopt its primary position of a price of \$30 in Zone A and \$100 in Zone B, then a practical way forward would be to roll over the 2008-09 indicative prices and apply them in arbitrations.³⁰⁰ Telstra submits that their agreement to rollover is on the following bases:
- Indicative prices will be rolled over as a "package" for the full period of the final determination, and applied consistently by the ACCC in all decisions across all fixed network services and to all access seekers until 31 December 2010.
 - If Telstra's appeal of the 2009 ULLS Undertaking³⁰¹ is successful, rollover as a "package" will no longer be possible as the ACCC is unable to make an arbitral determination which is inconsistent with an accepted undertaking.³⁰² As such, the roll over of the balance of the indicative prices may no longer be appropriate and the ACCC should undertake further consultation on the implications of the decision before making FDs in all arbitrations.³⁰³
339. Optus submits that the 2008-09 indicative prices are relatively high and consider that there is strong evidence supporting a lower ULLS price.³⁰⁴ Accordingly, Optus submits that the ACCC's rollover proposal is highly conservative.³⁰⁵ However, Optus submits that it would be appropriate to maintain a stable price structure while alternative pricing methods are assessed.³⁰⁶ Optus also considers that the 2008-09 indicative prices are consistent with international benchmarking.³⁰⁷

²⁹⁸ Telstra Reply Submission, *ULLS Annual Charges*, 9 November 2009, p. 3.

²⁹⁹ Ibid.

³⁰⁰ Telstra Letter, *ULLS/LSS Joint Hearing: Price Terms-Roll Over Option*, 2 November 2009, p. 2.

³⁰¹ In April 2009 the ACCC made a decision to reject Telstra's Band 2 \$30 ULLS undertaking. This decision has been appeal by Telstra and is currently being considered by the Australian Competition Tribunal.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Optus and XYZed, Letter, *Price Terms – Rollover Option*, 2 November 2009, pp. 1–2.

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Ibid.

particular service be higher.³¹⁹ Macquarie Telecom submits that should the ACCC adopt the ‘no worse off’ approach, it would support the rollover of prices until 31 December 2010.³²⁰

346. The Herbert Geer parties submit that the rollover of prices should only apply in relation to ULLS monthly charges as there are, in their view, pricing methodology and price shock concerns with the ULLS in the 2009 Draft Indicative Prices which would require an adjustment path.³²¹
347. Primus, in an individual submission, submits that it supports the ACCC’s proposal to rollover the 2008-09 indicative prices for the ULLS.³²² Primus considers that this is appropriate because:
- the judicial support for previous pricing has instilled in the industry an expectation of similar or decreasing pricing
 - future patterns of pricing [decreasing charges] will improve customer outcomes and encourage positive investment decision by industry, and
 - TSLRIC+ has been demonstrated as a flawed basis for determining access prices given the bias to inflate charges.³²³

5.3.3. ACCC view

348. In the course of the joint hearing, the Government proposed significant reforms to the telecommunications access regime in the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* which, among other things, proposes replacing the negotiate-arbitrate model with an ex-ante regulatory access framework.
349. The proposed reforms include allowing the ACCC to issue ‘access determinations’ and adopt ‘fixed principles’ which are aimed at improving competition and efficiency within telecommunications and promote greater regulatory certainty associated with regulatory processes under Part XIC of the Act³²⁴. The proposed reforms include:
- replacing the negotiate-arbitrate model with a streamlined regulatory process and providing the ACCC with the ability to make up-front access determinations on price and non-price terms of access, and
 - allowing the ACCC to specify pricing methodologies for declared services which would be used to determine prices over successive regulatory

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Herbert Geer, Letter, *Roll Over Prices*, 2 November 2009; Herbert Geer, Letter, *Expiry Date for ULLS and LSS Final Determinations*, 10 December 2009.

³²² Primus, Letter – *Rollover of Indicative Prices*, 2 November 2009.

³²³ Ibid.

³²⁴ Explanatory Memorandum to *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*, September 2009.

proceedings or successive undertakings in order to create greater regulatory certainty.³²⁵

350. The ACCC considers that given the status of the Bill in the current Parliament and the nature of the proposed changes it would be prudent to consider the impact of the proposed legislative changes before it made substantial changes to the price of ULLS monthly charges. The ACCC is also mindful that the proposed legislative reform Bill has been introduced but not yet debated in the Senate and that there remains uncertainty as to whether the Bill will be passed in its current form or the nature of any amendments to it. The ACCC believes these matters are relevant considerations in these arbitrations.
351. The ACCC is of the view that applying the indicative prices from the 2009 ULLS Pricing Principles in their totality for ULLS monthly charges for the period 1 July 2005 to 31 December 2010 will provide a degree of certainty regarding access to regulated services in a period of significant regulatory and industry change and associated uncertainty and is more likely to be in the LTIE.
352. While Macquarie Telecom only wish rollover to apply in limited circumstances, in the interests of certainty and consistency, the ACCC considers on balance, it more appropriate in the current environment to rollover prices across all of the fixed network services. This is in line with the ACCC's decision in its 2009 Pricing Principles and Indicative Prices inquiry³²⁶ and is reflected in the 2009 ULLS Pricing Principles that was made on 3 December 2009.³²⁷
353. In addition, the ACCC notes that the decision to apply the 2009 ULLS Pricing Principles also allays the concerns of the Herbert Geer parties in relation to the price shock which may have resulted from the 2009 ULLS Draft Indicative Prices.
354. The ACCC notes that XYZed also sought the ACCC to make a determination in relation to Band 4 monthly charges, in line with the charges proposed by Telstra for Zone B. On this occasion however, the ACCC has decided not to make a determination in relation to Band 4 charges. The ACCC considers that as it has determined to apply the 2009 ULLS Pricing Principles, in this instance, it would not be appropriate to determine a price for Band 4 which is not subject to an indicative price. In addition, the ACCC rejects XYZed's argument that as Telstra supports a \$100 charge for the ACCC's proposed Zone B, which covers Band 4, it is appropriate to apply this charge purely in Band 4. The ACCC notes that under the Zone B proposal raised in the 2009 Draft Indicative Prices, a \$100 charge would have applied to more services than those just in Band 4 allowing for greater cost recovery.

³²⁵ Ibid.

³²⁶ In 2009 the ACCC held an inquiry into the appropriate pricing principles and indicative prices for the LCS, WLR, PSTN OTA, ULLS and LSS.

³²⁷ ACCC, *Pricing Principles and Indicative Prices for LCS, WLR, PSTN OTA, ULLS, LSS*, December 2009.

5.4. Initial consultation

355. As noted in section 5.2 – Consultation Process, the ACCC initially consulted on the ULLS monthly charges for the periods from 2005-06 until 2011-12. Parties were asked to make submissions on the following matters:

- principles to apply;
- the application of TSLRIC+ pricing;
- proposed ULLS monthly charges until 31 July 2009 of:

| Band | Until 30 June 2006 | 2006-07 | 2007-08 | 1 July 2008-31 July 2009 |
|-------------|---------------------------|----------------|----------------|---------------------------------|
| 1 | \$5.60 | \$6.00 | \$6.20 | \$6.60 |
| 2 | \$12.30 | \$13.70 | \$14.30 | \$16.00 |
| 3 | \$25.00 | \$27.30 | \$28.50 | \$31.30 |

- proposed ULLS monthly charges for the period 1 August 2009 to 30 June 2010 and for 2010-11 of:

| Band | 1 August 2009-30 June 2010 | 2010-11 |
|-------------|-----------------------------------|----------------|
| Zone A | \$16.90 | \$20.00 |
| Zone B | \$61.50 | \$62.30 |

- the network cost model
 - the ‘specific cost’ cost model, including WACC parameters;
 - international benchmarking, including the Ovum international benchmarking report;³²⁸
 - the adoption of a transition price path for the ULLS monthly charges; and
 - recovery of ACT Utilities Tax.
356. As also noted above, the ACCC considers that it is appropriate to apply the indicative prices from the 2009 ULLS Pricing Principles for the period 1 July 2005 to 31 December 2010 in making the FD for ULLS monthly charges. As such many of the matters outlined in the initial consultation are no longer relevant.

³²⁸ The ACCC proposed to have regard to Ovum, *Telstra ULLS Undertaking-ULLS International benchmarking*, February 2009 which provides information concerning the ULLS monthly charges.

357. The ACCC recognises that the adoption of the indicative prices has meant a move away from its views expressed in its Consultation Paper. The rolled over prices remain consistent with the 2009 ULLS Pricing Principles and previous ULLS pricing principle determinations. The methodology applied in reaching the rolled over indicative prices is consistent with the methodology applied in previous FDs.³²⁹
358. The ACCC is of the view that rolling over 2008-09 indicative prices for the ULLS, and applying them in this arbitration, will provide a degree of certainty regarding access to regulated services in a period of significant regulatory and industry change and associated uncertainty. The ACCC considers that setting different prices at this point in time is not likely to promote industry and regulatory certainty. This view is consistent with the ACCC's preliminary view, as set out in a letter to parties on 27 October 2009; the charge determined for the period until 31 July 2009; and previous ULLS final determinations.

5.4.1. Principles to apply

359. Subsection 152AQA(6) of the Act requires the ACCC to have regard to pricing principles for a declared service when arbitrating an access dispute in relation to that declared service. In its Consultation Paper, the ACCC noted that public consultation was being undertaken on all pricing principles, including those applying to the ULLS.³³⁰
360. The Consultation Paper also considered the implementation of TSLRIC+ which can be understood by breaking it down into its component elements:
- *Total service (TS) – meaning that it is the entire access service that is to be costed (as opposed to a particular supply of that service)*
 - *Long run (LR) – meaning the cost assessment has regard to the costs that will be incurred over a period sufficiently long that all production elements can be varied or avoided*
 - *Incremental cost (IC) – meaning it is the additional costs incurred as a consequence of providing the service (as defined); or put another way, would be avoided if the service was not supplied*
 - *'+' – meaning that a contribution is included to common costs, i.e. costs that are incurred by the access provider, but which are not directly caused by, or not attributable to, the supply of a particular service or business activity or group of services / activities.*
361. In its Consultation Paper the ACCC proposed to have regard to the resulting ULLS pricing principles in specifying ULLS monthly charges in these

³²⁹ ACCC, *Publication of Final Determination and associated statement of reasons – Chime Communications/Telstra ULLS connection charges*, March 2008.

³³⁰ ACCC, *Consultation Paper on Final Determination, Annual Charges*, August 2009 (Consultation Paper), p. 3.

disputes.³³¹ As a result of the public consultation process, the ACCC made the 2009 ULLS Pricing Principles on 3 December 2009.

362. The 2009 ULLS Pricing Principles advocate the use of TSLRIC+ pricing in setting ULLS charges.
363. The ACCC considers that subsection 152AQB(9) of the Act requires the ACCC to have regard to model terms relating to a core service when arbitrating an access dispute in relation to that core service. While the ULLS is a core service, the 2008 Model Terms do not address ULLS monthly charges and therefore are not relevant in this context.
364. Subsection 152CR(2) of the Act permits the ACCC to have regard to other matters it considers relevant. The ACCC's view is to have regard to any preceding price determinations (pricing principles or indicative prices) in setting prices for a period when the pricing determination was current. In this respect the ACCC has had regard to the 2007 ULLS Pricing Principles and 2008 ULLS Pricing Principles.³³²
365. As noted above, the ACCC considers that it is appropriate to apply all of the indicative prices from the 2009 ULLS Pricing Principles in making the FD for ULLS monthly charges. Accordingly, the ACCC does not consider that the adoption of TSLRIC+ as the pricing principle is inconsistent with its views expressed in the Consultation Paper. The ACCC also considers that applying alternative TSLRIC+ methodologies at this stage is not likely to promote industry certainty.

5.4.2. ACT Utilities Tax

Introduction

366. In its Consultation Paper the ACCC noted that the proposed ULLS monthly charges are not intended to preclude the imposition of an additional charge that contributed to the recovery of the *ACT Utilities (Network Facilities) Tax Act 2006* (Utilities Tax).
367. The ACCC noted that there was potential for a clause to be added to the determination to make clear that Telstra is not precluded from requiring access seekers to contribute to the recovery of the Utilities Tax; and/or the basis upon which such a contribution should be calculated.³³³

Submissions

368. Telstra submits that it endorses the ACCC's preliminary view that the ULLS monthly charges specified in the FD should not preclude the levying of an

³³¹ Ibid.

³³² The 2007 ULLS Pricing Principles are contained in the ACCC, *Unconditioned Local Loop Service-Final pricing principles*, November 2007. The 2008 ULLS Pricing Principles are contained in the ACCC, *Unconditioned Local Loop Service-Pricing Principles and Indicative Prices*, June 2008.

³³³ ACCC, Consultation Paper, pp. 8–9.

additional charge that contributes to the recovery of the Utilities Tax.³³⁴
Telstra submits that the tax is levied on infrastructure used in the CAN in the ACT and Jervis Bay.³³⁵

369. Telstra agrees with the ACCC's preliminary view that it is appropriate to recover the ACT Utilities Tax by way of surcharge for those services supplied in the ACT and Jervis Bay, rather than adding those costs to the general pool of costs to be recovered Australia wide.³³⁶

370. Telstra submits that the ACCC should not include an amount or a methodology for determining the amount of any such surcharge in the FD given no access seeker has included the amount of Utilities Tax as an issue in their notification.³³⁷ Rather, Telstra submits that a clause should be included in the FD which expressly states:

"This determination does not include any amount which Telstra may levy in order to recover tax paid by Telstra pursuant to the Utilities (Network Facilities Tax) Act 2006 (ACT) or any other tax, duty, levy, charge or impost (whether existing at the time that this determination is made or coming into effect at a later time) in relation to Telstra's infrastructure or facility."³³⁸

371. Telstra submits however, that if the ACCC decides to include an amount and/or methodology in the FDs, then:³³⁹

- in respect of 2009-10, a surcharge of \$1.85 per ULLS per month ex GST should be included; and
- in respect of 2010-11, the surcharge should be calculated by dividing the amount of Utilities Tax paid by Telstra in respect of the preceding tax year by the number of "eligible services" in operation on 31 March preceding the relevant financial year, and dividing that result by 12.

372. Optus submits that the following general principles should apply:

- its appropriate to assist parties on the issue;
- there needs to be more clarification included in the FD than suggested by the ACCC; and
- due to the lack of information provided by Telstra, the basis upon which such a contribution should be calculated cannot be determined.³⁴⁰

373. Optus submits that the payment of this tax can be a matter which is dealt with by the affected parties under the agreement which relates to the supply of the service.³⁴¹ Optus believes that parties should be able to deal with the

³³⁴ Telstra Primary Submission, *ULLS Annual Charges*, 9 October 2009, p. 17.

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid, pp.17–19.

³⁴⁰ Optus & XYZed Primary Submission, *Monthly Charges*, 9 October 2009, p. 8.

³⁴¹ Ibid.

imposition of this tax in their agreements in the manner most commercially acceptable to them.³⁴² Optus seeks that if the ACCC makes a FD in relation to this matter, that it is subordinate to any agreement under which the service is supplied.³⁴³

374. Optus also considers that there are a number of other issues which the ACCC should provide guidance on in its FD, including:
- Telstra’s obligation to determine whether the tax can be legally imposed on it
 - Telstra providing timely and sufficient detail to all parties to verify that the charge has been allocated in a equitable and non-discriminatory manner
 - Telstra must repay access seekers if they pay Telstra an increased charge in good faith.³⁴⁴
375. Optus submits that there is substantial legal uncertainty as to whether the ACT Utilities Tax is valid, and Telstra should be aware of this uncertainty and take action to determine its validity.³⁴⁵ Optus considers that given the tax has been in place for almost three years Telstra is in breach of its duty to ensure that the charges payable are reasonable.³⁴⁶
376. The Nicholls Legal parties submit it has not been demonstrated that the Utilities Tax ought properly to be included in a TSLRIC cost model, or the manner in which it might be levied in respect of the ULLS as supplied to the access seekers.³⁴⁷
377. The Herbert Geer parties submit that a surcharge in respect of the Utilities Tax should apply only to services utilising relevant infrastructure in the ACT.³⁴⁸ They restate this position in their reply submission.³⁴⁹
378. In response to Optus, Telstra submits that:³⁵⁰
- the ACCC should not specify an amount or a methodology for calculating the amount, rather the FD should include a clause which explicitly states that the amount does not include any amount which Telstra may levy in relation to the Utilities Tax, or any other tax, duty, levy, charge or impost in relation to Telstra’s infrastructure or facility;
 - it is entitled to treat the Utilities Tax as valid and that the FDs should proceed on that basis;

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid, p. 9.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Nicholls Legal Primary Submission, *ULLS Annual Charges*, 9 October 2009, p. 30.

³⁴⁸ Herbert Geer Primary Submission, *ULLS Annual Charges*, 9 October 2009, p. 9.

³⁴⁹ Herbert Geer Reply Submission, *ULLS Annual Charges*, 9 November 2009, p. 3.

³⁵⁰ Telstra Reply Submission, *ULLS Annual Charges*, 9 November 2009, p. 49.

- where an access agreement obliges an access seeker to pay a surcharge in respect of the Utilities Tax, the issue of what information should be provided to the access seeker regarding how the surcharge was determined should be governed by the terms of the agreement;
 - the issue of how to proceed in the event that the Utilities Tax is found to be invalid or if the amount of the tax surcharge paid is found to be too much should be governed by the terms of the access agreements between Telstra and each access seeker. If there are subsequent disagreements, either party should raise an access dispute with the ACCC.
379. Telstra notes that it agrees with the Herbert Geer parties that the tax should only be recovered from services utilising infrastructure in the ACT.³⁵¹ For the avoidance of doubt, recovery of the charge would need to extend to services utilising infrastructure in Jervis Bay as it is a Commonwealth Territory located in NSW.³⁵²
380. In its reply submission, Optus resubmits their views on the guidance to be provided by the ACCC on this matter. In addition to the guidance outlined in its primary submission, Optus submits that Telstra's methodology for determining the charge payable by access seekers is not reasonable as the charge should be spread across all services.³⁵³
381. Optus considers that there are two court decisions which provide authority that the ACT Utilities Tax maybe invalid.³⁵⁴ Optus also reiterates its view from its primary submission that the tax should first be dealt with under existing agreements with parties.³⁵⁵
382. Optus submits that no service should be excluded from the pool of eligible services over which the tax is split.³⁵⁶ Further, Optus considers that it is arbitrary for Telstra to determine to choose to recover the tax from only a handful of services and that all services which utilise the taxable route should be used to recover the tax.³⁵⁷

ACCC view

383. The ACCC considers that it is appropriate for the FD to specify that the monthly charges do not cover the recovery of the ACT Utilities Tax.
384. The ACCC agrees with both Telstra and Optus' views that it should not set an actual charge or methodology for the recovery of these costs as it has not been specified as an issue in dispute, and the recovery of the tax extends beyond the services which are being arbitrated in this hearing. In addition, the ACCC

³⁵¹ Ibid, p. 50.

³⁵² Ibid.

³⁵³ Optus and XYZed Reply Submission, *Annual Charges*, 9 November 2009, p. 51.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ Ibid, p. 52.

³⁵⁷ Ibid.

considers that as the cost only affects services within the ACT, and is not Australia-wide, it is not appropriate to include the costs as part of Telstra's overheads.

385. The ACCC acknowledges that while Telstra did provide a methodology for recovering costs, the most appropriate means of determining the recovery of the charge should be through its inclusion in the relevant service agreements. Should parties be unable to reach an agreement on the inclusion of the ACT Utilities Tax, parties are able to seek a determination from the ACCC on the matter.

5.5. Minimum charge periods

5.5.1. Introduction

386. The ACCC's preliminary view was that there should be no minimum period for which monthly charges are payable for the ULLS. This reflects the view that connection and disconnection costs are recovered by way of other charges, and hence a minimum connection period is not necessary to recover costs. Further, this access term has the potential of increasing the costs faced by competing access seekers and harm competition, and will not encourage economic efficiency.

5.5.2. Submissions

387. Telstra considers the ACCC must disregard access seekers submissions on minimum charge periods because it was not notified as an issue in dispute by both parties.³⁵⁸ Optus, the Herbert Geer and Nicholls Legal parties submit they agree with the ACCC's view that there should be no minimum charge period.³⁵⁹ Optus considers that if there was a minimum charge period this would allow Telstra to over-recover its costs and obtain a monopoly profit.³⁶⁰

5.5.3. ACCC's view

388. Consistent with the views expressed in its Consultation Paper, the ACCC considers there should be no minimum charge period.

5.6. Period of operation

389. In its Consultation Paper, the ACCC sought views from all parties as to the appropriate period of operation for the FD. This is an issue which has been raised in a number of consultation papers and additional correspondence with parties, including a letter of 7 December seeking parties final views on the expiry date for the FD. As such, the ACCC's general approach to determining the period of operation and parties views are discussed in section 3.2.

³⁵⁸ Telstra Reply Submission, *ULLS Annual Charges*, 9 November 2009, p. 50.

³⁵⁹ Herbert Geer Primary Submission, *ULLS Annual Charges*, 9 October 2009, p. 9; Nicholls Legal Primary Submission, *Annual Charges*, 9 Oct 2009, p. 30; Optus & XYZed Reply Submission, *Monthly Charges*, 9 November 2009, pp. 53–54.

³⁶⁰ Optus & XYZed Reply Submission, *Monthly Charges*, 9 November 2009, p. 53.

5.7. Applicable taxes

390. The ACCC did not seek submissions from parties in relation to applicable taxes, however, Telstra sought to provide submissions on the issue.

5.7.1. Submissions

391. Telstra submits that the monthly charges should expressly exclude any applicable taxes so as to enable Telstra to recover those costs separately.³⁶¹

392. In response, the Herbert Geer parties submit that if Telstra wants the ability to recover applicable taxes, then it must provide further details of what taxes it considers are recoverable to allow access seekers to take appropriate action.³⁶²

5.7.2. ACCC's view

393. The ACCC notes that Telstra did not specify which taxes should apply to the ULLS. Accordingly the ACCC does not consider it appropriate to make a finding in relation to this issue.

5.8. Assessment against subsection 152CR(1) criteria

394. The ACCC must take the subsection 152CR(1) criteria into account in making a FD. Not all of these criteria will be relevant to every particular issue that the ACCC must determine.

5.8.1. Paragraph 152CR(1)(a)

395. In assessing the ULLS monthly charge against the subsection 152CR(1), the ACCC must firstly have regard to the LTIE. This calls for consideration of a number of factors identified in section 152AB, being the objective of promoting competition, the objective of achieving any-to-any connectivity, the objective of encouraging the economically efficient use of and the economically efficient investment in infrastructure, and subsidiary matters (paragraphs 152AB(2)(c)-(e), subsection 152AB(4), paragraphs 152AB(6)(a)-(c) and subsection 152AB(7A)).

396. The ACCC considers that adopting monthly charges from the 2009 ULLS Pricing Principles in their totality for the period 1 July 2005 to 31 December 2010 (which includes the rollover of the 2008-09 indicative prices to apply through to 31 December 2010) best promotes the LTIE. This is because of the uncertainties surrounding the *Telecommunication Legislation Amendment Bill 2009* (the Bill). The ACCC considers that applying the rolled over charges would provide some certainty to industry until the final outcome of the Bill is known. The ACCC also notes that the monthly charges being applied are in line with those applied in previous determinations which the ACCC considered to be in the LTIE. Further, the ACCC considers that it is in the

³⁶¹ Telstra Primary Submission, *ULLS Annual Charges*, 9 October 2009, p. 19.

³⁶² Herbert Geer Reply Submission, *ULLS Annual Charges*, 9 November 2009, p. 9.

LTIE to maintain price stability in the current environment and not change methodology.

397. The ACCC considers that applying the indicative prices as set out in the 2009 ULLS Pricing Principles is unlikely to disrupt competition in the market for fixed line services as access seekers will have well known pricing principles and indicative prices in place to guide negotiations for access to key services.
398. The ACCC does not consider that the approach taken to this issue will affect the objective of achieving any-to-any connectivity.
399. The third criterion is the economic efficiency in use of, and the economically efficient investment in infrastructure used to provide the declared service. The ACCC considers that rolling over indicative prices is likely to maintain efficient investment in infrastructure and will allow current investment plans to play out.
400. The ACCC is also aware that there is continuing investment under the approach taken in regard to the 2009 ULLS Pricing Principles and that new investment decisions may be impacted by uncertainties associated with the Bill. The roll over would:³⁶³
- allow current investment plans to play out and
 - reduce investment uncertainty and compliance or regulatory burden on the industry until the Bill is released in its finalised form.
401. In addition, the ACCC considers that by applying the charges in the 2009 ULLS Pricing Principles, this will be in the LTIE because access seekers will continue to invest, thereby promoting competition.

5.8.2. Paragraph 152CR(1)(b)

402. The next criterion concerns the legitimate business interests of the access provider and the carrier's or provider's investment in facilities used to supply the declared service.
403. In this regard, the ACCC is of the view that 'legitimate business interests' can be interpreted as 'legitimate commercial interests'. The ACCC notes 'legitimate business interests' is closely related to efficient investment.
404. The ACCC considers that the adoption of the 2009 ULLS Pricing Principles in their entirety would ensure Telstra's legitimate commercial interests are assured through avoiding a potential two stage adjustment when the finalised Bill is released and allows prices to be re-assessed at a later date when there is more certainty around the NBN. These considerations prevent unnecessary burden on the carrier.³⁶⁴

³⁶³ ACCC, *Pricing Principles and Indicative Prices for LCS, WLR, PSTN OTA, ULLS, LSS*, p. 20.

³⁶⁴ *Ibid*, p. 9.

405. Further, the ACCC considers that the adoption of indicative prices would promote the efficient use of and investment in infrastructure by minimising disruptions to pricing and investments. This is consistent with protecting Telstra's legitimate business interests.

5.8.3. Paragraph 152CR(1)(c)

406. The third criterion is the interests of all persons who have the right to use the service. The ACCC considers that access seekers' interests lie in being able to compete for end-users on the basis of their relative merits, without being impeded in acquiring end-user customers or incurring unnecessary costs.
407. The ACCC considers that the charges in the FD are consistent with the interests of access seekers, as persons who have rights to use the declared service. These monthly charges will best allow access seekers to compete on their merits, over those stages of production which are under their control, based upon the relative quality and cost of the downstream services they supply.
408. Further, the ACCC has not been presented with any evidence which will lead to the setting of different prices in different disputes. Accordingly, no access seeker will be at a competitive advantage over any other.

5.8.4. Paragraph 152CR(1)(d)

409. The next matter is the direct cost of providing access to the ULLS. These are the ULLS incremental or 'specific' costs and possibly a contribution to the indirect costs necessary in providing access to the ULLS. In this context, the criterion involves consideration of whether the charges will enable the recovery of Telstra's direct costs inclusive of a normal risk-adjusted return on efficient investment.
410. By adopting the indicative prices in the 2009 ULLS Pricing Principles for the period of 1 July 2005 to 31 December 2010, the ACCC considers that this ensures the appropriate recovery of direct costs by Telstra. Given that these same charges have in the past allowed Telstra to recover its direct costs, it follows this situation will not change with the rolling over of indicative prices.

5.8.5. Paragraphs 152CR(1)(e) and 152CR(1)(f)

411. The next two criteria are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirement necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility.
412. The ACCC does not consider that there are any extensions necessary to Telstra's ordering systems to supply the ULLS. The ACCC does not consider that the 'operational and technical requirements' criterion materially contributes to this decision in respect of monthly charges.

5.8.6. Paragraph 152CR(1)(g)

413. The last matter is the economically efficient operation of a carriage service, a telecommunications network or a facility.
414. Consistent with the approach adopted by the Australian Competition Tribunal, the ACCC considers that in applying this criterion, it is relevant to consider:
- economic efficiency
 - the economically efficient operation of downstream services
 - the telecommunication networks and infrastructure used to supply these services.³⁶⁵
415. The ACCC has considered issues of economic efficiency under section 5.8.1 above.
416. The ACCC considers that the economically efficient operation of carriage services and associated networks and facilities of the access provider and access seekers will be encouraged and continued by applying monthly charges that are based on efficient costs.
417. Further, the charges bring certainty to Telstra and access seekers concerning the terms and conditions to apply until the 31 December 2010. This, in itself, promotes the economically efficient operation of a carriage service, a telecommunications network or a facility.

³⁶⁵ Re Telstra Corporation Ltd [2006] ACompT 4 [94-95]].

6. Single connection and disconnection charges

6.1. Introduction

6.1.1. Background

418. A ULLS connection can be made using:
- Telstra's standard ordering systems and processes; or
 - a Managed Network Migration (MNM) process.
419. A ULLS 'single' connection is when Telstra's standard ordering systems and processes are used, and comprise all ULLS connections that occur outside of a MNM process.
420. The ACCC proposed in its Consultation Paper on Final Determination, *'Single' connection and disconnection charges*, April 2009 (Consultation Paper) that a discrete ULLS disconnection charge should not be levied.
421. Parties in dispute with Telstra on this matter are:
- Chime, Amcom, Agile, Netspace, Network Technology and Adam (represented by and referred to as Herbert Geer parties)
 - Primus (provided the same submission as Hebert Geer parties, and as such is in this instance referred to as a Herbert Geer party)
 - TPG, Request, Macquarie , PowerTEL and NEC (represented by and referred to as Nicholls Legal parties)
 - Optus and XYZed (referred to as Optus)

Current charges

422. The charges that currently apply between the parties are the subject of IDs. The charges applying between the parties are also the subject of a CRA or similar.
423. The ACCC sought the parties' confirmation on the terms and conditions that currently apply. Consequently, the ACCC is of the view that single connection and disconnection charges are addressed in the following agreements:
- ULLS single connection charges for Chime, Primus, Adam, Agile, Amcom, XYZed, Macquarie, PowerTel, Request, Network Technology and Primus are set out in CRA 167.
 - ULLS single connection charges for Optus are set out in Access Agreement Variation No. 163.

424. In its reply submission, Telstra notes that several of the access seekers did not necessarily notify all of the contract charges listed in their submissions as being issues in dispute.³⁶⁶ Telstra submits that, in these circumstances, the ACCC should not seek to cover them in its FDs.³⁶⁷ The ACCC considers that the access seekers have clearly notified the issues in dispute in their initial dispute notifications and subsequent correspondence. Having issued IDs in relation to these notified disputes, the ACCC considers it appropriate to proceed to making FDs on these same issues.

Prior consideration

425. ULLS single connection charges were considered in ACCC, *Publication of Final Determination and associated statement of reasons - Chime Communications/Telstra ULLS connection charges*, March 2008 (Chime Decision).

426. Telstra submits that the ACCC should not consider itself bound by this decision, and that all of the issues must be considered afresh in light of the statutory criteria.³⁶⁸ Telstra considers that there could be a danger in referring to a previous decision should it be set aside on review.³⁶⁹

427. The Herbert Geer parties³⁷⁰ disagree with Telstra on this latter point,³⁷¹ as did the Nicholls Legal parties³⁷² which noted that, in any event, it was open to Telstra to apply to the ACCC to vary a determination pursuant to subsection 152DT(1) of the Act.³⁷³

428. The ACCC has taken the view that it can and should take its previous decisions into consideration in making FDs in accordance with subsection 152CR(2) of the Act. The ACCC considers that it should adopt a consistent approach to recurring issues and where changes in its approach are appropriate, acknowledge those changes and explain them.

429. However, the ACCC does not consider itself bound to reach the same conclusions as expressed in previous arbitral determinations. This reflects the fact that there are numerous matters to which it has regard in making a FD. In particular, the individual circumstances of each access dispute and further or better information that becomes available through parties' submissions means that it could be appropriate to adopt a different approach or reach a different conclusion consistent with the statutory criteria.

430. The ACCC does not consider that it will fall into error by having regard to decisions that are subject to court review at the time of making a FD and

³⁶⁶ Telstra Reply Submission, *ULLS Single Connection Charges*, 4 June 2009, p. 2.

³⁶⁷ Ibid.

³⁶⁸ Telstra Primary Submission, *ULLS Single Connection Charges*, 18 May 2009, p. 2.

³⁶⁹ Ibid.

³⁷⁰ Herbert Geer represents: Adam, Agile, Amcom, Chime, Macquarie and Network Technology.

³⁷¹ Herbert Geer Reply Submission, *Single Connection & Disconnection Charges*, 4 June 2009, p. 2.

³⁷² Nicholls Legal represents: PowerTel and Request.

³⁷³ Nicholls Legal Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 2.

believes that it is incumbent on it to reach FDs in as timely a manner as possible, irrespective of pending court proceedings. For the purposes of this arbitration the previous determinations which Telstra refers to were subsequently upheld by the Federal Court.³⁷⁴

Principles to apply

431. The ACCC, in its Consultation Paper, proposed to the parties that ULLS single connection charges should be determined having regard to the relevant pricing principles, set out in:
- ACCC, *Unconditioned Local Loop Service - Pricing Principles and Indicative Prices*, June 2008.
432. However since that time, these pricing principles have been repealed and incorporated into the following instrument which was made on 3 December 2009:
- *Pricing Principles for the Unconditioned Local Loop Service (ULLS) Determination 2009* (2009 ULLS Pricing Principles).
433. The ACCC undertook an industry-wide public consultation process in the making of these pricing principles. Parties to this joint arbitration were also consulted on the indicative prices contained in these pricing principles as outlined further in these reasons.
434. Telstra recognises that the ULLS pricing principles adopt de-averaged charges for ULLS single connection charges but submits that the ACCC should nonetheless adopt averaged connection charges for the ULLS.³⁷⁵ Telstra also supports the adoption of a TSLRIC+ approach for determining ULLS single connection charges but objects to certain aspects of the ACCC's proposed application of that approach.³⁷⁶
435. Optus submit that the ACCC should have regard to the relevant pricing principles.³⁷⁷ They further submit that the ACCC should not be confined to cost estimates (including estimates of TSLRIC+) and should also take into account other relevant data including international benchmarking and the stability of ULLS connection prices.³⁷⁸
436. The Herbert Geer and Nicholls Legal parties submit that they accept the ACCC's approach to the principles to apply.³⁷⁹

³⁷⁴ *Telstra Corporation Limited v Australian Competition and Consumer Commission* [2009] FCA 757 (17 July 2009).

³⁷⁵ Telstra Primary Submission, *ULLS Single Connection Charges*, 18 May 2009, p. 2.

³⁷⁶ Ibid.

³⁷⁷ Optus and XYZed Primary Submission, *Single Connection Charges*, 18 May 2009, p. 15.

³⁷⁸ Ibid; Optus and XYZed Reply Submission, *Single Connection Charges*, 4 June 2009, p. 9.

³⁷⁹ Herbert Geer Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 4; Nicholls Legal Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 2.

437. In response to Optus' submissions Telstra submits that it is not appropriate to use international benchmarking when detailed Australia specific cost information is available.³⁸⁰
438. In light of the repealed pricing principles the ACCC has taken into account the 2009 ULLS Pricing Principles which incorporates the same pricing principles and indicative prices as those from the repealed instrument.
439. Consequently, the ACCC considers it is required by subsection 152AQA(6) of the Act to take the 2009 ULLS Pricing Principles into account in specifying ULLS single connection charges.
440. Under these principles, relevant to ULLS single connection charges:
- a TSLRIC+ pricing principle should be applied to the ULLS
 - the ULLS charges should be geographically de-averaged
 - ULLS connection charges should be set with reference to the amounts charged by third party contractors to Telstra for jumpering work in exchanges, indirect costs and back-of-house costs.
441. These pricing principles also contain price-related terms (indicative prices) for ULLS single connections. The ACCC considers that it is appropriate to apply these principles and prices when determining the charges, albeit while taking into account the regulatory environment in which those principles and prices will apply. The approach taken in regard to ULLS single connections is consistent with the approach taken to other pricing issues that have been determined in this arbitration.

Technical advice

442. The ACCC has received a number of reports (some of a draft or interim nature) in previous arbitrations which in the ACCC's opinion are relevant to the present access disputes. These reports contain analysis concerning the connection of the ULLS. The reports that are particularly relevant to ULLS single connection costs are:
- Consultel, *Analysis relating to Primus-Telstra ULLS Dispute – interim report*, March 2006.
 - Consultel, *Analysis of ULLS and LSS undertakings and subsequent submissions – final report*, February 2006.
 - Consultel, *Transferring Services between ULLS and LSS – Draft report*, August 2006.
 - Layer 10, *Analysis relating to ULLS access disputes—Primus, Chime, Optus, XYZed, Request, PowerTel and Telstra*, January 2008.

³⁸⁰ Telstra Reply Submission, *ULLS Single Connection Charges*, 4 June 2009, p. 1.

443. The ACCC, in its Consultation Paper, proposed to the parties that the reports prepared for previous arbitrations should be considered.
444. Telstra submits that much of the technical advice relied upon by the ACCC is unsound in relation to ULLS single connections.³⁸¹ Specifically, Telstra submits that a number of the reports are either interim or draft reports and that it is inappropriate for the ACCC to rely upon such material in making a FD as a draft report may not reflect the expert's settled views.³⁸²
445. Telstra also expressed its objections to the ACCC's continued reliance on the material prepared by Dr Brooks in determining connection charges and submits that the access seekers have been selective and inconsistent in their reliance on the various reports of Dr Brooks.³⁸³ Telstra's concerns are that Dr Brooks lacks independence, lacks the requisite qualifications and that his previous reports are not soundly reasoned.³⁸⁴
446. Both the Herbert Geer and Nicholls Legal parties consider it appropriate that the ACCC have regard to the reports it has previously obtained.³⁸⁵ Optus supports the use of analysis by Layer 10.³⁸⁶
447. The Nicholls Legal parties submit that Dr Brooks is both independent and amply qualified and that the general findings in the Consultel Reports are supported by a body of other submissions and evidence provided to the ACCC during its enquiry into Telstra's proposed LSS and ULLS connection and disconnection undertakings.³⁸⁷ The Nicholls Legal parties submit that, in the absence of compelling and credible evidence to the contrary, the ACCC is entitled to rely on the Consultel Reports.³⁸⁸
448. The ACCC considers that Dr Brooks is qualified to provide advice to the ACCC regarding single connections. The ACCC has previously appointed Dr Brooks to advise on these technical matters which are within his field of expertise. It has not called on Dr Brooks to provide expert advice on economic, financial or costing matters.
449. The ACCC considers that Dr Brooks is impartial and does not consider that he could reasonably be perceived to be otherwise. The ACCC notes that Dr Brooks had not performed work for any of the access seeker parties participating in hearings at the time of preparing his reports. Dr Brooks does not have any personal or financial interest in any of the access seekers participating in the joint arbitration hearing.

³⁸¹ Telstra Primary Submission, *ULLS Single Connection Charges*, 18 May 2009, p. 2.

³⁸² Ibid.

³⁸³ Ibid; Telstra Reply Submission, *ULLS Single Connection Charge*, 4 June 2009, p. 2.

³⁸⁴ Ibid.

³⁸⁵ Herbert Geer Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 4; Nicholls Legal Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 2.

³⁸⁶ Optus and XYZed Primary Submission, *Single Connection Charges*, 18 May 2009, p. 2.

³⁸⁷ Nicholls Legal Reply Submission, *Single Connection & Disconnection Charges*, 4 June 2009, p. 2.

³⁸⁸ Ibid.

450. Telstra notes that some of these reports are of a draft or interim nature however the ACCC considers that Telstra has not offered any substantive criticisms of these reports which the ACCC could directly address. The ACCC notes that although the reports are marked as either 'draft' or 'interim', at the time they were compiled the ACCC was satisfied with their findings and did not seek final reports. Consequently, the ACCC is of the view that it should have regard to each of the Consultel/Layer 10 reports. The ACCC considers that the reports are appropriately reasoned and the conclusions reached are sound and appropriately explained.

6.2. Consultation Process

451. The ACCC undertook two consultations in relation to the ULLS single connection charges. The first of these consultations, carried out by way of the ACCC issuing a Consultation Paper and accompanying DFD, sought views from parties in relation to the assessment of efficient costs, including:

- jumpering, travel, vehicle, tool and materials costs
- indirect costs
- 'back-of-house' costs.

452. Following the initial consultation, the ACCC undertook an industry wide consultation in relation to pricing principles and indicative prices for the declared fixed network services, including prices for the ULLS. As a result of this consultation and the extensive views expressed by parties in relation to the proposed indicative prices, the ACCC wrote to parties involved in the joint arbitration hearing seeking views on the option of rolling over the 2008-09 indicative prices, which included indicative prices for ULLS single connection charges.³⁸⁹

453. Having taken all the parties' submissions into consideration the ACCC has decided to apply the indicative prices from the 2009 ULLS Pricing Principles in their totality for the period 1 July 2005 to 31 December 2010 (which includes the rollover of the 2008-09 indicative prices to apply through to 31 December 2010). In the ACCC's opinion, the indicative prices contained in these pricing principles, were in the LTIE when first made, and are still in the LTIE taking into account the current uncertain regulatory environment.

454. The ACCC considers that the subsection 152CR(1) criteria supports this approach.

455. Consequently, while the submissions from the initial consultation phase are no longer relevant for the purposes of this FD, the principles of assessing efficient costs are. Such an approach is in line with the ACCC's decision to rollover indicative prices given that the 2009 ULLS Pricing Principles require connection charges to be set with reference to these distinct cost categories.

³⁸⁹ ACCC letter to Telstra, Nicholls Legal, Herbert Geer and Optus dated 27 October 2009.

6.3. Consultation on rollover

456. On 27 October 2009, the ACCC wrote to parties indicating its preliminary view was to rollover the 2008-09 indicative prices until 31 December 2010 and apply these prices in arbitrations. Parties' views were sought on this proposal.
457. The ACCC also provided a complete schedule of its proposed indicative prices for fixed network services for the period:
- Until 30 June 2006, and
 - 1 July 2006 through to 31 December 2010,
- reflecting the approach the ACCC had taken in respect of the 2009 ULLS Pricing Principles.
458. In December 2009, after assessing all of the information the ACCC had obtained during its industry-wide consultation on the pricing principles and indicative prices for fixed network services, the decision to rollover indicative prices for fixed network services was made with consideration given to three key events that introduced a degree of regulatory, industry and pricing uncertainty, namely:
- the introduction of the *Telecommunications Legislation Amendment Bill 2009*;
 - the effect the National Broadband Network will have on the regulation of legacy assets and new telecommunication investments; and
 - the appropriateness of TSLRIC+ as a pricing methodology in light of the above.
459. Of the determinations made as a result of this decision, the ACCC notes that the 2009 ULLS Pricing Principles established ULLS single connection charges for the periods:
- Until 30 June 2006
 - 2006-07
 - 2007-08
 - 1 July 2008 - 31 July 2009
 - 1 August 2009 – 31 December 2010.
460. The ULLS charges are de-averaged, consistent with previous pricing principles.
461. No indicative charge was set for ULLS in Band 4 or for vacant ULLS connections.

6.3.1. Submissions

462. Telstra submits it would accept the roll over of ULLS prices from 1 August 2009 to 31 December 2010, provided the indicative prices for all fixed network services are rolled over for the same period and applied in arbitrations.³⁹⁰ Telstra notes its acceptance of this is based on the indicative prices being rolled over as a “package” for the full period and that the roll over prices will be applied consistently by the ACCC in all decisions across all fixed network service and to all access seekers until 31 December 2010.³⁹¹
463. The Herbert Geer parties submit that rollover of prices should only apply in relation to the ULLS monthly charge.³⁹² The parties submit that application of rollover to prices other than the ULLS monthly charge (i.e., ULLS single connection charges) would likely fail to meet all of the statutory criteria in subsection 152CR(1) of the Act.³⁹³
464. While not directly specifying ULLS connection charges, the Herbert Geer parties make a submission on the issue of rollover of pricing generally. They submit that the rolled over prices cannot be justified for charges other than the ULLS monthly charges, because:
- there is no price shock concern with the 2009 Draft Indicative Prices released in August 2009 as the ULLS monthly charge requires an adjustment path but changes to the LSS monthly charge do not;
 - the LSS charges contained in the 2009 Draft Indicative Prices are not based on the network cost model used for the ULLS and the remaining fixed network services, and as such the concerns raised by access seekers with regards to TSLRIC+ do not apply to the LSS; and
 - the LSS charges for both rollover and the 2009 Draft Indicative Prices are based on the same model, with different inputs due to changes in demand.³⁹⁴
465. The Nicholls Legal parties consisting of PowerTel and Request submit that the ACCC should rollover 2008-09 ULLS and LSS prices for all fixed line services until 31 December 2010.³⁹⁵ However, Nicholls Legal has also submitted that Macquarie Telecom is opposed to the rollover of the 2008-09 ULLS prices.³⁹⁶
466. Nicholls Legal on behalf of Macquarie Telecom wrote to the ACCC on 13 November 2009, in relation to the proposed rollover of indicative prices.³⁹⁷ Macquarie Telecom submitted that a rollover of indicative prices was not

³⁹⁰ Telstra, Letter, *ULLS/LSS joint hearing: Price terms-roll over option*, 2 November 2009.

³⁹¹ Ibid.

³⁹² Herbert Geer, Letter, *Roll Over Prices*, 2 November 2009, p. 1; Herbert Geer, *Expiry Date for ULLS and LSS Final Determinations*, 10 December 2009.

³⁹³ Herbert Geer, Letter, *Roll Over Prices*, 2 Nov 2009, p. 2.

³⁹⁴ Ibid, p. 3.

³⁹⁵ Nicholls Legal, Letter, *Roll Over Options*, 10 December 2009.

³⁹⁶ Nicholls Legal – Macquarie Telecom, Letter, *Roll Over Options*, 10 December 2009.

³⁹⁷ Macquarie Telecom, *Setting Indicative Prices for Fixed Services*, 13 November 2009.

appropriate and would be disadvantageous to access seekers who have reached agreements with Telstra that adopt lower prices than the 2008-2009 indicative prices.³⁹⁸ As a remedy, Macquarie Telecom proposed that the ACCC rollover 2008-2009 prices by implementing a ‘no worse off’ principle to protect the interests of these access seekers. Macquarie Telecom submits that this would ensure that existing commercially agreed prices would be the de facto indicative price should the 2008-2009 rolled-over indicative price for a particular service be higher.³⁹⁹ Should the ACCC adopt this proposal, Macquarie Telecom supports the rollover of prices until 31 December 2010.⁴⁰⁰

467. Primus submits that they support the ACCC’s proposal to rollover the 2008-09 indicative pricing for the ULLS.⁴⁰¹
468. Optus considers that the 2008-09 indicative prices are relatively high and are likely to over-compensate the access provider.⁴⁰² However Optus also considers that it would be appropriate for the ACCC to maintain a stable pricing structure whilst alternative pricing methods are assessed.⁴⁰³ Moreover, the 2008-09 indicative prices are broadly consistent with international benchmark rates and other relevant data points.⁴⁰⁴
469. Optus submits that in the event that the ACCC decides to roll over the 2008-09 indicative prices for fixed network services until 31 December 2010, the rolled over prices should be applied in the arbitration of the dispute, on basis that the ACCC commits to undertaking a comprehensive review of its approach to fixed line access prices.⁴⁰⁵

6.3.2. ACCC view

470. In the course of the joint hearing, the Government proposed significant reforms to the telecommunications access regime in the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009* which, among other things, proposes replacing the negotiate-arbitrate model with an ex-ante regulatory access framework.
471. The proposed reforms include allowing the ACCC to issue ‘access determinations’ and adopt ‘fixed principles’ which are aimed at improving competition and efficiency within telecommunications and promote greater regulatory certainty associated with regulatory processes under Part XIC of the Act⁴⁰⁶. The proposed reforms include:

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ Ibid.

⁴⁰¹ Primus, Letter, *Roll Over of Indicative Prices*, 2 November 2009.

⁴⁰² Optus and XYZed, Letter, *Price Terms – Rollover Option*, 2 November 2009, p. 1.

⁴⁰³ Ibid; Optus, Letter, *Price Terms – Rollover Option*, 10 December 2009.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid, p. 2.

⁴⁰⁶ Explanatory Memorandum to *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*, September 2009.

- replacing the negotiate-arbitrate model with a streamlined regulatory process and providing the ACCC with the ability to make up-front access determinations on price and non-price terms of access, and
 - allowing the ACCC to specify pricing methodologies for declared services which would be used to determine prices over successive regulatory periods or successive undertakings in order to create greater regulatory certainty.⁴⁰⁷
472. The ACCC considers that given the status of the Bill in the current Parliament and the nature of the proposed changes it would be prudent to consider the impact of the proposed legislative changes before it made substantial changes to the price of ULLS single connections. The ACCC is also mindful that the proposed legislative reform Bill has been introduced but not yet debated in the Senate and that there remains uncertainty as to whether the Bill will be passed in its current form or the nature of any amendments to it. The ACCC believes that these matters are relevant considerations in these arbitrations.
473. The ACCC is of the view that applying the indicative prices from the 2009 ULLS Pricing Principles in their totality for the period 1 July 2005 to 31 December 2010 for ULLS single connections will provide a degree of certainty regarding access to regulated services in a period of significant regulatory and industry change and associated uncertainty.
474. The ACCC also notes that ULLS single connection charges are consistent with the 2008 ULLS Pricing Principles.
475. Further, the ACCC considers that the submissions made by the Herbert Geer parties requiring that only ULLS monthly charges should be rolled over but not other charges disregards the ACCC's views set out in its letter of 27 October 2009. In this letter, the ACCC stated that it was considering the rollover of the 2008-09 indicative prices in their entirety. The ACCC does not consider it appropriate for the setting of charges for the ULLS in isolation due to its concerns about the regulatory uncertainty which currently exists.
476. While the Herbert Geer parties and Macquarie Telecom only wish rollover to apply in limited circumstances, in the interests or certainty and consistency, the ACCC considers on balance, it more appropriate in the current environment to rollover prices across all of the fixed network services. This is in line with the ACCC's decision in its 2009 Pricing Principles and Indicative Prices inquiry⁴⁰⁸ and reflected in the 2009 ULLS Pricing Principles.

6.4. Initial consultation

477. As noted in section 6.2 – 'Consultation Process', the ACCC initially broadly consulted on the following matters in relation to ULLS single connections:

⁴⁰⁷ Ibid

⁴⁰⁸ ACCC, *Pricing Principles and Indicative Prices for LCS, WLR, PSTN OTA, ULLS, LSS*, December 2009.

- jumpering, travel, vehicle, tool and materials costs for connections
- indirect costs
- ‘back-of-house’ costs.

6.4.1. Jumpering, travel, vehicle, tool and materials costs for connections

478. Submissions were sought from parties on the following matters:

- general methodology
- weighting between singular and multiple tickets
- contractor rates for PSTN and LSS connections compared to ULLS.

479. As noted above, the ACCC considers that it is appropriate to apply all of the indicative prices from the 2009 ULLS Pricing Principles in making the FD for ULLS single connection charges. As such, many of the issues outlined in the initial consultation are no longer relevant.

480. The ACCC also recognises that the adoption of the indicative prices has meant a move away from its views as expressed in the Consultation Paper. These include:

- The methodology suggested for use in averaging 3P contractor quotes for setting the ULLS connection charges. With the rollover of charges, these suggested methodologies are no longer relevant.
- The application of PSTN charges in establishing new ULLS connection charges. The ACCC reviewed arguments in relation to the disparity between ULLS jumpering charges and PSTN jumpering charges. However, given that the ACCC has now decided to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010 and apply the charges from the relevant indicative prices, the issue of comparing PSTN contractor rates with ULLS rates is not relevant to this FD.
- The ACCC notes there was no agreement as per the parties’ submissions on the appropriate weighting that should apply for singular versus multiple jumpering. The ACCC considers that the weightings applied within the 2009 ULLS Pricing Principles, and which have since been used in the rollover of prices, better reflect the proportions that are reasonably open to Telstra to achieve, having regard to the number of connections made in each Band and the number of exchanges. The weightings are as follows:

| | Band 1 | Band 2 | Band 3 |
|------------------|---------------|---------------|---------------|
| Weighting | 0:100 | 30:70 | 80:20 |

481. This outcome is also consistent with previous arbitral findings and in light of the ACCC's decision to rollover prices there is no reason to move away from these findings.
482. The rolled over prices remain consistent with the 2009 ULLS Pricing Principles and previous ULLS pricing principle determinations. The methodology applied in reaching the rolled over indicative prices is consistent with the methodology applied in previous FDs.⁴⁰⁹ The ACCC notes that the pricing principles require that connection charges should be set with reference to the amounts charged by third party contractors to Telstra for jumpering work in exchanges. They do not specify how those contractor charges should be used to set price.

6.4.2. Jumpering, travel, vehicle, tool and materials costs for disconnections

483. Submissions were sought from parties in relation to ULLS single disconnection charges.
484. As with other charges, the ACCC considers that it is appropriate to apply the indicative prices from the 2009 ULLS Pricing Principles in making the FD for ULLS connection charges. As such, many of the issues outlined in the initial consultation are no longer relevant.
485. The ACCC considers that where a ULLS disconnection takes place as a result of an end-user churning their downstream services to another service provider, there is the potential for the removal of the existing jumpers to be combined with installing the new jumpers on the relevant line. Overall costs can be significantly reduced by combining the two processes and the costs of removing the jumpers would be subsumed into the relevant connection charge.
486. Accordingly, the ACCC has maintained its position that no cost allowance for disconnections should be allowed for the ULLS which is consistent with the rollover of the 2008-09 indicative prices.

6.4.3. Indirect costs

487. Submissions were sought from parties on a mark-up of 10 percent on 3P contractor rates to cover indirect costs such as contract management costs.
488. The ACCC considers that the TSLRIC+ pricing principles which apply to the ULLS includes an allocation for common costs. Consistent with the views expressed in the Chime Decision⁴¹⁰ the ACCC acknowledges that the allowance of a 10 per cent mark up for contract management is not set by reference to Telstra's actual costs, but rather what is considered a reasonable mark-up.

⁴⁰⁹ See for example ACCC, *Publication of Final Determination and associated statement of reasons – Chime Communications/Telstra ULLS connection charges*, March 2008.

⁴¹⁰ Chime Decision, p. 202.

489. Given the ACCC's decision to apply the rollover of the 2008-09 indicative prices, which includes a 10 per cent mark up for contract management costs, the ACCC has maintained the position put forward to parties in its Consultation Paper. This position is also consistent with recent ACCC arbitration determinations, connection charge undertaking assessments and the 2009 ULLS Pricing Principles.

6.4.4. 'Back of house' costs

490. Submissions were sought on the single connections costs associated with the following Telstra workgroups and processes, namely:

- Data activation centre (DAC)
- Integrated deployment solution centre (IDS).

491. Costs associated with Telstra's wholesale customer front of house activities are recovered through annual rental charges.

492. The ACCC proposed in its Consultation Paper to make an allowance for efficient DAC and IDS group costs, on the basis that an efficient operator would incur these costs, and that these are not recovered through other charges.

493. Submissions on the DAC and IDS group costs dealt with:

- salaries;
- the time allowed for DAC activity; and
- the ACCC's proposed allowance of \$10.80 for cutover testing.

494. The ACCC considers that the various back of house costs should remain consistent with the 2009 ULLS Pricing Principles, in line with the ACCC's decision to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010. This includes the approach the ACCC has previously taken in respect of allowances for the salary component and the time allowed for DAC activity.

495. The ACCC considers that its proposed approach continues to fairly reflect the costs that an efficient operator would incur in providing them.

496. However, in regard to cutover testing Telstra submits that it remains obliged under the ACIF C569:2005 ULLS Ordering & Provisioning Code (ACIF Code) to provide cutover testing for IULLS cutovers where such testing is requested by an access seeker.⁴¹¹ Consequently Telstra submits that it should not be prevented from collecting a charge for cutover testing where it is

⁴¹¹ Telstra Primary Submission; *ULLS Single Connection & Disconnection Charges*, 18 May 2009, p. 7.

provided on request.⁴¹² However, as far as Telstra is aware, there is no current demand for cutover testing.⁴¹³

497. Optus submits that cutover testing has been discontinued since October 2007 and hence allowances for this activity are no longer required.⁴¹⁴
498. In reply the Herbert Geer parties submit that they do not object to Telstra being able to charge for cutover testing when performed at an access seeker's request.⁴¹⁵ The parties submit they have no objections to the ACCC's proposed allowance of \$10.80 for cutover testing being indexed to subsequent years.⁴¹⁶
499. The ACCC considers that the cutover testing process is not necessary for IULLS and TULLS connections, and notes that cutover testing has now ceased for both connection types.
500. However, the ACCC acknowledges that while the process may be inefficient or unnecessary; Telstra is still required to perform cutover testing on request due to the operation of the ACIF Code. If the ACCC was to disallow cost recovery for cutover testing that had occurred in the past upon request from access seekers, Telstra would be unable to recover costs incurred as a result of choices made by access seekers. In order to reflect Telstra's obligations under the ACIF Code, the ACCC considers that it would be appropriate for Telstra to be compensated for cutover testing performed where it was requested by access seekers.
501. Accordingly, the ACCC considers it more appropriate that the FD specifies that the access seeker is liable to pay Telstra for cutover testing when cutover testing was requested for a connection. This approach is appropriate as it relates the recovery for cutover testing to the access seeker behaviour that caused Telstra to incur the cost.
502. The ACCC considers that in line with previous determinations,⁴¹⁷ an allowance of \$10.80 be made for cutover testing in line with the rollover of indicative prices.

6.4.5. Other matters

503. The ACCC also sought submissions on the following issues:

Costs for financial years

504. The ACCC sought submissions on its proposal contained in the Consultation Paper that where it held data for a particular financial year it would apply such data in calculating the charges for that financial year. Where such data was not

⁴¹² Ibid.

⁴¹³ Ibid.

⁴¹⁴ Optus and XYZed Primary Submission, *Single Connection Charges*, 18 May 2009, p. 9.

⁴¹⁵ Herbert Geer Reply Submission, *Single Connection & Disconnection Charges*, 4 June 2009, p. 9.

⁴¹⁶ Ibid.

⁴¹⁷ Chime Decision, p. 221.

available, the ACCC proposed to estimate these costs from known data by either interpolation or by indexation.

505. With the ACCC's decision to apply all indicative prices, this issue is no longer relevant because existing models have been used. The indicative prices up to 2008-09 are based on the use of 3P contractor rates for the 2008-09 period. In line with the ACCC's decision to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010, updated 3P contractor rates for the 2009-10 period have not been applied. However, the ACCC acknowledges that Telstra did provide new ULLS singular contractor rates on 15 July 2009 outlining the rates that it will pay for 2009-10.⁴¹⁸

Cost models

506. Submissions were sought on simple ULLS connections cost models that adopted the ACCC's views and were attached to the ACCC's Consultation Paper.
507. The cost model distributed to parties is the same as the model used in determining previous determinations, albeit with updated inputs. The model results align with those included in the indicatives prices for the period up to and including 2008-09.
508. Due to the regulatory uncertainty, the ACCC does not consider it an appropriate time to adopt an alternative method for determining connection charges such as adopting PSTN rates over ULLS rates.
509. In addition, given the decision to consistently apply rolled over rates from 2008-09 indicative prices to the period 1 August 2009 until 31 December 2010, the ACCC has not relied on the cost models sent to the parties for this period.
510. Having considered the various submissions made by the parties the ACCC considers that the rolled over prices will provide certainty regarding access to ULLS in a period of significant regulatory and industry change and is in the LTIE.

Averaged or de-averaged charges

511. The ACCC sought submissions on whether ULLS single connection charges should be determined on a geographically de-averaged or averaged basis.
512. The decision to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010 is consistent with the ACCC determining ULLS single connection charges on a geographically de-averaged basis. This approach also complies with the 2008 and 2009 ULLS Pricing Principles. The ACCC considers that it is appropriate to have regard to the previous and current pricing principles for the ULLS. Geographic de-

⁴¹⁸ Telstra, Letter to ACCC, *ULLS Third Party Contractor Rates*, 15 July 2009 – Annexure A, Statement of [REDACTED] of Telstra Corp Ltd, 22 July 2009.

averaging provides that prices are set for the ULLS such that they reflect significant cost differentials in different geographic regions.

Bands 1, 2, 3

513. The ACCC sought submissions on whether to specify charges to apply to ULLS connections in Band 4. This reflected the view that there is little if any demand for ULLS connections in Band 4. This position is consistent with the ACCC's decision to rollover ULLS single connection charges. In the various submissions the parties supported this approach.⁴¹⁹

Charges where a Vacant ULLS provisioning process is requested

514. The ACCC is not setting connection charges for ULLS that are connected under a vacant ULLS provisioning process (VULLS). This reflects its view that where ULLS are connected by means of an In-Use or Transfer ULLS provisioning process commercial charges are not aligned with efficient costs. The parties support this approach.⁴²⁰

6.4.6. Commencement date, expiry date and interest

515. The ACCC has backdated the ULLS single connection charges. Interest is payable on any over- or under-payment that has occurred. The term of backdating, and reasons for the approach have been discussed previously in section 4.4 of this Statement of Reasons.

6.4.7. Changes to the draft final determination

516. The ACCC provided a DFD to the parties for comment. Some of the terms specified in the FD differ to some extent to those proposed at the DFD stage due to the ACCC's decision to rollover the 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010 in line with the 2009 ULLS Pricing Principles.

6.5. Assessment against subsection 152CR(1) criteria

6.5.1. Paragraph 152CR(1)(a)

517. As discussed at section 4.3.1 above, the ACCC must take the subsection 152CR(1) criteria into account in making a FD. Not all of these criteria will be relevant to every particular issue that the ACCC must determine.

⁴¹⁹ Optus and XYZed Primary Submission, *Single Connection Charges*, 18 May 2009, p. 14; Nicholls Legal Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 4; Telstra Primary Submission; *ULLS Single Connection & Disconnection Charges*, 18 May 2009, p. 9; Herbert Geer Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 13.

⁴²⁰ Optus and XYZed Primary Submission, *Single Connection Charges*, 18 May 2009, p. 15; Nicholls Legal Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 5; Telstra Primary Submission; *ULLS Single Connection & Disconnection Charges*, 18 May 2009, p. 4; Herbert Geer Primary Submission, *Single Connection & Disconnection Charges*, 18 May 2009, p. 14.

518. The ACCC notes that the parties did not make submissions addressing ULLS single connections and the subsection 152CR(1) criteria.
519. Having regard to the subsection 152CR(1) matters, paragraph 152CR(1)(a) concerns the LTIE. This calls for consideration of a number of factors identified in section 152AB, namely the objective of promoting competition, the objective of achieving any-to-any connectivity, the objective of encouraging the economically efficient use of and the economically efficient investment in infrastructure and subsidiary matters (paragraphs 152AB(2)(c)-(e), subsection 152AB(4), paragraphs 152AB(6)(a)-(c), subsection 152AB(7A) and subsection 152AB(8)).
520. The ACCC considers that prices based on the forward-looking costs of an efficient provider best promote competition and use of infrastructure in this current period of significant regulatory and industry change. By rolling over 2008-09 indicative prices for the period from 1 August 2009 until 31 December 2010 parties will be assured of certainty regarding access to regulated services. Further, this state of certainty is also in the LTIE.
521. The ACCC does not consider that the approach taken to this matter affects the objective of achieving any-to-any connectivity, or that the matters identified in paragraph 152AB(6)(a) are relevant here.
522. Turning to efficient investment in and use of infrastructure, the ACCC firstly considers the efficient use of and investment in infrastructure used to supply the ULLS. The ACCC also considers consequences for efficient use of and investment in the equipment, such as DSLAMs, that are used to supply downstream voice and data services.
523. The ACCC considers that efficient use of and investment in the infrastructure used to supply the ULLS will be encouraged where Telstra is able to recover the efficient, forward-looking costs of making ULLS single connections, including a normal risk-adjusted return on capital employed. Connection and disconnection charges above this level for ULLS access seekers would, however, have the effect of discouraging efficient investment in and use of infrastructure used to supply the ULLS. Use of and investment in infrastructure used to supply downstream services would also be likely to be below efficient levels.
524. With the rollover of indicative prices the ACCC considers that Telstra will continue to be able to recover costs and attain a reasonable return. Similarly, the rolled over prices will continue to allow access seekers efficient use of infrastructure. While the realisation of more specific current charges may have effected this balance better, the ACCC considers that rolled over prices provide greater stability and certainty in the current climate of change. This position is ultimately also in the LTIE.
525. Telstra's legitimate commercial interests include its ability to exploit economies of scale and scope. Telstra will better be able to exploit economies of scale and scope to the extent that rolled over charges provides certainty in the current climate and will increase demand for ULLS and downstream

services. As there are fixed costs in providing these services, the increased demand will give rise to economies of scale and scope, which Telstra could exploit.

526. In relation to ULLS disconnection charges the ACCC considers where a ULLS disconnection takes place as a result of an end-user churning their downstream services to another service provider, there is the potential for the removal of the existing jumpers to be combined with installing the new jumpers on the relevant line.
527. The ACCC considers that disallowing disconnection costs for the ULLS represents an efficient process that would promote competition. This best reflects the interests of access seekers and allows for recovery of efficient costs of disconnections. Not allowing separate disconnection charges for all disconnections will give Telstra incentives to invest in efficient churn and disconnection processes for the ULLS. Further, by promoting competition, there will be indirectly increased incentives to invest efficiently in the supply of ULLS and downstream services.
528. Telstra's legitimate commercial interests include its ability to recover its costs and make a normal commercial return on capital employed. Accordingly a separate disconnection charge is not needed to reflect Telstra's legitimate commercial interests. Disallowing a disconnection cost will encourage Telstra to adopt efficient connection and disconnection processes, which is in its legitimate commercial interests and is consistent with the ACCC's decision to rollover indicative prices.

6.5.2. Paragraph 152CR(1)(b)

529. The next matter concerns the legitimate business interests of the access provider, and the carrier's or provider's investment in facilities used to supply the declared service.
530. The ACCC's views on the effect of this decision on these matters have already been discussed as part of the matters concerning the LTIE. Telstra's legitimate business interests are likely to be met by the rolling over of prices which in the past have proved capable of sustaining Telstra's legitimate business interests.

6.5.3. Paragraph 152CR(1)(c)

531. The third criterion is the interests of all persons who have the right to use the services. The ACCC considers that access seekers' interests lie in being able to compete for end-users on the basis of their relative merits, without being impeded in acquiring end-user customers or incurring unnecessary costs.
532. It is in the interest of ULLS access seekers to pay charges that reflect the efficient, forward-looking costs of connecting services as allowed for by the rolling over of prices.
533. The interests noted under 152CR(1)(c) are also promoted by arrangements that provide better access to effective churn and disconnection processes, and not

incurring disconnection costs that could be avoided if an effective and efficient process and pricing were employed. As noted above, the ACCC considers that having separate disconnections and reconnections is an inefficient process that leads to higher costs of acquisition for access seekers, and makes access seekers face avoidable costs. Not allowing disconnection costs (in certain circumstances) will be more likely to lead to efficient churn and disconnection processes. Also, creating an environment where pricing is stable and the processes used remain consistent is in the interests of all persons who have the right to use the services in this current climate of change.

6.5.4. Paragraph 152CR(1)(d)

534. The fourth criterion is the direct cost of providing access to the declared service. It calls for consideration to be given to not only Telstra's actual costs but also its ability to recover these costs.
535. The ACCC considers that Telstra will likely recover the direct costs of making ULLS single connections in the future under the approach applied in this determination, as the indicative prices are being rolled over. Given that these same prices have in the past allowed Telstra to recover its direct costs, it follows that this situation will not change with the rolling over of indicative prices.

6.5.5. Paragraphs 152CR(1)(e) & (f)

536. The next two criteria are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirements necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility.
537. The costs of extensions to Telstra's ordering systems necessary to supply the ULLS has been taken into account in other charges. The ACCC does not consider that the 'operational and technical requirements' criterion materially contributes to this decision.

6.5.6. Paragraph 152CR(1)(g)

538. The last criterion is the economically efficient operation of a carriage service, a telecommunications network or a facility. The ACCC has considered issues of economic efficiency above.
539. The rolling over of prices continues to fairly reflect the costs that an efficient operator would incur in providing them. The restrictions set out in section 152CQ of the Act do not apply to a determination that set single connection and disconnections charges on this basis.
540. The ACCC considers that should an approach result in ULLS connection charges that are above efficient forward-looking levels, this would impede competition in the provision of downstream (voice and DSL) services. In these circumstances, Telstra would be able to set above-cost prices for its

downstream services, leading to a reduction in the consumption of these services below efficient levels, and consequential allocative inefficiencies.

7. Late withdrawal charges

7.1. Introduction

7.1.1. Background

541. A ‘withdrawal’ is the cancellation of an order (request) for a service. A ‘late withdrawal’, in the context of a ULLS ‘single’ order (i.e., not an order submitted as part of a MNM), is a withdrawal that occurs less than two clear business days from the scheduled cutover date.

542. Agile and Telstra are in dispute in this matter.

7.1.2. Current charges

543. ULLS late withdrawal charges are not the subject of an ID.

544. The charges currently applying are specified in a CRA between Agile and Telstra and appear in Table CRA167.8 of that Agreement.

545. The Variation Agreement to the CRA dated 2 July 2007 specifies the current charges as follows:

| | Band 1 | Band 2 | Band 3 | Band 4 |
|-------------------------|--------|--------|--------|--------|
| Late withdrawal charges | \$ 80 | \$ 85 | \$ 85 | \$ 95 |

546. Agile⁴²¹ and Telstra⁴²² confirm the ACCC’s summary of current charges.

7.1.3. Prior consideration

547. ULLS late withdrawal charges have not been considered previously by the ACCC. However, the ACCC’s Consultation Paper⁴²³ indicated that the cost categories that are potentially relevant to these charges have been considered in the context of ‘single’ connection charges recently in ACCC, *Final Determination and associated statement of reasons – Primus/Telstra ULLS access dispute*, March 2008 at pp. 52 – 95 (Primus Decision).

548. The Consultation Paper also indicated that the charges applying to the cancellation of orders close to cutover have been considered in the context of a MNM; recently in the Primus Decision at pp. 154–158.

⁴²¹ Herbert Geer Primary Submission, *ULLS late withdrawal charges*, 2 July 2009, p. 1.

⁴²² Telstra Primary Submission, *Late withdrawal charges*, 2 July 2009, p. 1.

⁴²³ ACCC, *Consultation Paper on Final Determination, Late Withdrawal Charges*, June 2009 (the Consultation Paper). The Consultation Paper was provided to both Telstra and Agile.

549. Agile notes and agrees with the ACCC's comments regarding previous consideration.⁴²⁴
550. Telstra submits that the ACCC's prior consideration of ULLS 'single' connection charges is potentially relevant.⁴²⁵ However, Telstra notes that where the cost categories used by the ACCC in setting ULLS 'single' connection charges are relevant to ULLS late withdrawals, the allowances made by the ACCC for those categories are unlikely to be appropriate and that there are additional cost categories applicable to late withdrawals.⁴²⁶
551. Telstra notes that the FD dealing with ULLS 'single' connection charges in relation to the Primus Decision that the ACCC stated in its Consultation Paper as 'published' has not been published.⁴²⁷
552. The ACCC in accordance with subsection 152CR(2) of the Act has taken the view that it can and should take its previous decisions into consideration in making the FD. The ACCC believes that it should adopt a consistent approach on recurring issues, but also acknowledges that it must consult and explain any change in approach to those issues where that change is appropriate.
553. However, the ACCC does not consider itself bound to reach the same conclusions as expressed in previous arbitral determinations. This reflects the fact that there are numerous matters to which it has regard in making a FD apart from what is listed in subsection 152CR(1) of the Act. In particular, the individual circumstances of the access dispute and new or additional information that becomes available through parties' submissions in a particular access dispute means that it could be appropriate to adopt a different approach and to reach a different conclusion consistent with the statutory criteria.

7.1.4. Principles to apply

554. The ACCC's Consultation Paper proposed to have regard to the ACCC's, 2008 ULLS Pricing Principles in specifying late withdrawal charges in relation to the ULLS.
555. Agile in principle, agrees with the ACCC having regard to its pricing principles and indicative prices of June 2008 in setting late withdrawal charges.⁴²⁸
556. Telstra submits that to the extent to which the ACCC can rely on the pricing principles and indicative prices it should, however, it considers that its contractual charges are appropriate and that the ACCC should not determine charges for late withdrawals in this access dispute.⁴²⁹

⁴²⁴ Herbert Geer Primary Submission, *ULLS late withdrawal charges*, 2 July 2009, p. 1.

⁴²⁵ Telstra Primary Submission, *Late withdrawal charges*, 2 July 2009, p 1.

⁴²⁶ Telstra Primary Submission, *Late withdrawal charges*, 2 July 2009 Ibid, pp. 1–2.

⁴²⁷ Ibid, p 2.

⁴²⁸ Herbert Geer Primary Submission, *ULLS late withdrawal charges*, 2 July 2009, p. 2.

⁴²⁹ Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 2.

557. As the ULLS pricing principles set out in the 2009 ULLS Pricing Principles repeals the 2008 ULLS Pricing Principles, the ACCC has had regard to its 2009 ULLS Pricing Principles.
558. The manner in which the ACCC proposes to apply these principles and parties' views are discussed below.

7.1.5. Technical advice

559. The ACCC has previously sought the view of Consultel, and later Layer 10,⁴³⁰ as an independent expert. These views were sought in relation to the costs associated with work performed by the DAC workgroup in qualifying ordered services, and of the IDS in arranging the cutover of ordered services. These reports are, in the ACCC's opinion, relevant to the present access dispute and contain analysis that is relevant to an assessment of those costs for the ULLS. The reports are:
- Consultel, *Analysis of ULLS and LSS undertakings and subsequent submissions – final report*, February 2006; see discussion of DAC costs at pp. 30–38 (Consultel report)
 - Layer 10, *Analysis relating to ULLS access disputes—Primus, Chime, Optus, XYZed, Request, PowerTel and Telstra*, January 2008; see discussion of 'single' ULLS connection costs at pp. 25–48 (Layer 10 report).
560. The ACCC in its Consultation Paper proposed to have regard to these reports in the current arbitration.
561. Agile noted the ACCC's preliminary view and agreed that these reports are potentially relevant.⁴³¹
562. Telstra objected to the ACCC's continued reliance on the material prepared by Dr Brooks.⁴³² Telstra submits that Dr Brooks lacks a sufficient degree of independence and the requisite economic, finance and costing qualifications and experience to provide opinions on costing.⁴³³ Further, Telstra submits that Dr Brooks' previous reports are not soundly reasoned.⁴³⁴
563. The ACCC considers that Dr Brooks is qualified to provide advice to the ACCC regarding ULLS access charges. The ACCC appointed Dr Brooks to advise on these technical matters which are within his field of expertise. It has not called on Dr Brooks to provide expert advice on economic, financial or costing matters.

⁴³⁰ This change in business name reflects that the reports' author established a separate consultancy business.

⁴³¹ Herbert Geer Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 2.

⁴³² Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 2.

⁴³³ Ibid.

⁴³⁴ Ibid.

564. The ACCC considers that Dr Brooks is impartial and does not consider that he could reasonably be perceived to be otherwise. The ACCC notes that Dr Brooks had not performed work for any of the access seeker parties participating in these hearings at the time of preparing his reports. Dr Brooks does not have any personal or financial interest in any of the ULLS access seekers participating in the joint arbitration hearing.
565. The ACCC is of the view that it should have regard to each of the Consultel/Layer 10 reports that have been submitted in previous arbitrations. The ACCC considers that the reports are appropriately reasoned and the conclusions reached are sound and appropriately explained. Further, the reports contain material relevant to these proceedings and in the interests of minimising parties' costs, should be utilised.
566. In addition, the ACCC notes that despite Telstra's objections in using Dr Brooks' reports, it has not provided the ACCC with evidence to support its allegations.

7.2. Application of pricing principles to late withdrawal charges

7.2.1. Introduction

567. The ACCC proposed in its Consultation Paper that ULLS late withdrawal charges should be based on the TSLRIC+ of the associated systems and/or tasks.
568. The ACCC's preliminary view was to estimate the TSLRIC+ cost by benchmarking against the TSLRIC+ of common cost categories associated with ULLS 'single' connections, where the data was available.
569. The ACCC proposed that the use of a benchmarking TSLRIC+ approach is appropriate as ULLS late withdrawal charges apply in respect of only some ULLS orders, such as those where the access seeker loses the end-user customer (i.e., ceases to hold a valid firm order) before the ULLS provisioning completes.
570. The ACCC did not propose to have regard to the use of MNM benchmarks because the ACCC's preliminary view was that the TSLRIC+ estimate of order withdrawals close to cutover would likely differ between 'single' and MNM orders as:
- pre-jumpering would be unlikely in the case of ULLS 'single' orders, but could be undertaken in MNMs
 - VULLS could be requested via ULLS 'single' orders, but could not be processed via MNMs
 - back-of-house processes could differ between 'single' and MNM orders.

571. The ACCC sought the parties' views in particular on:
- the extent to which ULLS late withdrawal charges have been or would be incurred
 - the use of a benchmarking approach.

7.2.2. Submissions

572. Telstra submits that ULLS orders are rarely withdrawn within two clear business days of the scheduled cutover date and accordingly, access seekers rarely incur a late withdrawal charge.⁴³⁵ Telstra also submits that the approach taken by the ACCC in its Consultation Paper is likely to significantly underestimate Telstra's direct costs and should not be adopted.⁴³⁶
573. Telstra submits that late withdrawals are overwhelmingly related to VULLS connections and that the charges set out in its relevant access agreement are appropriate having regard to the criteria in section 152CR of the Act.⁴³⁷ Telstra compares the ACCC's position in regard to late withdrawal charges with its view in respect of service qualification (SQ) charges where the ACCC said that it should not vary the SQ charge because:
- the amount of the SQ charges currently applying is relatively small, hence there is little potential for any divergence between the charge and TSLRIC+ estimates of associated systems or operations to be material
 - SQ charges are likely to be infrequently imposed.⁴³⁸
574. Telstra contends in relation to this comparison that while it recognises that the quantum of late withdrawal charges is higher, they are nonetheless infrequently imposed, and therefore, in the interests of consistent regulation it is unnecessary for the ACCC to decide late withdrawal charges.⁴³⁹ Telstra reiterates this position in its reply submission.⁴⁴⁰
575. Telstra states that this would also be consistent with the ACCC's proposal not to determine connection charges for VULLS given that late withdrawals are overwhelmingly related to VULLS.⁴⁴¹
576. Telstra submits that in the event the ACCC decides to determine late withdrawal charges, the ACCC should undertake a proper TSLRIC+ analysis of the actual costs associated with late withdrawals because benchmarking the costs of a late withdrawal against the costs of an IULLS or TULLS connection

⁴³⁵ Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 3.

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ ACCC, *Consultation Paper on Final Determination: Service Qualification Charges*, June 2009, p. 3 as cited in Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 3.

⁴³⁹ Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 3.

⁴⁴⁰ Telstra Reply Submission, *Late Withdrawal Charges*, 9 July 2009, p. 1.

⁴⁴¹ Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 3.

is likely to significantly under-estimate Telstra's direct costs and should not be adopted.⁴⁴² It states that a proper TSLRIC+ analysis will require further consultation with parties to identify the appropriate cost inputs.⁴⁴³

577. Agile submits that it encountered 31 instances of late withdrawal charges being applied in the last 6 months.⁴⁴⁴ Agile in its reply submission states that in most of the cases a service was finally connected to the customer premises.⁴⁴⁵
578. Agile, in relation to the proposed benchmarking approach, submits that the ACCC's approach is likely to overestimate the amount of costs incurred by Telstra for the reason that the ACCC assumes that all back-of-house work has been completed when the withdrawal occurs, which in their view is not the case.⁴⁴⁶ Agile reiterates this view in its reply submissions.⁴⁴⁷
579. In support of its view, Agile notes the Layer 10 report considers that Telstra, as an efficient operator, could reduce its DAC costs by investing in its IT system to reduce manual activities with such costs being recovered through a slight increase in monthly charges.⁴⁴⁸
580. Agile, in its reply submission, accepts that the relatively infrequent occurrence of late withdrawal charges may justify the ACCC's proposed benchmarking approach.⁴⁴⁹ However, Agile states that as there is the potential for significant divergence between the CRA charge and the TSLRIC+ charge this does not, as argued by Telstra, justify the ACCC in refusing to set charges for late withdrawals.⁴⁵⁰

7.2.3. ACCC view

581. While the ACCC notes that both parties' submissions indicate a relatively similar but minimal number of instances of ULLS late withdrawal charges that have been imposed in the past, it considers that due to the level of the charge, it is appropriate that the ACCC determine a reasonable late withdrawal charge.
582. However, the ACCC does not support the view that a full TSLRIC+ analysis, as proposed by Telstra, is warranted given the infrequent nature of instances of late withdrawals.
583. Therefore, the ACCC considers it is appropriate for it to decide ULLS late withdrawal charges in this dispute in line with its proposed approach of benchmarking TSLRIC+ costs. For this purpose, the ACCC uses its 2009 ULLS Pricing Principles.

⁴⁴² Ibid, p. 2.

⁴⁴³ Ibid.

⁴⁴⁴ Herbert Geer Primary Submission, *ULLS Late Withdrawal Charges*, 2 July 2009, p. 2.

⁴⁴⁵ Herbert Geer Reply Submission, *ULLS Late Withdrawal Charges*, 9 July 2009, p. 3.

⁴⁴⁶ Herbert Geer Primary Submission, *ULLS Late Withdrawal Charges*, 2 July 2009, p. 2.

⁴⁴⁷ Herbert Geer Reply Submission, *ULLS Late Withdrawal Charges*, 9 July 2009, p. 2.

⁴⁴⁸ Layer 10 Report, p. 43 as cited in Herbert Geer Primary Submission, *ULLS Late Withdrawal Charges*, 2 July 2009, p. 3.

⁴⁴⁹ Herbert Geer Reply Submission, *ULLS Late Withdrawal Charges*, 9 July 2009, p. 2.

⁴⁵⁰ Ibid.

584. The ACCC considers that Telstra’s comparison of SQ charges and late withdrawal charges is not valid because the circumstances to which each charge will apply is different. Further, the ACCC believes that although late withdrawal charges are infrequently imposed, the TSLRIC+ benchmark estimate varies from Telstra’s charge significantly. The ACCC also considers that Telstra should have provided evidence as to either; how the late withdrawal charge is determined or why there is a significant increase in the cost between an order withdrawal charge and a late withdrawal charge.⁴⁵¹
585. The ACCC notes the differing views of Agile and Telstra regarding the over and under estimation of costs respectively. However, the ACCC is of the view that the use of benchmarking provides the best available approach—given that the ULLS late withdrawal charges only apply to some ULLS orders, such as where an access seeker loses the end-user before the ULLS provisioning is complete. The ACCC believes that the benchmarking against the TSLRIC+ of common cost categories associated with ‘single’ connections will allow Telstra to recover the efficient costs that it incurs from the placing of orders and late withdrawal of such orders.
586. The ACCC notes that it clearly directed the parties to address particular matters in relation to late withdrawal charges in line with the submission template provided to the parties with its Directions dated 10 June 2009. Telstra submits that the ACCC’s proposed charges are an under-estimation of its costs. However, the ACCC notes that Telstra has not provided in its submissions any details of additional costs that it incurs.

7.3. Assessment of efficient costs

7.3.1. Introduction

587. The ACCC in its Consultation Paper stated that its preliminary view is that the following cost categories are potentially relevant to ULLS late withdrawals:

- back-of-house costs (DAC and IDS) and/or third-party cancellation fees
- jumpering and associated costs
- front-of-house costs.

588. The ACCC sought parties’ submissions in relation to the applicability of these costs should it decide to determine late withdrawal charges.

7.3.2. Submissions

589. Telstra submits that since the vast majority of late withdrawals relate to VULLS connections which incur significantly higher jumpering and DAC costs, if the ACCC decides the charges for late withdrawals, Telstra proposes that the ACCC should undertake a proper TSLRIC+ analysis of the actual

⁴⁵¹ A standard order withdrawal is the cancellation of an order with more than two days notice prior to provisioning, while a late withdrawal occurs less than two days prior to the cut over.

costs, without following a benchmarking approach based on IULLS and TULLS connections.⁴⁵²

590. Telstra also submits that the ACCC's analysis will need to recognise additional costs that Telstra efficiently incurs over and above the costs of a ULLS 'single' connection including back-of-house costs, jumpering costs and front-of-house costs.⁴⁵³ Telstra states that it has not been able to quantify the additional back-of-house and front-of-house costs.⁴⁵⁴

591. Agile submits that the approach that is most consistent with the statutory criteria is one which seeks to allow Telstra to recover the efficient costs that it has incurred from the placing of the order and late withdrawal of the order by the access seeker.⁴⁵⁵ Agile proposes a two-step process as follows:

- first, determine what actions or functions the access seeker has caused Telstra or its agents to perform arising from the placing and the late withdrawal of the order; and
- second, determine what the efficient costs of those functions or actions are.⁴⁵⁶

592. Agile further submits that it reassessed DAC timeframes based on the Layer 10 report and suggests that the DAC time should be reduced by 1 minute to 7 minutes because the 1 minute allowance for service qualification is not necessary given that this is an automated process performed on Telstra's LOLO/LOLIG system.⁴⁵⁷ In Agile's view, if manual service qualification is required, this then means that the order has to be submitted via Telstra's ULLCIS system, which then incurs a separate charge.⁴⁵⁸ Therefore, in Agile's opinion, it is double dipping to include the 1 minute component for this task in the DAC time attributed to connections.⁴⁵⁹ Agile submits that such a reduction results in the total of \$11.18 in Agile's previously submitted cost model being revised to \$14.90.⁴⁶⁰

593. Telstra in response to Agile's submissions regarding charges for manual SQ activities, states that there is no separate charge provided the ULLS order proceeds to completion.⁴⁶¹

7.3.3. ACCC view

594. The ACCC considers that in order to follow the two-step process proposed by Agile, it must undertake a detailed cost study to determine what actions and/or functions are involved by Telstra or its contractor in performing a late

⁴⁵² Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, pp. 3–4.

⁴⁵³ Ibid, p. 4.

⁴⁵⁴ Ibid.

⁴⁵⁵ Herbert Geer Primary Submission, *Late withdrawal charges*, 2 July 2009, p. 3.

⁴⁵⁶ Ibid.

⁴⁵⁷ Ibid, pp. 2–3.

⁴⁵⁸ Ibid, p. 3.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid.

⁴⁶¹ Telstra Reply Submission, *Late Withdrawal Charges*, 9 July 2009, p. 2.

withdrawal request by an access seeker. The ACCC does not consider it should undertake a costly and time consuming study to determine late withdrawal charges due to the limited number of times the charge is incurred.

595. Further, the ACCC does not believe that it should apply the revised DAC time and its related cost estimate proposed by Agile. The ACCC believes that applying a revised DAC time will not result in significant changes in late withdrawal charges. Further, the ACCC considers that it is more appropriate to adopt the approach taken by Dr Brooks in the Consultel/Layer 10 reports—for the reasons discussed under Technical Advice at (section 7.1.5) above as in the ACCC’s view this maintains a consistency in its approach in arbitrating access disputes and the ACCC is satisfied that the analysis contained in those reports is still correct.
596. The ACCC also continues to believe that undertaking a TSLRIC+ cost study is not necessary at this stage for the same reasons as given above. The ACCC notes that Telstra simply states that it incurs additional costs over and above the costs of a ‘single’ connection but has not provided the ACCC with details of such costs in its submissions. As such, the ACCC is unable to make any assumptions about Telstra costs.

7.4. Back-of-house costs

7.4.1. Introduction

597. The ACCC’s preliminary view was to include the cost of back-of-house work groups (DAC and IDS) in the cost base to be recovered through ULLS late withdrawal charges because the ACCC was of the view that:
- Each work group could perform tasks in relation to ULLS orders (requests) that are withdrawn late:
 - the DAC could be involved in performing any necessary service qualifications; and
 - the IDS group could be involved in checking, allocating and/or withdrawing tickets of work to technicians and/or rescheduling other tickets of work as a result of a late withdrawal.
 - These costs are not recovered through other charges; such as a ULLS withdrawal charge (Table 167.5) or ULLS service qualification charge (Table 167.3 and Table 167.4) of the CRA.
598. The ACCC proposed to directly apply the TSLRIC+ estimates for the cost categories used in the context of ULLS ‘single’ connections. This reflects the ACCC’s view that the DAC and IDS workgroups would perform similar tasks concerning those ULLS orders that are withdrawn late and those that are completed. For instance, for each task, the DAC would perform a service qualification.
599. The ACCC noted in its Consultation Paper that its most recent estimate of the TSLRIC+ of tasks performed by DAC and IDS work groups in the context of

ULLS ‘single’ connections is contained in the ULLS ‘single’ connections cost model which was attached to the ACCC’s consultation paper on ‘single’ connection charges circulated to the parties in April 2009.⁴⁶²

600. The ACCC sought the parties’ views on the involvement of DAC and IDS workgroups in late withdrawals; and on whether other charges recover any or all of the costs of the tasks that these workgroups perform in respect of late withdrawals.

7.4.2. Submissions

601. Telstra submits that, in the time available for making submissions, it was not able to quantify the additional back-of-house and front-of-house costs that late withdrawal by an access seeker will generate.⁴⁶³
602. Telstra, referring to Agile’s submission, also confirms that according to the CRA the standard order withdrawal charge and the late withdrawal charge apply in different circumstances and Telstra does not charge the standard order withdrawal charge for late withdrawals.⁴⁶⁴
603. Agile submits that it believes the charges for a standard order withdrawal and service qualification included in the CRA are sufficient and allow Telstra to recover any DAC and/or IDS costs that are causatively linked to an access seeker’s order.⁴⁶⁵ Agile further notes that the standard order withdrawal charge is \$17.50 which is 20 cents more than the ACCC’s proposed \$17.30 late withdrawal charge for 2008–09.⁴⁶⁶
604. Agile further submits that in the absence of satisfactory evidence from Telstra to demonstrate why it is necessary for Telstra to apply a standard order withdrawal charge and a late withdrawal charge, the ACCC should proceed on the basis that the standard order withdrawal charge is sufficient to allow Telstra to recover the costs of DAC and IDS actions or functions arising from an order and withdrawal, late or otherwise, of that order.⁴⁶⁷
605. Agile also argues that on the basis of the evidence Agile has seen that all back-of-house activities relating to a ‘single’ connection will have been performed at the time of a late withdrawal.⁴⁶⁸ Therefore, Agile proposes that if DAC and IDS had performed additional activities as a result of a late withdrawal, the cost of these additional activities should be offset by any cost savings that result from DAC and IDS activities which would have been performed but were not due to an order being withdrawn.⁴⁶⁹

⁴⁶² ACCC, *Consultation paper on final determination – ‘single’ connection and disconnection charges*, April 2009.

⁴⁶³ Telstra Primary Submission, *Late withdrawal charges*, 2 July 2009, p. 4.

⁴⁶⁴ Telstra Reply Submission, *Late withdrawal charges*, 9 July 2009, p. 2.

⁴⁶⁵ Herbert Geer Primary Submission, *ULLS late withdrawal charges*, 2 July 2009, p. 3.

⁴⁶⁶ Ibid.

⁴⁶⁷ Ibid.

⁴⁶⁸ Herbert Geer Reply Submission, *Late Withdrawal Charges*, 9 July 2009, p. 3.

⁴⁶⁹ Ibid.

7.4.3. ACCC view

606. The ACCC notes Agile's concern that a standard order withdrawal charge is sufficient to allow Telstra to recover the cost of DAC and IDS actions arising from an order and withdrawal, late or otherwise. Agile also submits that it has evidenced that all back-of-house activities relating to a 'single' connection will have been performed at the time of a late withdrawal. Accordingly, the ACCC considers that once a late withdrawal occurs, back-of-house costs have been incurred by Telstra. Therefore, it is reasonable to consider back-of-house costs in deciding late withdrawal charges.
607. In relation to Agile's notice that the standard order withdrawal charge is \$17.50 as against the ACCC's proposed late withdrawal charge of \$17.30 for the 2008-09 period, the ACCC considers Telstra's submission that it charges either a standard order withdrawal charge or late withdrawal charge, not both. Therefore, setting late withdrawal charges as proposed by the ACCC will not affect the standard order withdrawal charges that are currently in place. This also suggests that regardless of which charge applies, the impact on the access seeker is minimal.
608. The ACCC notes Telstra concerns regarding its inability to quantify the additional back-of-house and front-of-house costs due to time constraints it had with making submissions. In the ACCC's opinion, if Telstra had genuine concerns of its additional costs, it either could have submitted estimates of such additional costs later in the process or could have pointed out which of its previous submissions did include such additional cost information, without referring to its previous submissions in a broad manner. While the ACCC did not inform the parties that it will not consider additional submissions in the process, this has not prevented Telstra from submitting material outside of the consultation periods specified in the directions. Accordingly, in the absence of such additional cost information, the ACCC has formed its views on the basis of the available cost estimates.

7.5. Cancellation fees

7.5.1. Introduction

609. The ACCC in its Consultation Paper considered that Telstra may be liable to pay a cancellation fee or similar to a contractor when cancelling a ticket of work (TOW) after it has been provided to the contractor but before cutover.
610. The ACCC also indicated that there is the potential that this fee would be for essentially the same tasks that the IDS would perform in the eventuality that it was a Telstra technician that was fulfilling the TOW. That is, the fee could be for the contractor having checked a ticket of work, assigned it a technician and/or instructing the technician not to fulfil the work ticket, and/or consequential rescheduling of other work tickets. If so, then including both the fee payable to the contractor and the IDS cost allowance could lead to double counting, as for any particular TOW it is likely that one or other of the IDS or the contractor will perform these tasks, and not both.

611. The ACCC's preliminary view was to include cancellation fees payable to contractors in the cost base to be recovered through late withdrawal charges, provided that such fees exist and it being demonstrated that there is no double counting between the proposed IDS allowance and the cancellation fee payable to the contractor.
612. The ACCC particularly sought Telstra's advice as to whether such fees are payable, and if so, the circumstances in which they are payable; and, the simple average of these cancellation charges.

7.5.2. Submissions

613. Telstra submits that it does not incur specific cancellation fees when a ULLS request is withdrawn.⁴⁷⁰
614. Agile submits that it agrees with the ACCC's preliminary view that Telstra should not be able to double recover cancellation fees in the event that such fees relate to actions or functions that have been attributed to IDS by the ACCC as part of the ACCC's benchmarking approach.⁴⁷¹

7.5.3. ACCC view

615. Based on these submissions, the ACCC has formed the view that Telstra does not incur any cancellation fee and therefore it is not a consideration in deciding late withdrawal charges.

7.6. Jumpering and associated costs

7.6.1. Introduction

616. The ACCC's preliminary view was not to include the cost of jumpering tasks (and associated travel, tool, vehicle, and material costs), within the cost base to be recovered through charges for the late withdrawal of orders (requests).
617. This reflects the ACCC's preliminary views that:
- a withdrawal request following the completion of jumpering works would be rejected, and instead a reversal would be required,⁴⁷² for which separate charges are payable⁴⁷³
 - although there is some potential for jumpering works to be interrupted (e.g., as a result of unavailable access seeker network infrastructure, no lead-in cable or a fault detected during VULL testing), and hence for a

⁴⁷⁰ Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 4.

⁴⁷¹ Herbert Geer Primary Submission, *ULLS late withdrawal charges*, 2 July 2009, p. 4.

⁴⁷² ACIF C569:2005, ULLS order and provisioning code section 12.7; Telstra OPM for ULLS, section 13.1.

⁴⁷³ CRA Table 167.11.

withdrawal to be requested at this point, it is also possible that this would result in a late ‘retarget’,⁴⁷⁴ for which a separate fee is payable.⁴⁷⁵

618. The ACCC sought the parties’ views on whether jumpering and associated costs are incurred in connection with orders that are the subject of late withdrawal (as distinct to those that are subject to a late retarget or reversal). If so, the ACCC also sought the parties’ views on the scale, and frequency, of the costs incurred, and whether this differs between types of ULLS orders (IULLS, TULLS and VULLS).

7.6.2. Submissions

619. Telstra submits that it has an obligation to pay the contractor once a TOW has been dispatched for ULLS jumpering, and the contractor has accepted that TOW.⁴⁷⁶ Where a late withdrawal is made after the dispatch of the TOW, Telstra is obliged to pay the contractor at the agreed rate for jumpering, including where jumpering is not actually performed due to a late withdrawal.⁴⁷⁷ Telstra dispatches TOWs for ULLS jumpering routinely to contractors on the day before the scheduled cutover date.⁴⁷⁸ Telstra also claims that a large proportion of late withdrawals occur after jumpering has been completed (on the day of cutover) and thus Telstra is obliged to pay the contractor.⁴⁷⁹
620. Telstra, in summary, submits that the ACCC should include jumpering costs in the cost base to be recovered through late withdrawal charges and that those jumpering costs should be those for a VULLS connection which are higher than those for IULLS and TULLS connections.⁴⁸⁰ Telstra claims that it is also likely that a late withdrawal will result in additional jumpering costs over and above those of a VULLS connection.⁴⁸¹ This, it submits, will occur in circumstances where the late withdrawal is made after jumpering has occurred in the exchange, in which case Telstra will subsequently need to remove the new jumper in the same way as it removes redundant jumpers after a ULLS disconnection.⁴⁸²
621. Agile agrees with the ACCC’s preliminary view that jumpering and associated costs should not be included within the cost base to be recovered through late withdrawal charges.⁴⁸³
622. In reply to Telstra’s submission, Agile submits that it can be concluded from Telstra’s submissions that Telstra does not necessarily incur the cost of the

⁴⁷⁴ Telstra OPM for ULLS, section 9.2.2 ‘Cutover testing for VULL’; section 9.3 ‘Provisioning targets’; and 11.7, ‘Retargets’.

⁴⁷⁵ CRA Table 167.11.

⁴⁷⁶ Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 4.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

⁴⁸² Ibid.

⁴⁸³ Herbert Geer Primary Submission, *ULLS late withdrawal charges*, 2 July 2009, p. 4.

relevant TOW in every case where a late withdrawal takes place.⁴⁸⁴ For instance, where the late withdrawal takes place two business days before cutover, Telstra is unlikely to have to pay for the TOW.⁴⁸⁵ Agile submits that it should not be assumed that Telstra is actually ‘out-of-pocket’ by having to pay for a TOW which relates to an order the subject of a late withdrawal as Telstra may be entitled to require the contractor to perform another job in lieu of the TOW which has been cancelled.⁴⁸⁶

623. Agile submits that to set the late withdrawal charges on the basis of VULLS costs as proposed by Telstra, would lead to Telstra being over-compensated.⁴⁸⁷ Agile submits that if the ACCC accepts Telstra’s submissions about jumpering costs, it would be appropriate for the ACCC, consistent with its benchmarking approach, to set late withdrawal charges only for IULLS and TULLS orders.⁴⁸⁸
624. Agile submits that consistent with the ACCC’s benchmarking approach, it may be appropriate to use the charge that the ACCC determines for a ‘single’ connection as the starting point for the charge it determines for a late withdrawal.⁴⁸⁹
625. Agile also submits that the starting point charge (i.e., charge for a ‘single’ connection) is fair and reasonable if the ACCC concludes that jumpering costs are a legitimate cost category for late withdrawal charges.⁴⁹⁰ Such an approach is also consistent with the ACCC’s benchmarking approach.⁴⁹¹

7.6.3. ACCC view

626. The ACCC notes that Telstra raises its concerns over the ACCC’s proposal not to include in the cost base the cost of jumpering tasks. In its submission Telstra argues that it has an obligation to pay the contractor at the agreed rate for jumpering. At the same time, Telstra states that it despatches TOW for ULLS jumpering, routinely on the day before the scheduled cutover date. This means, if the withdrawal request occurs less than two clear business days from the scheduled cutover date, Telstra in fact is not incurring this cost in relation to a late withdrawal. As such, a late withdrawal may incur some other charges such as an order withdrawal charge which are not in dispute and are in the CRA.
627. The ACCC in its Consultation Paper sought parties’ views on the scale and frequency of costs incurred and whether the cost differs between types of ULLS (i.e., IULLS, TULLS and VULLS). Telstra submits that it incurs higher costs in relation to VULLS but did not make submissions in respect of the

⁴⁸⁴ Herbert Geer Reply Submission, *ULLS late withdrawal charges*, 2 July 2009, p 3.

⁴⁸⁵ Ibid, pp. 3–4.

⁴⁸⁶ Ibid, p. 4.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

other requested information such as the scale and the frequency of such cost occurrences.

628. The ACCC considers that the instances of jumpering subject to late withdrawals should be minimal—as Telstra despatches TOWs routinely on the day before the scheduled cutover date and the ACCC is of the view that actual jumpering occurs on the day of the cutover. Based on Agile’s submission, which Telstra did not seek to correct, the ACCC considers that where jumpering has been allocated but not performed, Telstra maybe entitled to require the contractor to perform another job in lieu of the TOW which has ben cancelled.
629. Therefore, the ACCC does not intend to include jumpering and associated costs (travel, tool, vehicle and materials costs) in the cost base to be recovered through late withdrawal charges. This is consistent with the ACCC’s proposed approach outlined in its Consultation Paper.

7.7. Other matters relevant to setting costs

7.7.1. Front-of-house costs

630. The ACCC’s preliminary view was not to include in ULLS late withdrawal charges allowances for the cost of front-of-house work groups (including costs of staff involved in late withdrawal escalations). This reflects the preliminary view that these costs are already included in the cost pool that is recovered through monthly rental charges.
631. Telstra has not submitted its views on front-of-house costs other than its concern that it did not quantify these costs due to time constraints for making submissions.⁴⁹²
632. Agile supports the ACCCs view that front-of-house costs should not be included within the cost base to be recovered through late withdrawal charges.⁴⁹³
633. As stated previously in discussing back-of-house costs, the ACCC is satisfied that Telstra has had ample opportunity to make submissions concerning front-of-house costs. In the ACCC’s opinion, if Telstra had genuine concerns of its additional costs, it either could have submitted estimates of such additional costs later in the process or could have pointed out which of its previous submissions did include such additional cost information, without referring to its previous submissions in a broad manner. The ACCC notes that it did not inform parties that submissions lodged outside the timelines in the Direction would not be considered and it was open to parties to lodge relevant information. In the absence of such additional cost information, the ACCC has formed its views on the basis of the available cost estimates.

⁴⁹² Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 4.

⁴⁹³ Herbert Geer Primary Submission, *Late Withdrawal Charges*, 9 July 2009, p. 4.

634. Accordingly, the ACCC does not intend to include any front-of-house costs in the cost base to be recovered through late withdrawal charges.

7.7.2. Averaged or de-averaged charges

635. The ACCC's preliminary view was to determine ULLS late withdrawal charges on a geographically averaged basis. This reflects the preliminary view that relevant cost categories will concern back-of-house systems and processes, and hence the level of associated costs will not differ between geographic areas.

636. Telstra does not object to the ACCC's proposal to determine the charges on a geographically averaged basis.⁴⁹⁴

637. Agile agrees with the ACCC's view regarding the averaging of late withdrawal charges.⁴⁹⁵

638. In its reply submission, Agile submits that if the ACCC agrees with Telstra's view that jumpering costs are a legitimate cost category, then, consistent with the ACCC's approach relating to 'single' connection charges, it may be appropriate for the ACCC to determine ULLS late withdrawal charges on a de-averaged basis.⁴⁹⁶

639. The ACCC reaffirms its view from the Consultation Paper that it is appropriate to determine late withdrawal charges on a geographically averaged basis. The ACCC notes that neither party objected to the ACCC's view, indicating that the level of costs do not differ between geographical areas because relevant cost categories will only concern back-of-house systems and processes.

7.7.3. Bands 1, 2 and 3

640. The ACCC stated in its Consultation Paper that it did not intend to specify charges to apply to ULLS late withdrawal charges for Band 4. This reflects the view that there is little if any demand for ULLS connections in Band 4.

641. Agile while agreeing to the ACCC's preliminary view of not specifying late withdrawal charges for Band 4 observes that as it is the ACCC's preliminary view that it is appropriate to average late withdrawal fees on the basis that relevant cost categories will concern back-of-house systems and processes, and hence the level of associated costs will not differ between geographical areas, submits that there appears to be no reason, in principle, why the charges set by the ACCC for late withdrawal fees cannot also apply to Band 4.⁴⁹⁷

⁴⁹⁴ Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 4.

⁴⁹⁵ Herbert Geer Primary Submission, *Late Withdrawal Charges*, 9 July 2009, p. 4.

⁴⁹⁶ Herbert Geer Reply Submission, *Late Withdrawal Charges*, 9 July 2009, p. 5.

⁴⁹⁷ Herbert Geer Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 4.

642. Telstra does not object to the ACCC's approach to determine charges for Bands 1–3 only and refers to an earlier submission regarding band definitions.⁴⁹⁸
643. The ACCC agrees with Agile's view, in principle, that it could set late withdrawal charges for Band 4. However, at this stage the ACCC is of the view that it does not need to determine late withdrawal charges for Band 4 due to the lack of demand for ULLS connections in these areas.

7.7.4. Charges for late IULLS, TULLS and VULLS orders

644. The ACCC's preliminary view was to specify a charge to apply for the late withdrawal of all ULLS order types (IULLS, TULLS and VULLS). This reflects the preliminary view that costs associated with late withdrawals do not differ between ULLS order types.
645. The ACCC also suggested that if costs associated with the late withdrawal of VULLS orders exceed those for IULLS and TULLS late withdrawals, then it may be more appropriate to restrict the determination to apply to only IULLS and TULLS late withdrawals. This would be consistent with the ACCC's approach to 'single' connection charges.
646. Agile agrees with the ACCC's view.⁴⁹⁹
647. Telstra submits that the costs in relation to late withdrawal of VULLS are significantly higher than the other two types, TULLS and IULLS.⁵⁰⁰
648. The ACCC notes the claims made by Telstra that it incurs significantly higher costs in relation to the late withdrawal of VULLS and the majority of late withdrawals relate to VULLS. However, Telstra has not provided any cost estimates in relation VULLS late withdrawals to enable the ACCC to take this into consideration. Therefore, the ACCC is of the view that in the absence of a submission from Telstra outlining the cost figures and evidence to substantiate its claims, it is unable to determine otherwise.
649. Therefore, the ACCC is of the view that it should adopt its preliminary view and set late withdrawal charges that are to apply to all ULLS order types.

7.8. Proposed charges

7.8.1. Introduction

650. In its Consultation Paper, the ACCC proposed late withdrawal charges for the ULLS excluding Band 4 services as follows:

⁴⁹⁸ Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 5.

⁴⁹⁹ Herbert Geer Primary Submission, *Late withdrawal Charges*, 2 July 2009, p. 4.

⁵⁰⁰ Telstra Reply Submission, *Late Withdrawal Charges*, 2 July 2009, p. 2.

| Period | ULLS late withdrawal charges |
|--------------------------|-------------------------------------|
| 1 July 2005–30 June 2006 | \$ 15.60 |
| 1 July 2006–30 June 2007 | \$ 16.10 |
| 1 July 2007–30 June 2008 | \$ 16.70 |
| 1 July 2008–30 June 2009 | \$ 17.30 |
| 1 July 2009–30 June 2010 | \$ 17.90 |

651. The proposed prices are derived from adding the allowance for DAC and IDS work group costs provided in the ULLS ‘single’ connections cost model that was given to the parties in April 2009.
652. Having stated its preliminary views in its Consultation Paper on ‘ULLS late withdrawal charges’, the ACCC sought the parties’ submissions on the issues raised in it, asking the parties to also address the subsection 152CR(1) criteria and provide supporting information where relevant to support their arguments. Parties were also requested to outline the changes that should be made to the DFD should their submissions be accepted.

7.8.2. Submissions

653. Agile submits that it does not agree with the proposed charges, suggesting the modifications should be made to the ACCC’s approach and cost model regarding back-of-house costs in relation to ‘single’ connections charges.⁵⁰¹ Agile submits that the ACCC’s proposed charges are too high and proposed a revised IDS/DAC cost estimate of \$14.90 based on revised number of minutes and suggested the ACCC, in case it decides to set late withdrawal charges to use that estimate in determining costs in relation to ‘single’ connection charges.⁵⁰²
654. Agile submits that Telstra should not be permitted to recover the late withdrawal charge because the costs incurred by Telstra that arise from an order and late withdrawal of that order are recovered through the imposition of the standard order withdrawal charge.⁵⁰³ Therefore, allowing Telstra to recover the late withdrawal charge would allow Telstra to benefit from a windfall which cannot be justified under any of the statutory criteria.⁵⁰⁴
655. Telstra submits that its contractual charges are appropriate and that the ACCC should not consider setting late withdrawal charges.⁵⁰⁵ Telstra also submits that if the ACCC sets charges it should undertake a proper TSLRIC+ analysis of the actual costs associated with late withdrawals and that the ACCC’s approach of benchmarking the costs of a late withdrawal against the costs of a

⁵⁰¹ Herbert Geer Primary Submission, *ULLS Late Withdrawal Charges*, 2 July 2009, p. 4.

⁵⁰² Ibid, pp. 2–3.

⁵⁰³ Ibid, p. 5.

⁵⁰⁴ Ibid.

⁵⁰⁵ Telstra Primary Submission, *Late Withdrawal Charges*, 2 July 2009, p. 2.

TULLS and IULLS connection is likely to significantly underestimate Telstra's direct costs and should not be adopted.⁵⁰⁶

7.8.3. ACCC view

656. The ACCC notes Agile's view that the charges proposed by the ACCC in the consultation paper are too high and proposed revisions. However, for the reasons set out in section 7.3, the ACCC does not believe that it should apply the DAC times and related costs.
657. Further, the ACCC does not accept Agile's view that Telstra benefits from a windfall as the order withdrawal and late withdrawal charges apply in different circumstance. The ACCC also rejects Telstra's claims that the TSLRIC+ analysis is required to determine the costs due to the limited number of times the charges is incurred.
658. Accordingly, having considered the parties submissions, the ACCC consider it appropriate to adopt the charges set out in its Consultation Paper for late withdrawal charges.
659. The ACCC notes that in the Consultation Paper, late withdrawal charges were only proposed for the period up to and including 30 June 2010. However, in light of the ACCC's decision to set charges for the period until 31 December 2010 the ACCC has extended the 2009–10 charge until the expiry of the price schedules in the FD.
660. Accordingly, the ACCC sets the ULLS Late Withdrawal Charges as follows:

| Period | Charge per ULLS late withdrawal |
|--------------------------------|--|
| 2005–06 | \$15.60 |
| 2006–07 | \$16.10 |
| 2007–08 | \$16.70 |
| 2008–09 | \$17.30 |
| 2009–10 | \$17.90 |
| 1 July 2010 – 31 December 2010 | \$17.90 |

7.9. Assessment against subsection 152CR(1) criteria

661. The ACCC must take the subsection 152CR(1) criteria into account in making a FD. Not all of these criteria will be relevant to every particular issue that the ACCC must determine.
662. The ACCC notes that the parties did not make submissions addressing late withdrawal charges and the subsection 152CR(1) criteria.

⁵⁰⁶ Ibid.

7.9.1.Paragraph 152CR(1)(a)

663. Subsection 152CR(1)(a) concerns the LTIE. In assessing the late withdrawal charge terms against this criteria, the ACCC considers that it calls for consideration of a number of factors identified in section 152AB, being the objective of promoting competition, the objective of achieving any-to-any connectivity, the objective of encouraging the economically efficient use of and the economically efficient investment in infrastructure, and subsidiary matters (paragraphs 152AB(2)(c)–(e), subsection 152AB(4), paragraphs 152AB(6)(a)–(c), subsection 152AB(7A) and subsection 152AB(8)).
664. The ACCC considers that specifying a charge to apply for ULLS late withdrawals by aligning the ULLS charges with the efficient cost of supplying the ULLS will best promote competition in the industry and ultimately the LTIE. If charges faced by access seekers exceed the forward-looking efficient costs of providing the ULLS due to late withdrawals, access seekers would face higher charges based on costs that Telstra could avoid in the long-run. This would discourage efficient entry in downstream markets for voice and DSL services. Alignment with the efficient forward-looking costs for ULLS provisioning leads to conditions that allow the access provider and access seekers to compete in downstream markets on their relative merits.
665. The ACCC believes that the relevant costs related to ULLS late withdrawal is the DAC and IDS work group costs provided in the ULLS ‘single’ connections cost model and the charges proposed are derived from adding the allowance for DAC and IDS work group costs. Given submissions received on the DAC and IDS costs, the ACCC considers that the allowance proposed in the Consultation Paper is still appropriate.
666. In the context of late withdrawals, the ACCC considers that Telstra does not incur front-of-house costs, cancellation fees and jumpering and associated costs such as travel tool, vehicle and materials costs. Therefore, these costs should not be included in the cost pool to determine late withdrawal charges.
667. The ACCC is of the view that if an access seeker faces high late withdrawal charges in providing ULLS to its end-users, this will have a negative effect on competition. The ACCC considers that end-users should be able to change their mind within 2 days of cut-over, leading to the withdrawal of an order, without excessive charge, thereby promoting competition and being in the interests of end-users.
668. The ACCC does not consider that the approach adopted on this issue would significantly affect the objective of achieving any-to-any connectivity, the matters identified in paragraph 152AB(6)(a).
669. The ACCC considers that addressing late withdrawal charges in the FD encourages the efficient use of and investment in infrastructure, and is consistent with Telstra’s legitimate commercial interests. The ACCC considers the late withdrawal charge allows Telstra to recover its efficient forward looking cost of providing the ULLS, including a normal risk-adjusted return on capital employed.

670. This will also encourage the efficient use of and investment in infrastructure by access seekers, thereby promoting the LTIE. The ACCC considers that the current charge applied by Telstra would be likely to inhibit or hinder access seekers in investing in infrastructure. By allowing for a risk-adjusted rate of return, the ACCC has had regard to investment incentives (paragraph 152AB(6)(c)), and the risks involved in making these investments (subsection 152AB(7A)).
671. Telstra's legitimate commercial interests include its ability to exploit economies of scale and scope. The ACCC does not consider that the approach taken in setting the ULLS late withdrawal charges will directly affect those interests. The ACCC does not consider the use of DAC and IDS costs in relation to 'single' connections would underestimate efficient costs for connections. The ACCC considers that Telstra's legitimate commercial interests include its ability to recover its costs and make a normal commercial return on capital employed. The ACCC believes that the ULLS late withdrawal charges set by it are not below the unit costs that Telstra will incur due to late withdrawal of ULLS requests.

7.9.2.Paragraph 152CR(1)(b)

672. The next matter is the legitimate business interests of the access provider and its investment in the CAN which is used to provide the ULLS. This is related closely to the issue of Telstra's legitimate commercial interests. The ACCC considers that not allowing any cost component for late withdrawal of ULLS orders would be contrary to Telstra's legitimate interests. The ACCC's considers its approach leads to an amount that meets Telstra's legitimate business interests as it allows cost recovery for all late withdrawals that Telstra is required to perform. The ACCC further notes that despite its directions for parties to provide cost estimates in relation to late withdrawals, it did not receive such information, leading the ACCC to make its decision on the basis of information before it.

7.9.3.Paragraph 152CR(1)(c)

673. In relation to the criterion on the interests of all persons with rights to use the ULLS, the ACCC is of the view that access seekers' interests lie in being able to compete on their relative merits without being subject to unnecessary costs and being impeded in acquiring end-user customers. It is in ULLS access seekers' interests to pay charges that reflect the efficient forward-looking cost of connecting services and not the significantly higher charges that are currently imposed.
674. The ACCC's considers that its approach to setting charges for ULLS late withdrawals will secure the interests of access seekers by having to pay a charge that reflects the efficient and forward-looking costs for the late withdrawal of ULLS orders.

7.9.4.Paragraph 152CR(1)(d)

675. The fourth criterion is the direct cost of providing access to the declared service. It calls for consideration to be given to Telstra's ability to recover these costs. The ACCC refers to its discussion at Section 7.3 on assessment of efficient costs in light of the parties submissions. The ACCC's approach ensures that Telstra will be able to recover its efficient costs related to ULLS late withdrawals where it is required to perform such requests. The ACCC also notes that it has directed parties to provide any additional cost estimates that will apply for late withdrawals and in the absence of such additional information from the parties it has set the charges on the basis of information before it.
676. In its approach, the ACCC has allowed for Telstra to recover the direct costs of late withdrawals by basing it on the costs related to DAC and IDS work groups which perform activities necessary to carry out a ULLS late withdrawal.

7.9.5.Paragraphs 152CR(1)(e) and (f)

677. The next two matters are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirements necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility.
678. The ACCC also considers that the costs of extensions to Telstra's systems in order to perform ULLS late withdrawals have been taken into consideration in other charges, such as standard order withdrawal charges. In relation to the reliable operation of the carriage service, the ACCC does not consider that the late withdrawal charge materially affects this criterion.

7.9.6. Paragraphs 152CR(1)(g)

679. The last matter is the economically efficient operation of a carriage service, a telecommunications network or a facility. The ACCC considers that specifying a charge to apply for ULLS late withdrawals and aligning it with efficient cost of supply will promote the economically efficient operation of the ULLS while also allowing Telstra to recover its incurred back of house costs. This is because it allows end-users to change their mind within two days of cutover, leading to the withdrawal of an order, without excessive charge.

7.10. Commencement date, expiry date and interest

680. The ACCC has backdated the late withdrawal charges. Interest is payable on any under/over payments that has occurred. The term of backdating, and reasons for the approach have been discussed previously in section 4.4 of this Statement of Reasons.

8. Network Modernisation and Upgrade terms

8.1. Introduction

8.1.1. Background

681. A 'network modernisation and upgrade' is a change to the Telstra network. They include matters that have the potential to significantly disrupt services – such as the relocation of exchanges/nodes or altering the deployment class of equipment that the network will support – to matters that will have little consequence for the availability or quality of services. A network modernisation and upgrade could occur in response to an unforeseen change in circumstances and/or emergency, or could be undertaken in implementing planned network changes.

682. Parties in dispute with Telstra on this matter are:

- Optus, XYZed (referred to as Optus)
- Chime, Agile, Network Technologies and Amcom (represented by and referred to as the Herbert Geer parties)
- Request and Macquarie (represented by and referred to as Nicholls Legal parties)

8.1.2. Current terms and conditions of access

683. Network modernisation and upgrade terms are not the subject of IDs. These terms are currently the subject of Telstra's CRA or similar agreement:

- CRA 167 (clauses 5.5 to 5.13)
- x167 Service Schedule to the Access Agreement (clauses 7.5 to 7.10) (Request and Macquarie ULLS)
- Access Agreement (Schedule 167, clauses 7.5A to 7.11) (XYZed)
- Access Agreement (Schedule 42A, clauses 6.5 to 6.18) (Optus)

684. The standard access terms specify that Telstra will provide the access seeker with not less than [REDACTED] notice of network upgrades that may:

- require the relocation of a point of interconnection from exchange buildings closer to end users;
- alter the deployment class of access seeker equipment;
- require the truncation of services provided from traditional exchange buildings; or
- involve the installation of equipment closer to an end user than an exchange.

685. Telstra's standard agreement also specifies measures that the access seeker must undertake in order to continue to acquire the ULLS in the event of a network upgrade.

8.1.3. Prior consideration

686. The ACCC and the Australian Competition Tribunal (ACT) have previously considered network modernisation in the context of an access undertaking that Telstra proposed for the ULLS.⁵⁰⁷ The ACCC has more recently considered major network modernisation terms in the 2008 Model Terms⁵⁰⁸.

687. The ACCC, in accordance with subsection 152CR(2) of the Act, has taken the view that it can and should take its previous decisions into consideration in making FDs. The ACCC believes that it should adopt a consistent approach on recurring issues but also acknowledges that it must consult and explain any changes in approach to those issues where that change is appropriate.

688. Under section 152AQB, the ACCC is required to have regard to the 2008 Model Terms for core services (such as the ULLS).

689. In light of the submissions received in the initial consultation, particularly the significant scope of issues raised by Telstra, the ACCC considered it appropriate to revise the DFD and hold a Supplementary Consultation.

8.2. Initial Consultation

8.2.1. Introduction

690. The ACCC's position in its Initial Consultation paper⁵⁰⁹ was to adopt clause G of the 2008 Model Terms. The ACCC considered this was appropriate to address the terms that applied only to Major Network Modernisation and Upgrades (MNMU). In determining these access terms the ACCC considered the existing commercial arrangements between Telstra and the access seekers were not appropriate. In particular, the ACCC was concerned that the period of notice given to access seekers and the level of negotiation and consultation provided for major network modernisations was inadequate.

691. In the Initial Consultation the ACCC sought to address terms for major network modernisations of a single exchange service area (ESA) that may require the relocation of exchanges/nodes or alteration of the deployment class of equipment that the network will support. The terms consulted upon specified a minimum notification obligation on Telstra of six months (26 weeks) before any such modernisation and upgrade could be scheduled to take effect. This term was coupled with an obligation on Telstra to provide

⁵⁰⁷ *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3; ACCC, *Assessment of Telstra's ULLS monthly charges undertaking, Final Decision*, August 2006.

⁵⁰⁸ ACCC Report, *Final Determination—Model Non-Price Terms and Conditions*, November 2008, p. 21.

⁵⁰⁹ ACCC, *Consultation Paper on Final Determination, Network Modernisation and Upgrade Terms*, June 2009 (Initial Consultation).

‘equivalent’ notification when approving a network upgrade, i.e. Telstra was required to give an access seeker the same amount of notice as Telstra had.

692. The ACCC considered the application of clause G of the 2008 Model Terms should encourage greater consultation and negotiation between Telstra and access seekers and achieve agreement and mutual resolution on how network upgrades should be implemented.

8.2.2. Submissions

693. Submissions were received from parties outlining a number of concerns with the ACCC’s proposed terms. In particular, Telstra raised concerns that:⁵¹⁰

- there is no carve out for network upgrades in emergency situations
- the equivalence test provisions are vague and uncertain
- the required content for notification is unworkable
- the obligation to consult and negotiation is unrestricted, and
- it is unclear when the proposed notification procedures apply.

694. Access seekers similarly had concerns, although primarily focused on:⁵¹¹

- the minimum period notice period before a modernisation or upgrade should be at least 12 to 24 months
- Telstra should have an equivalent obligation not to withhold its consent to a greater notice period
- Clause 5 should be amended to require Telstra to negotiate in good faith, and
- the exclusion of coordinated capital works programs.

695. In addition, Telstra submits that it is not permissible for access seekers to vary their dispute notifications during the course of the arbitration to include additional issues in dispute and the dispute concerning network modernisation should be addressed via a separate notification (pursuant to section 152CM of the Act). Telstra submits that the ACCC should refrain from determining terms and conditions associated with network modernisation.⁵¹²

696. Telstra submits there has been an incremental expansion of the scope of access disputes over the course of this arbitration which is contrary to the ACCC’s statutory obligations to have regard to the desirability of access disputes being

⁵¹⁰ Telstra Initial Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 2 July 2009.

⁵¹¹ Optus and XYZed Initial Primary Submission, *Network Modernisation and Upgrade Terms*, 2 July 2009; Herbert Geer Initial Primary Submission, *Network Modernisation and Upgrade Terms*, 2 July 2009; Nicholls Legal Initial Primary Submission, *Network Modernisation and Upgrade Terms*, 2 July 2009.

⁵¹² Telstra Initial Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 2 July 2009, pp. 7–9.

resolved in a timely manner (subsection 152CLA(1) and to act as speedily as a proper consideration of the dispute allows (paragraph 152DB(1)(b)).⁵¹³ Telstra submits that it is difficult for participants to know which issues are in dispute and the critical factors on which the determination is to turn.⁵¹⁴ Telstra submits that this results in the risk that each participant may not have a reasonable opportunity to be heard.⁵¹⁵

697. The Herbert Geer parties submit that Telstra's submission is unwarranted and intended to frustrate the arbitration process and prevent the efficient resolution of access disputes.⁵¹⁶ Herbert Geer submits subsection 152CP(2) of the Act gives the power to the ACCC to deal with any matter in relation to the declared service including matters that were not the basis of notification in dispute including specifying other terms and conditions of the access seeker's access to the declared service.⁵¹⁷

698. The Herbert Geer parties also submit that while Amcom only disputed the period of notification the DFD dealt with broader matters.

8.2.3. ACCC view

699. Due to the scope of the issues raised by parties and following consideration of both the primary and reply submissions from the Initial Consultation, the ACCC considered it appropriate to revise the DFD and issue a Supplementary Consultation Paper.⁵¹⁸ The Supplementary Consultation is discussed in section 8.3.

700. The ACCC notes that subsection 152CP(2) of the Act allows the ACCC to deal with any matters relating to access by the access seeker that is not the basis of notification in each access dispute. The ACCC's view is that although certain aspects or issues related to network modernisation have not been notified in each dispute, the ACCC considers it is appropriate to canvas all the relevant issues via a consultation process to be able to make an informed determination on the relevant terms to apply for each access dispute.

701. The ACCC's view is that by canvassing and considering wider issues relevant to MNMUs in a joint arbitration hearing, this enables the ACCC to account for industry wide considerations that may be common to the arbitration of each access dispute. The ACCC does not consider there is an incremental expansion of the scope of the access disputes, and to the contrary the joint arbitration hearing merely provides the opportunity for access seekers to make submissions on all relevant matters before the ACCC makes a FD.

⁵¹³ Ibid, pp. 14–17.

⁵¹⁴ Ibid.

⁵¹⁵ Ibid.

⁵¹⁶ Herbert Geer Initial Primary Submission, *Network Modernisation and Upgrade Terms*, 2 July 2009, pp. 2-4.

⁵¹⁷ Ibid.

⁵¹⁸ ACCC, *Supplementary Consultation Paper on Draft Final Determination, Network modernisation and upgrade terms*, November 2009 (the Supplementary Consultation Paper).

702. The ACCC considers a joint arbitration hearing allows the ACCC to conduct an efficient process to consider all submissions necessary in making an informed determination and to resolve each access dispute. The ACCC's view is that the joint arbitration hearing allows parties to make submissions on all relevant matters in a structured process and to ensure there is reasonable opportunity to make and respond to submissions on all issues relevant to each access dispute.

8.3. Supplementary Consultation

703. As noted at section 8.2.3, in light of the submissions received in the Initial Consultation the ACCC conducted a Supplementary Consultation. In the Supplementary Consultation Paper, the ACCC indicated that parties should respond to the additional terms in the DFD. However, the ACCC did not restrict the parties to only responding to the new terms. Where parties submitted on an issue in the Supplementary Consultation and this was inconsistent with submissions from the Initial Consultation, the ACCC has taken the submission to the Supplementary Consultation as the primary view of the party.

8.3.1. Coordinated Capital Works Programs (CCWPs)

Introduction

704. In its Initial Consultation Paper, the ACCC did not specify terms to address unilateral capital works programs undertaken by Telstra to upgrade its network. However, the ACCC sought to address this anomaly that would allow Telstra to implement a capital works program with extended application in multiple ESAs without consulting or notifying access seekers.

705. In the Supplementary Consultation, the ACCC consulted on terms which imposed obligations on Telstra to:

- inform access seekers of intended capital works programs by publishing a three year forecast (updated every six months) outlining expected capital investments to be made over that period, together with the area affected and anticipated timeframes; and
- inform access seekers of CCWPs by giving them a Schedule (12 months in advance of anticipated commencement) detailing the extent of the capital works program and the expected impact on access seekers services.

Submissions

General

706. The Herbert Geer⁵¹⁹ and Nicholls Legal⁵²⁰ parties submit that they do not object to the inclusion of clauses which deal with the CCWP. However,

⁵¹⁹ Herbert Geer Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 6.

⁵²⁰ Nicholls Legal Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 1.

concerns are raised that the notice period should be consistent with the 24 months provided for in Telecom New Zealand's FTTN (cabinetisation) upgrade,⁵²¹ and not 12 months as currently provided for in the DFD.⁵²²

707. Telstra submits that while it considers the CCWP provisions unnecessary, if they are to be included the nature and scope of the terms should be reviewed.⁵²³ Specifically, Telstra submits:
- the scope of the CCWP provisions should be narrowed
 - information to be submitted as part of a CCWP schedule should be narrowed
 - greater time is required for the preparation of the initial CCWP forecast
 - CCWP schedules should only be provided to affected access seekers
 - confidentiality of information should be provided, and
 - Telstra should not be required to publish CCWP forecasts or schedules on its website.⁵²⁴
708. Telstra, in their reply submission, also considers that the ACCC's definition of a CCWP would require Telstra to determine the number of ESAs that a particular upgrade will affect at an early stage in order to comply with the forecast and notification obligations.⁵²⁵ Telstra considers that this may be extremely difficult and in some cases impossible.⁵²⁶

NBN carve out

709. Telstra notes that it had previously announced a proposed rollout of a fibre to the node (FTTN) network.⁵²⁷ In relation to the ACCC's proposed terms imposing obligations on Telstra to provide forecasts for, and notifications of CCWP, Telstra submits that it is its understanding that the provisions are intended to assist access seekers in their planning and investment decisions.⁵²⁸ However, since the previous round of consultation, it notes that the Commonwealth has announced its intention to establish a fibre-to-the-premises (FTTP) network, introducing legislation that is, in part, intended to

⁵²¹ New Zealand Commerce Commission, *Standard Terms Determination for Telecom's Unbundled Copper Local Loop Network Service, UCLL General Terms, Public Version*, 7 November 2007, p. 34 (New Zealand Terms).

⁵²² Herbert Geer Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009 p. 6, Nicholls Legal Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 1.

⁵²³ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, pp. 2–5

⁵²⁴ Ibid.

⁵²⁵ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 1.

⁵²⁶ Ibid.

⁵²⁷ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 2.

⁵²⁸ Ibid.

facilitate this.⁵²⁹ Telstra submits that there is now considerable uncertainty in relation to the final structure of the Government's roll-out of a FTTP network although what is clear is that a government controlled entity will be responsible for any FTTP rollout.⁵³⁰ It is therefore unclear to Telstra as to what the CCWP provisions are intended to address.⁵³¹

710. Telstra submits that given the circumstances the CCWP provisions were intended to capture and recent significant developments relating to the FTTP rollout, the CCWP provisions are unnecessary and should be deleted.⁵³²
711. In response, the Herbert Geer parties submit that the legislation introduced to facilitate the NBN is irrelevant to the issue of adequate provision being made for access seekers to have notification of CCWPs that are, by definition, not part of the NBN rollout.⁵³³
712. Optus rejects Telstra's submission that the CCWP provisions should be deleted and consider Telstra's previous FTTN plans as irrelevant.⁵³⁴ In their view, these provisions are intended to close a loophole and apply to upgrades to be undertaken in more than one ESA or to Telstra decisions to switch off its CAN in multiple ESAs.⁵³⁵
713. Telstra submits the scope of the proposed CCWP provisions is too broad because the concept of CCWP covers circumstances beyond a planned, significant rollout of FTTP and much of the information is likely to be subject to change and thus unlikely to provide certainty to access seekers.⁵³⁶
714. Telstra submits that it understands the ACCC's intention of the CCWP provisions to be to give access seekers adequate notice of a FTTN rollout so it can be considered in planning and investment decisions.⁵³⁷ However, Telstra contends that the current drafting goes beyond a FTTN rollout and would mean one-off upgrades which happen to impact on more than one exchange area would be covered by the provisions.⁵³⁸ Telstra cites an example of where a non-FTTN upgrade is caught by the proposed CCWP definition, but considers that as this type of upgrade is not part of a FTTN rollout it is not an upgrade that on its understanding is intended to be included by the ACCC.⁵³⁹
715. Telstra considers that given the broad definition of CCWP, neither the CCWP forecasts nor the CCWP schedules would provide access seekers with the

⁵²⁹ Ibid.

⁵³⁰ Ibid.

⁵³¹ Ibid.

⁵³² Ibid.

⁵³³ Herbert Geer Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 2.

⁵³⁴ Optus and XYXed Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 2.

⁵³⁵ Ibid.

⁵³⁶ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 3.

⁵³⁷ Ibid.

⁵³⁸ Ibid.

⁵³⁹ Ibid.

certainty desired outside of FTTN upgrades because planning for one off upgrades is likely to be more changeable and occur over shorter timeframes.⁵⁴⁰ Telstra also submits that the costs of complying with the FD as currently drafted would be inconsistent with the criteria in subsection 152CR(1).⁵⁴¹

716. The Nicholls Legal parties submit that the reference to the provision not including a NBN upgrade should be removed from the definition of a CCWP.⁵⁴² Access seekers consider that it is important that they are aware of any significant changes to the network which may affect their investment in and use of declared services.⁵⁴³
717. In response to the Nicholls Legal parties, Telstra submits that a carve out for the FTTP upgrade associated with any government sponsored NBN rollout remains necessary.⁵⁴⁴ Telstra reiterates its views that arrangements in relation to the NBN upgrade should be addressed in any government consultative process and that it would not be prudent for the FD to constrain any NBN implementation.⁵⁴⁵
718. In reply to Telstra, Optus submits that the CCWP provisions are intended to apply to circumstances broader than FTTN upgrades, and are intended to close a loophole relating to Telstra upgrading more than one ESA.⁵⁴⁶ Further, Optus submits that if the CCWP provisions are restricted only to a FTTN upgrade, it would defeat the purpose of including a CCWP provision in the DFD as Telstra will be able to upgrade its network in multiple ESAs without having to provide notice to access seekers.⁵⁴⁷ Optus submits that a greater notice period in the DFD will allow access seekers to plan and investigate options for continuing to serve their customers.⁵⁴⁸
719. In response to Telstra, the Herbert Geer parties submit that upgrades of the nature of FTTN that go beyond a FTTN rollout are the type of upgrades that should be captured by the CCWP provisions and disagree with Telstra's view that information provided pursuant to the CCWP provisions needs to be set in stone before it can be useful to access seekers.⁵⁴⁹
720. Telstra submits that if Telstra ceases to own or control the CAN during the period of application of the FD then the terms of the FD should be amended

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid.

⁵⁴² Nicholls Legal Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 1.

⁵⁴³ Ibid.

⁵⁴⁴ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 2.

⁵⁴⁵ Ibid.

⁵⁴⁶ Optus Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 3.

⁵⁴⁷ Ibid.

⁵⁴⁸ Ibid, p. 4.

⁵⁴⁹ Herbert Geer Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, pp. 3–4

and explicitly expressed to cease to apply.⁵⁵⁰ In reply, Optus does not object to the inclusion of such a term.⁵⁵¹ The Herbert Geer parties submit if Telstra ceases to own the CAN, it will not be conducting network modernisations to it and therefore the FD terms would not apply.⁵⁵² The Nicholls Legal parties submit there remains a high degree of uncertainty about the implementation of the NBN.⁵⁵³

Scope of provisions

721. Telstra submits that some of the information proposed to be provided pursuant to the CCWP provisions is already provided by Telstra in its Long Term Notification Report (LTNR).⁵⁵⁴ Telstra contends that the provision of this information under the CCWP provisions would impose additional costs upon Telstra, when some of that information (although in somewhat less detail) is already available to access seekers.⁵⁵⁵
722. The Herbert Geer parties consider that Telstra's LTNR is not an adequate substitute for the CCWP provisions.⁵⁵⁶
723. Optus considers that the CCWP provisions do not duplicate Telstra's existing obligations as there is different information in the CCWP provisions as compared with the LTNR, which Telstra admits is less detailed.⁵⁵⁷ In particular, the LTNR does not provide specific information on the affected ESAs and DAs.⁵⁵⁸
724. Accordingly, Telstra submits that the CCWP requirements should be limited to a planned, significant, coordinated network modernisation affecting more than one ESA, where an access seeker would be required to relocate their equipment from the exchange to an access point closer to the end-users premises.⁵⁵⁹
725. Optus rejects Telstra's claim that the CCWP provisions are inconsistent with the legislative criteria set out in subsection 152CR(1) as it considers that the

⁵⁵⁰ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 7.

⁵⁵¹ Optus and XYZed Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 14.

⁵⁵² Herbert Geer Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, p. 6.

⁵⁵³ Nicholls Legal Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p.1.

⁵⁵⁴ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, pp. 2-3..

⁵⁵⁵ *Ibid.*

⁵⁵⁶ Herbert Geer Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, p. 2.

⁵⁵⁷ Optus and XYZed Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, p. 2.

⁵⁵⁸ *Ibid.*

⁵⁵⁹ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 3.

benefits the CCWP provisions bring outweigh Telstra's costs in complying with the FD.⁵⁶⁰

CCWP Schedule Information

726. Telstra submits that the information requirements as set out in the DFD should be narrowed.⁵⁶¹ Telstra also submits that it may not be in a position to identify those services that *will* be affected by a CCWP 12 months in advance.⁵⁶² Instead, Telstra considers it would be more likely that it would have to provide the necessary information to those access seekers that *may* be affected.⁵⁶³ Telstra also observes that the Individual Notification process would identify those affected by a CCWP as notice is provided for under the Equivalent Period of Notice definition in clause 3 of the DFD.⁵⁶⁴ Accordingly, in circumstances where planning over a longer period is required, the obligation to provide information will also arise earlier and may arise more than 12 months in advance.⁵⁶⁵
727. In reply the Herbert Geer parties do not object to Telstra's proposed drafting changes to narrow the scope of the FD, which would see Telstra being required to provide information to those access seekers that *may* be affected.⁵⁶⁶
728. Optus disagrees with Telstra's arguments that the CCWP provisions lead to uncertainty and accepts that forecasts are subject to change.⁵⁶⁷ However, they consider that it is unlikely that a project once notified would be deleted from Telstra's modernisation program, since the underlying reasons for upgrade remain.⁵⁶⁸ Further, Optus submits that it is willing to bear this risk.⁵⁶⁹ Optus considers that the CCWP provisions promote equivalence of information between Telstra and access seekers.⁵⁷⁰

Time required for preparation of the initial CCWP forecast

729. Telstra submits 60 days is necessary to prepare an initial CCWP forecast.⁵⁷¹ In reply Optus submits that the information relied on in the CCWP forecast is

⁵⁶⁰ Optus and XYZed Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

⁵⁶¹ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 4.

⁵⁶² Ibid.

⁵⁶³ Ibid.

⁵⁶⁴ Ibid.

⁵⁶⁵ Ibid.

⁵⁶⁶ Herbert Geer Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, p. 4.

⁵⁶⁷ Optus and XYZed Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 4.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid.

⁵⁷⁰ Ibid.

⁵⁷¹ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 4;.

readily available to Telstra and even if it was not ‘business as usual’ information, it would only take 10 ‘man’ days to produce.⁵⁷²

730. In reply to Telstra, the Herbert Geer parties submit that it is likely Telstra already has detailed information about its major network modernisation plans in all ESAs and that this information is readily available for use by Telstra business units.⁵⁷³ The Herbert Geer parties acknowledge that it may take some time for Telstra to re-format the information in a manner that would comply with its obligations under an FD.⁵⁷⁴ However, they consider that Telstra has had advance notice of this requirement through the DFD and consultation papers and therefore it is open for Telstra to commence any preparatory work prior to the FD being made.⁵⁷⁵

CCWP Schedules should only be provided to affected Access Seekers

731. Telstra considers that the ACCC’s intention was that only access seekers affected by the relevant CCWP should receive the related schedule.⁵⁷⁶ Telstra submits that to the extent that it is required to provide the information to access seekers (outside of this arbitration) and for whom it is irrelevant, it is arguable that it is beyond the scope of the ACCC’s powers under section 152CP of the Act.⁵⁷⁷
732. Telstra also considers that information in the CCWP Schedule should not be provided to parties who have already been provided an Individual Notification for the same project, thereby limiting duplication.⁵⁷⁸
733. The Herbert Geer parties, in reply, consider that Telstra hold a significant competitive advantage over access seekers by being able to control the timing of network upgrades, while access seekers are at a competitive disadvantage due to the risk of assets being stranded.⁵⁷⁹ In their view, the provision of the CCWP schedule does not adequately address these risks if the information is only provided to access seekers that hold existing services.⁵⁸⁰ Such information may be of significant assistance to an access seeker who does not have any services within the relevant ESA in guiding its future investment decisions.⁵⁸¹ The Herbert Geer parties also see utility in the provision of the CCWP schedule and the Individual Notifications as there is some information

⁵⁷² Optus and XYZed Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, p.5.

⁵⁷³ Herbert Geer Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, p. 4.

⁵⁷⁴ Ibid.

⁵⁷⁵ Ibid.

⁵⁷⁶ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 4.

⁵⁷⁷ Ibid.

⁵⁷⁸ Ibid.

⁵⁷⁹ Herbert Geer Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 4.

⁵⁸⁰ Ibid, p. 5.

⁵⁸¹ Ibid.

included in the CCWP schedule which would not otherwise been made available.⁵⁸²

734. Optus, in response to Telstra, considers that the CCWP schedules should be provided to all access seekers and not just those who will be affected by the changes.⁵⁸³ Optus considers that allowing all access seekers to have access to the plans provides certainty and allows access seekers to consider their expansion plans in terms of Telstra's proposed upgrades.⁵⁸⁴
735. Optus also rejects Telstra's claim that it is unnecessary to provide access seekers a CCWP schedule followed by an Individual Notification.⁵⁸⁵ Optus considers that the CCWP schedule is general in nature, does not provide the same level of detail and Telstra has no obligation to update them when they have new information, unlike what Telstra is required to provide under the Individual Notification.⁵⁸⁶

Confidentiality of information in the CCWP forecast or schedule

736. Telstra submits that any information provided to access seekers as part of the CCWP forecasts or schedules should be subject to confidentiality obligations and limitations on its use and disclosure.⁵⁸⁷ In its view, if such protection is not provided the FD would fail to give weight to Telstra's legitimate interests in protecting its commercially sensitive business and investment plans.⁵⁸⁸
737. While acknowledging Telstra's desire to seek to protect its confidential information, the Herbert Geer parties submit that if parties cannot use the information outside of these arbitrations then the provisions will be of no practical use.⁵⁸⁹ Restrictions on being able to provide reasonable advice to customers about disruptions will be detrimental to the customers and cause significant damage to the access seeker's business reputation.⁵⁹⁰

Publication of forecasts or schedules on Telstra's website

738. Telstra submits that a FD which requires it to publish CCWP forecasts and schedules on its website would be outside the ACCC's power under section 152CP because the obligation would be to provide the information on an

⁵⁸² Ibid.

⁵⁸³ Optus and XYZed Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 9.

⁵⁸⁴ Ibid.

⁵⁸⁵ Ibid, p. 10.

⁵⁸⁶ Ibid.

⁵⁸⁷ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

⁵⁸⁸ Ibid.

⁵⁸⁹ Herbert Geer Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

⁵⁹⁰ Ibid.

industry-wide basis and not the subject of the bilateral disputes before the ACCC.⁵⁹¹

739. Telstra also submits that requiring the broad publishing of this data would be inconsistent with subsection 152CR(1)(b) of the Act, particularly where competing carriers that do not acquire the relevant service can obtain long-range information about Telstra's future investment plans.⁵⁹² Telstra therefore submits that the publication obligations should be removed.⁵⁹³
740. Optus considers, in response to Telstra, that the information should be available to all parties including end-users more generally.⁵⁹⁴ Optus does not consider this provision would be inconsistent with paragraph 152CR(1)(b) of the Act.⁵⁹⁵
741. The Herbert Geer parties submit that should the ACCC agree with Telstra's contention, then it should consider whether it could achieve its desired outcomes of publishing the forecasts and schedules through the use of Division 6 of Part XIB of the Act.⁵⁹⁶

Coordinated Capital Works Program forecasts

742. Optus submits that it supports that ACCC's inclusion of terms which require Telstra to provide access seekers with a written three year CCWP forecast, with updates provided every six months.⁵⁹⁷ Optus considers that this requirement is within the LTIE.⁵⁹⁸
743. Optus acknowledges that the forecast may change, however, consider access seekers would have early notice of plans and be able to make contingency arrangements.⁵⁹⁹ Optus also considers that the CCWP forecasts assist to ensure equivalence with Telstra.⁶⁰⁰
744. Optus submits however, that to further promote equivalence Telstra should be required to immediately provide all access seekers with an updated forecast when updates are made to its CCWP and update its website with this information.⁶⁰¹

⁵⁹¹ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

⁵⁹² Ibid.

⁵⁹³ Ibid.

⁵⁹⁴ Optus and XYZed Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 12.

⁵⁹⁵ Ibid.

⁵⁹⁶ Herbert Geer Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

⁵⁹⁷ Optus and XYZed Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 2.

⁵⁹⁸ Ibid.

⁵⁹⁹ Ibid.

⁶⁰⁰ Ibid, pp. 2–3.

⁶⁰¹ Ibid, p. 3.

745. In response, Telstra submits that the interpretation of “all access seekers” is not clear.⁶⁰² Telstra submits that for clarity, the FD should be amended to ensure Telstra is only obliged to provide the CCWP forecast and updates to the access seeker that has the benefit of this particular FD.⁶⁰³ Telstra also raises concerns with the term “immediately” as it is ambiguous.⁶⁰⁴ As such, Telstra considers that if the ACCC were to accept Optus’ proposed amendment, it should be changed to “as soon as practicable”.⁶⁰⁵
746. Telstra reiterates its view that the publication of the CCWP forecasts on its website is outside the ACCC’s arbitral powers under section 152CP of the Act.⁶⁰⁶
747. In relation to the information contained in the CCWP forecast, Optus submits that while it is generally satisfied, further information should be provided in relation to whether Telstra’s investment plans are likely to affect the provision of ULLS and how it would be affected.⁶⁰⁷ Optus submits that this information would assist the access seeker in preparing for and responding to an upgrade.⁶⁰⁸
748. In response, Telstra considers Optus’ proposed additional requirement unnecessary, because by their nature CCWPs will affect the supply of ULLS, and there is unlikely to be accurate or precise information available at the time the CCWP forecast is prepared.⁶⁰⁹ As such, Telstra considers that such information is unlikely to provide access seekers with certainty.⁶¹⁰
749. Optus submits that the ACCC should include a clause similar to the MNMU term in relation to negotiating in good faith.⁶¹¹ Optus proposes that the clause should restrict Telstra from implementing a CCWP within three years of the date of the FD and after that only if Telstra has complied with the relevant forecasting and notification clauses and negotiated in good faith with an access seeker in addressing any reasonable concerns the access seeker may have.⁶¹² Optus submits that this promotes certainty for an access seeker as it ensures Telstra’s compliance with the requirements of the FD before it conducts any co-ordinated capital works.⁶¹³

⁶⁰² Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 4.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid, p. 5.

⁶⁰⁵ Ibid.

⁶⁰⁶ Ibid.

⁶⁰⁷ Optus and XYZed Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 3.

⁶⁰⁸ Ibid.

⁶⁰⁹ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 5.

⁶¹⁰ Ibid.

⁶¹¹ Optus and XYZed Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 4.

⁶¹² Ibid.

⁶¹³ Ibid.

750. In reply Telstra submits that Optus' proposal is unnecessary given Telstra's obligations to consult with regard to MNMUs (which includes a CCWP).⁶¹⁴ Telstra submits that the imposition of an additional obligation to consult in respect of CCWPs will simply duplicate the obligations to consult under clause 1(b) [of the DFD].⁶¹⁵ Telstra also submits that due to the uncertain nature of the CCWP forecasts and schedules prior to funding approval, it would be hasty to engage in consultation when many of the details are unknown or likely to change.⁶¹⁶
751. Telstra also submits that Optus' proposed new clause is inappropriate and problematic because:
- FDs cannot continue to have effect after they have expired;
 - it is not clear if Optus' proposal means no CCWP can be undertaken unless Telstra complies with clauses 12 to 15 of the DFD, effectively making the forecast binding. In response to Optus' proposals, Telstra considers:
 - the New Zealand FTTN-type cabinetisation arrangements (New Zealand Terms) are indicative, not binding;
 - forecasts are based on indicative investment plans which are inherently uncertain; and
 - a three year binding forecast would be unworkable and unreasonable, particularly if there are changes outside of Telstra's control and/or a more cost effective alternative is developed that is less likely to affect an access seeker.⁶¹⁷
752. Telstra submits that it would be unreasonable for programs planned prior to the FD being delayed.⁶¹⁸ Telstra seeks that the ACCC's FDs should be expressed to have no application to CCWPs for which funding approval has been given prior to the date of the FD.⁶¹⁹ Telstra submits if the ACCC were to adopt Optus' proposal for negotiations in good faith, there should be a requirement that consultation cannot delay implementation.⁶²⁰ As such, Telstra proposes that clause 21 of the DFD should be amended to make it clear that it applies to negotiations under both clause 1(b) [of the DFD] and any new clause relating to CCWPs.⁶²¹

Coordinated Capital Works Program schedules

753. Optus, the Herbert Geer parties and the Nicholls Legal parties submit that the 12 month notice period specified in the DFD is too short and 24 months is

⁶¹⁴ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 2.

⁶¹⁵ Ibid.

⁶¹⁶ Ibid, p. 3.

⁶¹⁷ Ibid, pp. 5–6.

⁶¹⁸ Ibid, p. 4.

⁶¹⁹ Ibid.

⁶²⁰ Ibid, p. 3.

⁶²¹ Ibid, p. 4.

more appropriate and in line with the New Zealand Terms relied upon by the ACCC.⁶²² In reiterating its views from the initial consultation, Optus submits that a 12 month notice period is not appropriate in the event the access seeker is required to build new infrastructure and migrate customers to a new platform.⁶²³

754. Telstra, in response, considers that there are subtle differences between the ACCC's DFD and the New Zealand Terms.⁶²⁴ Primarily in the New Zealand Terms, the requirements relate to the upgrade of a network on a national basis whereas the ACCC's definition of CCWP would capture any planned upgrade across two or more exchanges.⁶²⁵ The New Zealand Terms also have a stand alone notice period, unlike in the ACCC's DFD where the obligation to provide a CCWP schedule 12 months in advance is coupled with an obligation to provide an Equivalent Period of Notice.⁶²⁶
755. Optus submits the impact on access seekers will depend on the number of ESAs affected and the number of ULLS affected in each ESA.⁶²⁷ As such, the greater the number of lines affected the greater notice that will be required.⁶²⁸
756. Optus submits that Telstra should be prohibited from conducting a CCWP which affects more than five ESAs in a calendar year.⁶²⁹
757. Telstra objects to this proposal from Optus and considers:
- the threshold of five ESAs appears arbitrary
 - in any given set of exchanges the subject of a CCWP, it is unclear how many access seeker services would be affected and therefore it would be inappropriate to prohibit all CCWPs spanning more than five ESAs where there would be little impact on access seekers or no access seekers would be affected
 - it would not be in the LTIE to restrict the number of ESAs in which Telstra may implement a CCWP.⁶³⁰
758. Telstra submits that Optus fails to adequately balance the interests of Telstra in implementing upgrades in a timely and efficient manner and the benefits that

⁶²² Optus and XYZed Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 4; Herbert Geer Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 6; Nicholls Legal Supplementary Primary Submission, *Network Modernisation*, 16 November 2009, p. 1.

⁶²³ Optus and XYZed Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 4.

⁶²⁴ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 2.

⁶²⁵ Ibid.

⁶²⁶ Ibid, pp. 3–4.

⁶²⁷ Optus and XYZed Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 5.

⁶²⁸ Ibid.

⁶²⁹ Ibid.

⁶³⁰ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 6.

flow from the upgrades for the long-term benefit of the highest possible number of end users.⁶³¹

759. Optus submits that if the ACCC rejects its arguments to apply a 24 month notice period in the event of a CCWP and/or rejects that Telstra should be prohibited from conducting CCWP which affects more than five ESAs, then an alternative would be for the ACCC to require Telstra to provide:
- a minimum 12 month notice period if the upgrade involves two to five ESAs and an alternative service is available for access seekers to migrate their customers across;
 - a minimum 24 month notice period if the upgrade involves two to five ESAs and an alternative service is not available;
 - a minimum 24 month notice period if the upgrade involves more than five ESAs and an alternative service is available; and
 - a minimum 36 month notice period if the upgrade involves more than five ESAs and an alternative service is not available.⁶³²
760. The minimum timeframes submitted are considered by Optus to allow it to take appropriate action in response to an upgrade through migrating customers to a new platform or building new infrastructure, without being forced to hand back all of the customers to Telstra.⁶³³
761. Telstra in response to Optus' proposed tiered approach, strongly rejects this proposal as they consider it is unworkable and fails to strike a balance between the interests of access seekers and the interests of end users.⁶³⁴ Specifically, Telstra considers that it would have to determine up to three years in advance whether alternative services will be available, and that it is difficult to know how many ESAs a particular CCWP will affect, a long time in advance.⁶³⁵
762. Telstra also submits that it remains of the view that the Equivalent Period of Notice to be given for General Notifications (with an Individual Notification following as soon as practicable after the General Notification) would mean that access seekers will obtain as much notice as Telstra in relation to MNMUs and should provide access seekers with sufficient advance notice to address their customers' needs, including migration to another platform.⁶³⁶
763. While Optus supports the information which is required to be provided by Telstra to access seekers through the CCWP schedule, Optus considers that Telstra should be required to provide additional information including:

⁶³¹ Ibid, p. 7.

⁶³² Optus and XYZed Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 5.

⁶³³ Ibid, p. 6.

⁶³⁴ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 7.

⁶³⁵ Ibid.

⁶³⁶ Ibid, p. 8.

- the ESA and DA affected
 - Telstra’s plan for the CCWP for each ESA
 - the access seeker’s ULLS in that exchange that will be affected
 - the expected impact of the CCWP on the access seekers’ ULLS and the anticipated timeframe for the implementation of the CCWP.⁶³⁷
764. Optus submits that clause 17(c) of the DFD should include a requirement on Telstra to include an approximate date when the services will cease, and the date that Telstra will cease accepting orders for the service at the exchange.⁶³⁸
765. In response, Telstra reiterates its view that any additional information requirement is unlikely to assist access seekers because there will be instances where Telstra can only identify services that may be affected, not will be affected.⁶³⁹ However, Telstra considers that should the ACCC wish to include a further information requirement, Telstra would not object to providing an estimate of the earliest date upon which services may cease and/or Telstra will cease accepting orders, provided this is expressed to be indicative only and not binding.⁶⁴⁰
766. Optus reiterates its Initial Consultation submission that the ACCC should stipulate in the FD that Telstra should not be able to use the required notice period as a pretext for ceasing to supply access seekers with new services.⁶⁴¹
767. In response, Telstra rejects Optus’ contention and considers that should the ACCC be minded to specify a point from which orders may be rejected, it does not object to the point in time proposed by Optus, that is 15 weeks from the expected cutover date for rejection of new service orders.⁶⁴²
768. Optus submits that for clarity, an additional clause should be added to ensure Telstra’s compliance with the FD.⁶⁴³ Optus considers that the clause should make it express that, with respect to CCWPs, both the CCWP and MNMU notification requirements would apply.⁶⁴⁴ Telstra submits it has accepted this interpretation and does not object to Optus’ suggestion.⁶⁴⁵

⁶³⁷ Optus Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 7.

⁶³⁸ Ibid.

⁶³⁹ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 9.

⁶⁴⁰ Ibid.

⁶⁴¹ Optus and XYZed Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 8.

⁶⁴² Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 9.

⁶⁴³ Optus and XYZed Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 8.

⁶⁴⁴ Ibid.

⁶⁴⁵ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 9.

ACCC view

769. The ACCC considers the FD terms in relation to CCWP schedules and forecasts provide valuable information necessary to enable access seekers to make informed business and investment decisions in relation to declared services. The ACCC considers the terms of the FD reflect a balance between the interests of Telstra in upgrading its network and the access seekers interests in having sufficient notice to incorporate relevant information of any such network upgrade into investment decisions and business decisions which may its affect the use of declared services.
770. The ACCC considers that the CCWP provisions should generally apply to planned, significant, coordinated network modernisation affecting more than one ESA, where an access seeker would be required to relocate their equipment from the exchange to an access point closer to end-users premises. The ACCC considers the CCWP provisions should capture situations where Telstra upgrades its network to provision FTTN/P, separately from the Government's proposed NBN rollout, and also where the ULLS is decommissioned as a result of a unilateral capital program by Telstra.
771. As the outcome of the NBN process is at this stage uncertain the ACCC does not seek to pre-empt the government's plans for a NBN rollout. Accordingly, the terms in the FD are not intended to apply to the Government planned NBN capital works program. The ACCC considers that the arrangements that should apply under such circumstances are more appropriately addressed as part of the NBN process.
772. The ACCC does not consider the terms of the FD specified are a duplication of Telstra's existing reporting obligations under its LTNR and that the information specified in the CCWP schedule and forecast contains information that is of a different type and specificity to existing reporting requirements. The ACCC considers Telstra is able to use the information it already has collated for the LTNR in carrying out upgrades and should incur no additional expense in preparing this information. Therefore, the ACCC considers as there should be minimal or no direct costs the utility and benefit in such information being provided outweighs any cost or detriment associated with the compliance with these reporting obligations by Telstra.
773. The ACCC notes Telstra's concern in relation to the utility of information based on indicative plans that may be subject to change and the inherent uncertainty of such information. However, the ACCC considers that in the absence of obligations to provide information about indicative investment plans or minimum timeframes stipulated for planned CCWPs the access seekers would be deprived of necessary and valuable information to make informed business and investment decisions in relation to declared services. The access seekers acknowledge that the provision of such information by Telstra is subject to change but still consider some notice would be preferable even if the circumstances in which that information was provided changes. The ACCC considers the provision of such information and notification obligations enables access seekers to make more informed decisions that would enhance competitive outcomes and be in the LTIE.

774. The ACCC notes that providing information on CCWPs as prescribed will require an assessment of the ESAs and the DAs affected and will necessitate an assessment of the likely implications on an ESA and the scope of a planned CCWP. As previously noted, the ACCC considers there is utility in the access seekers receiving information resulting from the assessments and notification which permits better informed decision making in regard to investment in infrastructure. The ACCC view is that improved availability of information relevant to making these decisions would promote investment in infrastructure and result in better competitive outcomes in the telecommunications industry.
775. The ACCC does not accept it should narrow the scope of the existing definition of CCWP to address a particular type of upgrade. The type of upgrades CCWP provisions contemplate concern the relocation of access seeker equipment from an exchange to an access point closer to an end user or the decommissioning of a declared service. The ACCC considers that to address a particular type of network modernisation or upgrade may unduly limit the scope of the application of the FD.
776. The ACCC considers that access seekers other than the parties to the dispute have a legitimate interest in receiving information contained in CCWP schedules and forecasts. However, the ACCC does not intend to extend the application of the FD terms to include parties who have not notified network modernisation and upgrade terms as being an issue in dispute.
777. The ACCC notes Telstra's concern that the information contained in the CCWP forecasts and schedules may contain commercially sensitive information. However, the ACCC does not accept that it is appropriate to extend the confidentiality directions of this arbitration. The ACCC notes the requirements in the DFD to publish CCWP forecasts and schedules on its website would make the information available to a broader public. The ACCC however, accepts Telstra's concerns and interests in limiting the disclosure of potentially sensitive information and considers that Telstra should not be required to publish that information to the extent that any of the information is confidential. The ACCC considers Telstra could also make such information available to other access seekers where it could control conditions of access and use of this information, although it has not mandated this through the FD.

Coordinated Capital Works Program forecasts

778. The FD requires Telstra to provide a CCWP forecast for three years in advance describing generally Telstra's indicative investment plans (as at the date of the forecast). In making CCWP forecasts Telstra is required to make an evaluation of the impact of such plans on individual ESAs and DAs and specify anticipated timeframes for implementation of CCWPs. Telstra is required to regularly update the CCWP forecast at not less than six month intervals for the duration of the FD.
779. The FD requires the initial forecast to be made at the commencement of the FD. As there is a lead in time of 21 days (subsection 152DN(1) of the Act) before the FD comes into effect, the ACCC considers that there is sufficient time to plan and prepare an initial CCWP forecast.

780. The ACCC considers that an obligation to provide a CCWP forecast on the basis of indicative investment plans will provide valuable information relevant to access seekers and give them the ability to make informed investment and business decisions in relation to the declared services. The ACCC notes the limitation of such information is its inherent uncertainty which may have subsequent implications for its usefulness and reliability. However, the ACCC considers on balance, such information is valuable to access seekers.
781. The ACCC's view is that it is unreasonable to impose on Telstra a binding forecast based on long range investment plans which in the ACCC's opinion would be problematic and unworkable. The ACCC considers that it is a fact that such plans can be inherently uncertain and subject to change because of circumstances beyond Telstra's control which may affect the feasibility of a particular CCWP being implemented.
782. The ACCC requires Telstra to comply with the notification requirements in the FD for network upgrades where capital expenditure has already been allocated and the minimum timeframes for notification have not yet elapsed. The ACCC considers the notification obligations for CCWP schedules are to apply prospectively and that access seekers should receive the benefit of MNMU information requirements i.e., Telstra is required to comply with the notification obligations and ensure access seekers receive all relevant information from the date the FD comes into effect. The ACCC considers that the terms should not apply to existing projects where capital expenditure has been allocated and where the minimum timeframes for the notification periods have already elapsed.
783. The ACCC considers that the obligation to negotiate in good faith should be extended to CCWP forecasts, but has limited this obligation so as not to delay implementation of a CCWP.

Coordinated Capital Works Programs schedules

784. The FD prescribes that Telstra must provide a written CCWP schedule to the access seeker by giving notice not less than 12 months before the expected commencement date of a planned capital works program. In the schedule, Telstra must use its best endeavours to provide an assessment of:
- ESAs and DAs affected;
 - Telstra's plan for each ESA;
 - how the access seeker's ULLS in that exchange will be affected;
 - the expected impact on the Access Seeker's ULLS; and
 - the expected timeframe for the implementation of the CCWP.
785. The ACCC recognises that there will be difficulty in making an assessment of the exact services affected 12 months in advance. However, the ACCC considers that Telstra should use its 'best endeavours' to make an assessment of the services that will be affected.

786. The ACCC considers a 12 month minimum timeframe for a CCWP is appropriate. The ACCC considers that it should not unduly restrict Telstra's ability to invest and upgrade its network and that a 12 months minimum is appropriate given the rate of technological innovation and the timeframes required to make investment and planning decisions regarding implementation of capital upgrades.
787. The ACCC notes the access seekers concerns in relation to a minimum timeframe and has addressed the situation where CCWP upgrades require more notification than the minimum timeframe. In these circumstances, access seekers should receive an Equivalent Period of Notice once Telstra has approved and allocated capital expenditure of a CCWP. This should ensure that access seekers receive the required notice.
788. The ACCC does not consider that Optus' proposed multi-tiered approach to notice periods in relation to the number of ESA subject of a CCWP upgrade is workable. The ACCC does not consider a prohibition on Telstra conducting a CCWP which affects more the five ESAs in a single year is reasonable and would obstruct Telstra in implementing upgrades in a timely and efficient manner which would have significant adverse consequences for the network overall.
789. The ACCC considers that providing detailed information on when services will cease to be available is useful information for an access seeker to have. However, the ACCC does not consider information of such a detailed nature is appropriate to be included in a CCWP schedule due to uncertainties associated with the longer timeframe of CCWP schedules. Instead the ACCC has determined this information is to be included in MNMU notifications.

8.4. Emergency Network Modernisation and Upgrades

8.4.1. Introduction

790. The terms for Emergency Network Modernisation and Upgrades (ENMUs) were introduced in the Supplementary Consultation Paper to address arrangements where network modernisation and upgrades occur in response to emergencies. The terms in the DFD permitted Telstra to conduct a MNMU where it was a reasonable response to an emergency and specify the notification requirements that apply to such situations.

8.4.2. Submissions

791. Telstra submits that it supports the terms in the DFD that exclude emergencies from the notification requirements of other MNMUs.⁶⁴⁶ Telstra considers regardless of how an emergency upgrade becomes necessary, it should be entitled to take timely, if not immediate, action to avoid or remedy it.⁶⁴⁷ Further, in reply submissions Telstra submits that while the issue may not

⁶⁴⁶ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 5.

⁶⁴⁷ *Ibid.*

have been specifically raised by access seekers, it is a matter that is integral to the question of the terms and conditions to apply in relation to network modernisations and upgrades.⁶⁴⁸ Telstra submits that emergency upgrades are so fundamental that the ACCC could not sensibly determine terms and conditions for MNMUs without giving consideration to how those terms should apply in an emergency.⁶⁴⁹

792. The Herbert Geer parties submit that they do not consider it is necessary for the FD to include a carve-out for EMNUs.⁶⁵⁰ However, they do not object to the inclusion of the terms provided the following principles are adhered to:

(i) there is a strict causative link between an emergency and the need for Telstra to undertake the upgrade; and

(ii) the upgrade is a proportionate response to the emergency.⁶⁵¹

793. Optus submits that a carve-out for emergency upgrades is not an issue in dispute between the parties and considers that most emergencies will not require a network modernisation in response.⁶⁵² Optus submits if the provision is included in the FD then an emergency network modernisation should only occur where it is reasonably necessary to do so in response to an emergency.⁶⁵³ Optus submits that Telstra should not be allowed to upgrade its network and render the declared services permanently unavailable if an alternate solution is available to rectify a fault.⁶⁵⁴ Optus considers that if this were not the case Telstra could upgrade its network in response to any emergency whether or not this was reasonable.⁶⁵⁵ Optus submits that the definition of EMNU should mean an upgrade that is necessary due to changes that are permanently required to the Telstra network or configuration as a result of the emergency.⁶⁵⁶

794. In reply, Telstra considers that if the ACCC were to agree with Optus, Telstra's ability to comply with its regulatory obligations and the provision of services and timely fault rectification may be hampered.⁶⁵⁷ Telstra gives the these reasons:

⁶⁴⁸ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 9.

⁶⁴⁹ Ibid.

⁶⁵⁰ Herbert Geer Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 6.

⁶⁵¹ Ibid.

⁶⁵² Optus and XYZed Supplementary Primary Submission, *Network Modernisations and Upgrade Terms*, 9 July 2009, pp. 1–2; Optus and XYZed Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, p. 13.

⁶⁵³ Optus and XYZed Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 1.

⁶⁵⁴ Ibid.

⁶⁵⁵ Ibid.

⁶⁵⁶ Ibid.

⁶⁵⁷ Telstra Supplementary Reply Submission, *ULLS Major Network Modernisation and Upgrade Terms*, 23 November 2009, p. 11.

- The ACCC has previously recognised that Telstra has a right to modernise its network and there has never been a suggestion that the right to acquire the declared service lasts indefinitely and is unconfined. Telstra submits there has never been any suggestion that it cannot modernise its network if there is an alternative available.
 - Optus fails to consider the time-critical characteristics of ENMUs, and the fact that such upgrades are undertaken in circumstances where an urgent response is required.
 - It would not be reasonable to require Telstra to delay any action until it had identified a range of alternatives and assessed the impact upon each access seeker; such an obligation would not be consistent with giving fundamental weight to the operational and technical requirements for the safe and reliable operation of the network nor Telstra’s legitimate business interests.
 - The obligation to adopt an “alternative” is unconfined.
 - Telstra considers Optus’ proposed terms are not in the LTIE through the promotion of competitors at the cost of efficient investment.⁶⁵⁸
795. Optus submits that its proposed amendment to the definition to EMNU will address the problem that Telstra may potentially use an emergency as an excuse to upgrade its network when there is an alternate solution to rectify the fault.⁶⁵⁹ Optus submits that without its amendment to the definition of EMNU, access seekers would effectively be forced to hand over affected customers and access seekers would not have the opportunity to either build alternative infrastructure or migrate their customers across to an alternate platform.⁶⁶⁰
796. Telstra submits that the definition of an ‘emergency’ in the DFD is unduly narrow because:
- the list of indicative examples may create uncertainty about whether other, unforeseen sets of circumstances are excluded;
 - the current definition may constrain Telstra when a confined or isolated part of the network endangers people or property
 - by using the word ‘occurrence’ this may not cover all circumstances in which a emergency response may be required.⁶⁶¹
797. Telstra provides an alternative definition of ‘Emergency’ and terms for an ‘Emergency Network Modernisation and Upgrade’ that it considers is consistent with the statutory requirements under subsection 152CR(1).⁶⁶²

⁶⁵⁸ Ibid, pp. 10–11.

⁶⁵⁹ Optus and XYZed Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 2.

⁶⁶⁰ Ibid.

⁶⁶¹ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, pp. 5–6.

⁶⁶² Ibid, p. 6.

798. In reply, Optus rejects Telstra's submission and proposed amendments considering that the alternate terms are too broad and undefined and open to abuse and prefers the ACCC's proposed definition of 'Emergency'.⁶⁶³
799. The Herbert Geer parties submit in reply the definition of 'Emergency' should not be widened unless the definition of 'Emergency MNMU' proposed by Optus is also adopted.⁶⁶⁴

8.4.3. ACCC view

800. In the FD the ACCC specifies that in the event of an 'emergency' Telstra may conduct an EMNU. The ACCC qualifies the terms for such network upgrades including that Telstra should use its best endeavours to provide access seekers with notification of the network upgrade (by way of an Individual Notification) prior to the upgrade being implemented. The ACCC considers that where it is not practicable for prior notice to be given, Telstra should provide the notification as soon as reasonably practicable.
801. The ACCC acknowledges that EMNUs were not an issue notified in dispute between the parties. However, the ACCC considers that it is appropriate to address terms in the FD that should apply for a MNMU in the context of emergencies.
802. The ACCC considers that the terms for EMNUs in the FD are intended to address coordinated and or significant emergency upgrades that are required to remedy a network emergency. The ACCC specifies terms and provides numerous indicative examples of circumstances that would typically constitute an emergency (such as fire, flood, storm, earthquake, explosion, accident, vandalism, theft, epidemic or war-like action). This is not an exhaustive indication of events that would normally constitute an emergency. However, the events described provide indicative guidance as to examples that may typically constitute an emergency.
803. The ACCC does not accept Telstra's proposed definition of an 'Emergency'. The ACCC considers that a definition of an 'emergency' as proposed by Telstra has such a broad application that it has the potential to be uncertain and include events and circumstances that may not ordinarily be considered to constitute an emergency. Therefore, the ACCC considers Telstra's proposed ENMU terms could be misinterpreted to include situations that may not normally be considered an emergency.
804. The ACCC considers that Telstra has a legitimate interest in modernising and upgrading its network and that access seekers do not have an unconfined right to acquire declared services (such as the ULLS). The ACCC notes that in the response to an emergency there may be interim and longer term measures required to ensure the 'emergency' is managed and rectified in a time-critical manner. However, the ACCC is concerned about the potential for

⁶⁶³ Optus and XYZed Supplementary Reply Submission, *Network Modernisation and Upgrade Terms*, 23 November 2009, pp. 14–15.

⁶⁶⁴ Herbert Geer, Supplementary Reply Submission, *Major Network Modernisation and Upgrade Terms*, 23 November 2009, p. 6.

misapplication of such terms for anticompetitive purposes. Accordingly, the ACCC has sought to qualify the terms for an emergency upgrade to circumstances where it is a proportionate and reasonable response to an emergency.

8.5. Major network modernisation and upgrades

8.5.1. Introduction

805. The terms contained in the DFDs supplied in the Initial and Supplementary Consultations address MNMUs of a single ESA that may have implications for the relocation of exchanges/nodes or alter the deployment class of equipment that the network will support. The terms consulted on specify and impose upon Telstra a minimum notification period of six months (26 weeks) coupled with an obligation to provide an equivalent period of notice to access in circumstances where Telstra approves capital expenditure for a network upgrade.

8.5.2. Submissions

806. The Herbert Geer parties submit that the supplementary DFD is materially different from the initial DFD and have significant concerns with the supplementary DFD in regards to MNMUs.⁶⁶⁵ The Herbert Geer parties submit that the equivalent notification terms in the supplementary DFD fails to have sufficient regard to the principle of equivalence when determining the terms of access.⁶⁶⁶ They consider that the concept of equivalence can be separated into two aspects: procedural equivalence and substantive equivalence.⁶⁶⁷ Procedural equivalence refers to an access seekers ability to consider and plan for an MNMU on the same basis as Telstra while substantive equivalence refers to the need to have regard to the outcome of an MNMU on the ability of an access seeker to continue to compete against Telstra after the MNMU has taken place.⁶⁶⁸

807. The Herbert Geer parties submit that they consider the ACCC has changed its position since the initial DFD because of Telstra's concerns in relation to its workability.⁶⁶⁹ Further, the Herbert Geer parties submit that Telstra did not dispute the in-principle approach to equivalent notification, but rather that the drafting in the Initial DFD was unworkable.⁶⁷⁰ Therefore, the Herbert Geer parties submit that the ACCC should consider whether the issues identified by Telstra could be addressed in a way that is more consistent with the ACCC's previous in-principle approach to procedural equivalence.⁶⁷¹

⁶⁶⁵ Herbert Geer Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 1.

⁶⁶⁶ *Ibid.*, p. 2.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Ibid.*, p. 2.

⁶⁶⁹ *Ibid.*, pp. 2–3.

⁶⁷⁰ *Ibid.*, p. 3.

⁶⁷¹ *Ibid.*

808. The Herbert Geer parties submit that access seekers should determine the utility of upgrade notices being provided before capital expenditure is finalised, and not Telstra.⁶⁷² In the parties view, the utility of such notices is self evident if the ACCC's initial in-principle approach to procedural equivalence is accepted.⁶⁷³ This is because Telstra is able, in its absolute discretion, to decide whether a particular MNMU should take place, and, subject to applicable notification requirements, when a MNMU will take place.⁶⁷⁴ The parties contend that Telstra will not impose a MNMU on itself unless to do so is in its interests, and much of the determination of whether such an MNMU is in its interests is likely to take place prior to capital expenditure being allocated.⁶⁷⁵
809. The Herbert Geer parties state that if the position in the supplementary DFD is adopted the risks to access seekers of insufficient notice include:
- the stranding of assets and lost investment;
 - loss of customers and revenue;
 - the adoption of less than optimal solutions; and/or
 - damage to business reputation.⁶⁷⁶
810. The Herbert Geer parties submit that Telstra does not face any of the risks highlighted above by access seekers.⁶⁷⁷ The parties further submit that Telstra should be required to provide information about its plans in relation to MNMUs as part of its CCWP forecasts.⁶⁷⁸
811. Optus, in its initial submission, objects to aligning equivalent notification with Telstra's approval or allocation of capital expenditure.⁶⁷⁹
812. In response to concerns in relation to equivalent notification, Telstra reiterate its submission on the unworkability of the terms of the initial DFD.⁶⁸⁰ Telstra submits that terms dealing with equivalent notification should be expressed from a clear and identifiable trigger that is based on sensible commercial procedures in order for it to comply with its obligations.⁶⁸¹
813. In relation to substantive equivalence, the Herbert Geer parties submit that the principle involves at a minimum the avoidance of:

⁶⁷² Ibid.

⁶⁷³ Ibid.

⁶⁷⁴ Ibid.

⁶⁷⁵ Ibid.

⁶⁷⁶ Ibid.

⁶⁷⁷ Ibid.

⁶⁷⁸ Ibid, p. 4.

⁶⁷⁹ Optus and XYZed Initial Reply Submission, *Network Modernisation and Upgrade Terms*, 16 July 2009, p. 4.

⁶⁸⁰ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 11.

⁶⁸¹ Telstra Primary Submission, *ULLS Network Modernisation and Upgrade*, 2 July 2009, p. 3.

- access seekers having insufficient time to do what is necessary in response to a MNMU to allow them to continue providing uninterrupted services to end users; and/or
 - access seekers having to cease providing services to end users.⁶⁸²
814. The Herbert Geer parties submit there is ample evidence before the ACCC to establish that a 30 week minimum notice period for a MNMU is insufficient and that a 12 months minimum notification period is more appropriate.⁶⁸³ The parties consider that a 12 month notice period would increase the probability of a mutually agreeable solution being found to a MNMU because both parties would be seeking to avoid an outcome which may be undesirable for both parties.⁶⁸⁴ The Herbert Geer parties contend that if the minimum notice period is increased to 12 months this will have the effect of reducing the significant imbalance in power between Telstra and the access seekers.⁶⁸⁵ Further, an outcome which is mutually agreeable also promotes the statutory criteria.⁶⁸⁶
815. In reply to the Herbert Geer parties, Telstra submits the minimum notification period should not be increased, as:
- by focusing on the minimum period of notice the Herbert Geer parties ignore the obligation for Telstra to give an “Equivalent Period of Notice” regarding a MNMU. As a result for more significant MNMUs, access seekers would receive a longer period of notice under the existing drafting proposed by the ACCC;
 - by including a ‘take it or leave it’ proposition as part of the minimum notification, the Herbert Geer parties fail to give due weight to the obligation for Telstra to consult with the access seekers and negotiate in good faith and have completely ignored Telstra’s responsibility in balancing the competing interests and concerns of all end-users;
 - the Herbert Geer access seekers appear to assume an indefinite right to acquire the declared service, which is incorrect;
 - imposing a blanket 12 month minimum notice period is not in the LTIE and does not reflect an appropriate balance between the competing interests of Telstra in being able to upgrade its network and the access seekers interests in having as much information as possible on which to base their planning and investment decisions because:
 - many of the upgrades may have a relatively small impact on the service and/or may only affect a small number of access seekers;
 - it ignores the interests of other wholesale customers, end-users and Telstra; and

⁶⁸² Herbert Geer Supplementary Primary Submission, *Network Modernisation and Upgrade Terms*, 16 November 2009, p. 5.

⁶⁸³ Ibid.

⁶⁸⁴ Ibid, pp. 5–6.

⁶⁸⁵ Ibid, p. 6.

⁶⁸⁶ Ibid.

- if would effectively give any single access seeker an ability to require Telstra to delay a MNMU for 12 months without any justification even though other access seekers may agree to a shorter notice period.⁶⁸⁷
816. The requirement to *negotiate in good faith* is interpreted in Telstra's submission as a requirement to consult access seekers about their concerns. Telstra submits that any requirement for consultation or negotiation should explicitly acknowledge Telstra's right to proceed with a MNMU subject to meeting the notification obligations.⁶⁸⁸ Telstra submits that the obligation to consult and negotiate on any reasonable concerns of the access seekers should be qualified so access seekers must not unreasonably withhold consent notwithstanding any ongoing negotiations or concerns regarding notification variation or a request for more information.⁶⁸⁹
817. Telstra submit that an obligation to *negotiate in good faith* with access seekers should be further qualified in that:
- an access seeker should raise any concerns it has in relation to a MNMU promptly; and
 - if Telstra seeks an access seeker's consent to vary the notice period or information request the access seeker must not unreasonably withhold consent.⁶⁹⁰
818. Optus and the Herbert Geer parties object to Telstra's proposed amendments and inclusion of these terms in the FD as in their opinion they create the certainty that Telstra could, with unilateral power and discretion, change the minimum period of notice or the information provided in the notice.⁶⁹¹ Optus and the Herbert Geer parties reason that there should be a reciprocal obligation that the access provider, also, should not unreasonably withhold its consent to a request for more time for notification, or for more information being provided in a notification at the request of an access seeker.⁶⁹²
819. Optus objects to Telstra's submission that access seekers concerns should be raised promptly. Optus considers Telstra should always negotiate in good faith on any reasonable concerns regardless of when the concerns are raised as it may not always be practical nor feasible. Optus submits that it is not in the

⁶⁸⁷ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, pp. 12–13.

⁶⁸⁸ Telstra, Initial Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 9 July 2009, p. 1.

⁶⁸⁹ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 8.

⁶⁹⁰ *Ibid*, p. 8.

⁶⁹¹ Optus and XYZed Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 16.

⁶⁹² Optus and XYZed Initial Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 9 July 2009, p. 10.

LTIE if Telstra were able to ignore access seeker concerns on the justification that they were raised too late.⁶⁹³

820. The Herbert Geer parties submit that the obligation to negotiate needs to be further clarified by the ACCC in the FD. The Herbert Geer parties also disagree with the Telstra's amendment to oblige access seekers to raise concerns promptly and reiterate if there is an obligation not to unreasonably withhold consent for a lesser period there also should be terms that express a reciprocal obligation that Telstra should not unreasonably withhold consent to a greater timeframe.⁶⁹⁴

Other Issues

821. Telstra submits in the Supplementary Consultation that information and notices should be able to be provided to access seekers in electronic form.⁶⁹⁵ The Herbert Geer parties and Optus submit they do not object to this submission.⁶⁹⁶
822. Telstra submits the non-price terms in relation to network modernisation and upgrades will be subject to an expiry date in the FD.⁶⁹⁷ Telstra submits that the FDs cannot continue to have effect after they have expired.⁶⁹⁸

8.5.3. ACCC view

823. The terms of the FD specify access terms for notification of a MNMU and are similar to those proposed in the supplementary DFD which address terms for major network modernisations of a single ESA that may have implications for the relocation of exchanges/nodes or altering the deployment class of equipment that the network will support.
824. The ACCC considers it appropriate that the terms and timeframes in the supplementary DFD are maintained, and that a two stage notification process of a General Notification (30 weeks) in advance of implementation followed by more specific information in the Individual Notification (26 weeks) in advance of an implementation of a MNMU has also been maintained.
825. In determining the notification requirements for a MNMU the ACCC has considered access seeker submissions and adopted the two stage notification

⁶⁹³ Optus and XYZed Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 15.

⁶⁹⁴ Herbert Geer Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 7.

⁶⁹⁵ Telstra, Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 7.

⁶⁹⁶ Herbert Geer Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p. 6.

⁶⁹⁷ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 2.

⁶⁹⁸ Telstra Supplementary Reply Submission, *ULLS Network Modernisation and Upgrade Terms*, 23 November 2009, p 3.

process submitted by Telstra. However, the ACCC did not accept Telstra's proposed timing associated with its submissions. The ACCC considers that a 6 month minimum timeframe for MNMUs is also appropriate. In determining the appropriate timeframes the ACCC has considered industry wide factors including technical innovation and the time necessary to plan and consult for the implementation of a MNMU. The ACCC also considered the Herbert Geer parties' submission that the notification timeframe for MNMUs should extend to be the same as CCWPs (i.e. a blanket 12 month period for consultation for MNMU and CCWPs). However the ACCC has concluded that this time period is inappropriate as it could be detrimental and compromise the operational and technical requirements necessary for the safe and reliable operation of the Telstra network.

826. Consistent with the ACCC's view on equivalence expressed in the 2008 Model Terms,⁶⁹⁹ the ACCC is of the opinion that access seekers should generally receive an "equivalent notice" of a planned network upgrade as Telstra effectively receives. The ACCC notes the findings in *Telstra Corporation Ltd (No.3)* [2007]⁷⁰⁰ in relation to the risks and consequences of the timing and location of network upgrades. Accordingly, the ACCC considers the timing and location of network upgrades are relevant to determining appropriate access terms. The FD applies the principle of equivalence in the context MNMUs. The FD specifies that Telstra is required to provide a minimum notification of a MNMU or the 'Equivalent Period of Notice' of a MNMU to that which Telstra receives, where there has been approval of capital expenditure for the upgrade.
827. The ACCC considers it is necessary to specify terms for MNMUs to ensure access seekers receive equivalent notification and as much notice as possible. In determining appropriate access terms the ACCC has sought to balance the interests, risks and consequences of failing to provide sufficient notification to access seekers against the benefits of not unduly constraining Telstra in its ability to efficiently invest to upgrade its network.
828. In specifying a reasonable minimum notification period, the ACCC notes access seekers submissions on previous network upgrades that have taken longer periods than those included in the FD. The ACCC notes that in such circumstances where longer time is necessary and appropriate, Telstra should provide more notice through the operation of the 'Equivalent Period of Notice' terms.
829. The ACCC relies on the submitted fact that it is normal business practice for Telstra to plan in advance and be aware of potential network modernisations and upgrades before it commits capital expenditure to implement these upgrades. Therefore, subject to the minimum terms the ACCC considers that Telstra is capable of giving advanced notice of notification when it allocates capital expenditure or otherwise approves or commits to implementing a planned network upgrade.

⁶⁹⁹ ACCC Report, *Final Determination on Model Non Price Terms and Conditions*, November 2008, p. 34.

⁷⁰⁰ ACompT 3, [318].

830. The ACCC's view is that Telstra is required to consult and negotiate in good faith with access seekers about the planning of a network modernisation and upgrade and how it should be implemented. The ACCC considers it is desirable, where possible, that parties should agree on when and how a network modernisation is implemented and the specific arrangements that apply. The ACCC generally considers this is preferred than attempting to proscribe specific access terms that should apply in all circumstances. Therefore, the ACCC considers that, subject to providing guidance on what it considers reasonable minimum access terms, the terms in the FD include a general obligation to negotiate in good faith.
831. The ACCC considers that the requirement to negotiate in good faith should not be unduly constrained or limited. The ACCC considers it not appropriate to include terms that would overtly prejudice a general obligation by specific qualifications that may effectively operate to undermine a general obligation.
832. The ACCC considers it is inappropriate to specify terms to apply to an access seeker without introducing a reciprocal obligation for Telstra not to withhold consent to a greater notification timeframe which limits or qualifies a general obligation to negotiate in good faith. Likewise, the ACCC considers other than explicitly recognising that Telstra has legitimate interests in upgrading its network the ACCC does not consider it is in the LTIE to enable Telstra to use its discretion to unilaterally vary the notification or the information requirements.
833. The ACCC notes it would facilitate the planning for network modernisations and upgrades if the access seekers concerns were raised in a timely and prompt manner. The ACCC considers that Telstra should attempt to address and resolve issues related to reasonable concerns, regardless when and how the concerns are raised. However, the ACCC recognises that it may not always be possible or feasible for all access seeker concerns to be articulated promptly, but consider that this should not undermine the weight given to the legitimate concerns an access seeker may have.
834. The ACCC considers the obligation to negotiate in good faith is an important aspect of planning and implementation of network modernisations and upgrades. The ACCC considers the obligation to negotiate and consult has a role in the notification and planning stages of both CCWPs and MNMUs. The ACCC considers that the obligation to negotiate in good faith should not be overly cumbersome to Telstra to the extent that it unduly frustrates the planned upgrade of its network. However, the ACCC considers Telstra should be constrained in its ability to implement network upgrades to the extent that it must accommodate the reasonable concerns and legitimate interests that an access seeker may have in relation to a network upgrade.

Other Issues

835. The ACCC considers that it is appropriate to allow Telstra to provide information and notifications to access seekers in electronic form.

836. The ACCC notes Telstra's submission in relation to terms in the FD applying beyond the expiry of the FD. The ACCC considers that due to the benefit derived through the application of MNMU terms, no expiry date has been set. In addition, the ACCC considers that the requirement to update the CCWP forecast every six months would become redundant if an expiry date was applied.

8.6. Assessment against subsection 152CR(1) criteria

837. The ACCC must take the subsection 152CR(1) criteria into account in making a FD. Not all of these criteria will be relevant to every particular issue that the ACCC must determine.

838. The ACCC notes that Nicholls Legal parties did not make submissions against the subsection 152CR(1) criteria. Optus, the Herbert Geer parties and Telstra made various submissions in respect of the subsection 152CR(1) criteria in the Initial Consultation and the Supplementary Consultation.

8.6.1. Paragraph 152CR(1)(a)

839. In assessing the MNMU terms against the subsection 152CR(1) criteria, the ACCC must firstly have regard to the LTIE. This calls for consideration of a number of factors identified in section 152AB, being the objective of promoting competition, the objective of achieving any-to-any connectivity, the objective of encouraging the economically efficient use of and the economically efficient investment in infrastructure, and subsidiary matters (paragraphs 152AB(2)(c)-(e), subsection 152AB(4), paragraphs 152AB(6)(a)-(c) and subsection 152AB(7A)).

840. In specifying the notification obligations for MNMU terms the ACCC has sought to address terms that best promote the LTIE. The ACCC considers that by specifying minimum notification requirements in the FD, this will ensure access seekers have access to relevant information to make informed investment and business decisions relating to the declared service.

841. The ACCC considers that by achieving an appropriate balance between Telstra's legitimate interests in upgrading its network while ensuring that access seekers are given sufficient time to incorporate knowledge of any such upgrade into their planning and investment decisions this will promote competitive outcomes, and ensure on-going any-to-any connectivity for customers.

842. The ACCC considers that if the notification time is unduly limited, access seekers face the increased risks of stranding investments/assets and potentially losing customers if there is insufficient time to migrate them to an alternative infrastructure platform. However, the ACCC recognises that if the timeframe is too long Telstra's ability to upgrade its network will be constrained and this may affect Telstra's ability to efficiently invest and upgrade its network.

843. The ACCC considers that the appropriate balance of interests between Telstra and access seekers will result in sufficient time to migrate customer's services

from the existing service platform to an alternative and this will also promote the objective of achieving any-to-any connectivity and ultimately the LTIE.

844. The ACCC considers undertaking network modernisations and upgrades are necessary to supply new or additional services or improve the quality of existing services; such changes have a direct and positive impact on the overall efficiency of the network and the LTIE.
845. The ACCC considers that the efficient use of and investment in infrastructure, will be encouraged where Telstra is able to invest in, and upgrade its network in a way that it can accommodate legitimate concerns of the access seekers while not being unduly delayed or exacerbate the time for implementation of a network upgrade. The ACCC considers that the terms in the FD will ensure that Telstra's legitimate commercial interests are protected by being able to invest efficiently.
846. Overall, the ACCC considers that by promoting equivalence of information the FD will promote competition by allowing access seekers to be more informed of changes to the network that may have implications on existing services or future investment thereby promoting efficient investment in infrastructure and enhancing the LTIE.

8.6.2. Paragraph 152CR(1)(b)

847. The next matter is the legitimate business interests of the access provider and its investment in the facilities to provide the ULLS. In determining the appropriate access terms the ACCC has considered the implications of practical notification requirements and the timing of those obligations. It is the ACCC's view that the notification arrangements for MNMUs and CCWPs provide terms to promote more certainty and to encourage efficient investment in the declared services.
848. The ACCC considers that the provision of information and notification obligations in the FD is consistent with Telstra's legitimate business interest. Telstra's legitimate business interests are not serviced by maintaining information asymmetry, just as information investment asymmetry should not be in Telstra's legitimate business interests.
849. The ACCC also recognises that extending the timeframes for notification, in line with access seekers wishes, would result in undue obstruction to Telstra's ability to implement a network upgrade in a timely and efficient way and also its legitimate interest and ability to invest. It may also result in stifling of investment in facilities and may be detrimental to end-users if modernisations could not be undertaken for an extended period due to onerous notice periods.

8.6.3. Paragraph 152CR(1)(c)

850. The next matter is the interests of all persons who have rights to use the declared service. The ACCC considers that in making terms for MNMUs the ACCC has considered Telstra's wholesale customers, access seekers and end-users interests in the declared services. The ACCC considers in determining

terms for such an upgrade the ACCC has given weight to access seekers legitimate interests on being informed of planned upgrades and being consulted in how a network upgrade is to be implemented. The ACCC considers in the absence of terms made in the FD the existing arrangements do not provide sufficient notification of upgrades and allow Telstra to unilaterally determine the arrangements to apply to a network modernisation and upgrade.

851. The notification periods set out in the FD also ensure that access seekers have sufficient notice to make informed investment decisions and compete for customers on their relative merits.

8.6.4. Paragraph 152CR(1)(d)

852. The fourth matter is the direct costs of providing access to the declared service. Telstra submits that the ACCC must ensure that it considers its direct costs of determining the notification requirements and obligations for the FD.⁷⁰¹ Telstra also submits the costs in requiring Telstra to provide information are part of its direct costs and should be weighed against the imposition of obligations that would result in increased compliance costs which would not otherwise significantly promote the LTIE.⁷⁰²
853. The ACCC notes that while parties submitted conflicting views on costs associated with the MNMU terms, no actual cost estimates were provided. Accordingly, the ACCC agrees with the views expressed by access seekers that costs for reproducing and distributing the information will be minimal because Telstra already provides some of this through the LTNR, and is likely to have access to the required data already. In addition, the ACCC considers that the benefits of the provision of the information in the NMU terms outweigh the costs.

8.6.5. Paragraphs 152CR(1)(e) and 152CR(1)(f)

854. The next two matters are the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else; and the operational and technical requirements necessary for the safe and reliable operation of a carriage service, or a telecommunications network or a facility.
855. The ACCC does consider that the value to a party of extension, or enhancement of capability is not relevant to this issue as the FD only requires the provision of information.
856. Further to the operational and technical requirements necessary for safe and reliable operation, the ACCC agrees with Telstra's view that emergency upgrades are so fundamental that the ACCC could not sensibly determine terms and conditions for MNMUs without giving consideration to how those terms should apply in an emergency.⁷⁰³ The ACCC considers that by

⁷⁰¹ Telstra Supplementary Primary Submission, *ULLS Network Modernisation and Upgrade Terms*, 16 November 2009, p. 3.

⁷⁰² Ibid.

⁷⁰³ Telstra Supplementary Reply Submission, *ULLS Major Network Modernisation and Upgrade Terms*, 23 November 2009, p. 9.

including terms on EMNU in the FD, the operational and technical requirements necessary for the safe and reliable operation of the network are enhanced. By including terms which allow for a MNMU to occur in response to an emergency, the ACCC has ensured that Telstra can undertake the most appropriate repairs/upgrades in an emergency situation.

857. The ACCC also considers that it would not be reasonable to require Telstra to delay any action until it had identified a range of alternatives and assessed the impact upon each access seeker; such an obligation would not be consistent with giving fundamental weight to the operational and technical requirements for the safe and reliable operation of the network nor Telstra's legitimate business interests.

8.6.6. Paragraph 152CR(1)(g)

858. The last matter is the economically efficient operation of a carriage service, a telecommunications network or a facility (paragraph 152CR(1)(g)).
859. The ACCC considers that the economically efficient operation of carriage services and associated networks and facilities of the access provider and access seekers will be encouraged by access seekers having greater information available to assist in making investment decisions. This is because it will remove an information asymmetry which may deter investment in the provision of services.

9. Appendix

Appendix A: Consultation Process Chronology

The following outlines the consultation process undertaken by the ACCC:

- On 2 November 2007, the ACCC received Agile's dispute notification dated 30 October 2007 under Part XIC of the Act, notifying a dispute with Telstra in relation to terms and conditions of its access to the ULLS.⁷⁰⁴
- On 22 November 2007, parties were:⁷⁰⁵
 - notified of the constitution of the Commission for the purposes of conducting the arbitration; in this instance the members would be the Chairman, Commissioner Willett and Commissioner King
 - given a confidentiality Order and Direction, and
 - informed of the case management team and meetings.
- On 24 January 2008, the ACCC advised the parties of the reconstitution of the Commission; constituting the Chairman, Commissioner King and Commissioner Martin.⁷⁰⁶
- On 20 February 2008, the ACCC wrote to the parties advising its decision on preliminary matters.⁷⁰⁷
- On 26 June 2008, the ACCC issued an interim determination which specified the ULLS annual charges and the ULLS single connection charges.⁷⁰⁸
- On 26 September 2008, the ACCC commenced public consultation on model non-price terms of access.⁷⁰⁹
- On 30 September 2008, the ACCC issued a draft direction which would require:⁷¹⁰
 - Agile to provide documents that record access terms for the ULLS which it considers relevant to the arbitration, and

⁷⁰⁴ Agile, *Telecommunications Access dispute: Agile – Telstra Unconditioned Local Loop Service*, 30 October 2007.

⁷⁰⁵ ACCC, *Access dispute – Unconditioned Local Loop Service (ULLS): Notified by Agile Pty Ltd on 30 October 2007*, 22 November 2007.

⁷⁰⁶ ACCC, *Agile – Telstra – ULLS Access Dispute – Reconstitution of the Commission*, 24 January 2008.

⁷⁰⁷ ACCC, *Telecommunications Access Dispute: ULLS: between Agile Pty Ltd (Agile) and Telstra Corporation Ltd (Telstra)*, 20 February 2008.

⁷⁰⁸ ACCC, *Telecommunications Access Dispute: Agile – Telstra – ULLS – Interim Determination*, 27 June 2008.

⁷⁰⁹ ACCC, *Agile/Telstra ULLS Access Dispute*, 26 September 2008.

⁷¹⁰ ACCC, *Telecommunications Access Dispute: Telstra ULLS*, 30 September 2008.

- Telstra to provide information concerning rates it has agreed with third party contractors for specified work.

On 13 October 2008, the ACCC made the direction. It was sent to the parties on 14 October 2008.⁷¹¹

Materials were provided in response to this direction on 3 November 2008.⁷¹²

- On 16 October 2008, the ACCC sought the view of parties in relation to the procedures the ACCC intended to adopt in making a final determination, including the potential to hold a joint hearing.⁷¹³
- On 13 November 2008, Agile advised that it was still in dispute with Telstra regarding the issues notified in its notification received 2 November 2007.⁷¹⁴
- On 5 December 2008, the Chairman determined to hold a joint arbitration hearing and the constitution of the Commission, in this instance, would be the Chairman and Commissioner Willett.
- On 19 December 2008, the ACCC advised parties that on 5 December 2008 the Chairman determined:
 - to hold a joint arbitration hearing under section 152DMA of the Act, for the ULLS and LSS access disputes, and
 - the members constituting the Commission for the purpose of the joint arbitration hearing would be the Chairman—Commissioner Samuel—and Commissioner Willett.
- The ACCC also provided its views to the parties on how it would conduct this hearing, and gave the parties a confidentiality order and direction signed by the Chairman to apply to this joint hearing.⁷¹⁵
- On 19 February 2009, parties were advised that the Chairman determined that the Amcom dispute should also be considered in the joint hearing process, and a new confidentiality order and direction was issued to the parties. The ACCC also advised the parties of the reconstitution of the Commission; in this instance, the members would be Commissioner Willett and Commissioner Dimasi.
- On 7 April 2009, the first stage of consultation (Initial Consultation) was initiated with parties provided with consultation papers, DFDs and Directions in relation to:
 - preliminary matters

⁷¹¹ ACCC, *Telecommunications Access Dispute: Agile – Telstra ULLS*, 14 October 2008.

⁷¹² Telstra, *Telecommunications Access Dispute between Telstra and Agile regarding the ULLS – Notified on 30 October 2007*, 3 November 2008; Herbert Geer, *Telecommunications Access Dispute: Agile – Telstra Unconditioned Local Loop Service*, 3 November 2008.

⁷¹³ ACCC, *Telecommunications Access Dispute: Various LSS and ULLS Disputes, 16 October 2008*

⁷¹⁴ *Herbert Geer Submission, Procedural Issues*, 13 November 2008.

⁷¹⁵ ACCC, *Telecommunications Access Disputes: Various LSS and ULLS Disputes*, 19 December 2009.

- MNM charges
- single connection and disconnection charges.⁷¹⁶

Submissions in response to this initial consultation were received on 18 May 2009 (primary) and 4 June 2009 (reply).

- On 20 May 2009, the ACCC notified parties of a reconstitution of the Commission for the Joint Hearing to include Network Technology, Chime and NEC as ULLS parties.⁷¹⁷
- On 12 June 2009, the second stage of consultation was initiated with parties provided with consultation papers, DFDs and Directions in relation to network modernisation and upgrade terms, and late withdrawal charges.⁷¹⁸

Submissions in response to the second stage of the consultation were received on 2 July 2009 (primary) and 9 July 2009 (reply).

- On 22 June 2009, the ACCC extended the Agile Telstra ULLS interim determination.⁷¹⁹
- On 1 July 2009, Telstra made additional reply submissions in relation to:
 - preliminary matters,
 - single connection and disconnection charges.⁷²⁰
- On 4 August 2009, the ACCC issued a draft Direction and consulted parties in relation to providing information on third party contractor rates for MDF jumpering.⁷²¹
- On 21 August 2009, the ACCC issued a direction to provide information on third party contractor rates for MDF jumpering tasks.⁷²²
- On 21 August 2009, the ACCC commenced consultation on the Fixed Services Review: Draft Pricing Principles and Indicative Prices.⁷²³
- On 24 August 2009, the ACCC commenced the Annual Charges Consultation and provided parties with a consultation paper, DFD and Direction.⁷²⁴

⁷¹⁶ ACCC, *Telecommunications Access Disputes – Various ULLS/LSS Disputes*, 7 April 2009.

⁷¹⁷ ACCC, *Telecommunications Access Disputes – Various ULLS/LSS Disputes*, 20 May 2009.

⁷¹⁸ ACCC, *Telecommunications Access Disputes – Various ULLS/LSS Disputes*, 12 June 2009.

⁷¹⁹ ACCC, *Agile – Telstra Unconditioned Local Loop Service Access Dispute – Extension to the Interim Determination*, 23 June 2009.

⁷²⁰ Telstra, *Telecommunications Access Disputes: Joint Hearing of ULLS/LSS Access Disputes*, 1 July 2009.

⁷²¹ ACCC, *Telecommunications Access Disputes: Joint Hearing of ULLS/LSS Access Disputes – Proposed Direction to Provide Information*, 21 August 2009.

⁷²² Ibid.

⁷²³ Ibid.

⁷²⁴ ACCC, *Telecommunications Access Disputes: Joint Arbitration Hearing of ULLS/LSS Access Disputes*, 24 August 2009.

Submissions were received in response on 9 October 2009 (primary) and 22 October 2009 (reply). The Nicholls Legal parties provided a reply submission on 26 October 2009.

- On 4 September 2009, the ACCC notified parties of a reconstitution of the Commission to include Adam as an LSS party.⁷²⁵
- On 16 September 2009, the ACCC wrote to parties in relation to whether the final determination should set charges for 2010-11 in relation to single connection and disconnection charges.⁷²⁶

Submissions were received in response on 9 October 2009 (primary) and 22 October 2009 (reply).

- On 27 October 2009, the ACCC undertook further consultation with parties proposing a rollover of 2008-09 indicative prices for fixed network services until 31 December 2010.⁷²⁷
- On 4 November 2009, the ACCC issued parties with a Supplementary Consultation Paper on the issue of Network Modernisation and Upgrades.⁷²⁸

Submissions were received on 16 November 2009 (primary) and 23 November 2009 (reply).

- On 3 December 2009, the ACCC made final Pricing Principles and Indicative Prices for the Fixed Network Services.⁷²⁹
- On 7 December 2009, the ACCC wrote to parties seeking final views on the expiry date for the final determination.⁷³⁰

⁷²⁵ ACCC, *Telecommunications Access Disputes: Joint Hearing of ULLS/LSS Access Disputes – Addition of Adam Internet/Telstra LSS Access Dispute*, 4 September 2009.

⁷²⁶ ACCC, *Telecommunication Access Dispute – Joint Arbitration Hearing of LSS ULLS Disputes – Single Connection and Disconnection Charges, MNM Charges and ULLS Call Diversion Charges*, 16 September 2009.

⁷²⁷ ACCC, *ULLS LSS Joint Hearing: Price Terms – Rollover Option*, 27 October 2009.

⁷²⁸ ACCC, *Pricing Principles and Indicative Prices for LCS, WLR, PSTN OTA, ULLS, LSS 1 August 2009 to 31 December 2010*, 3 December 2009.

⁷²⁹ *Ibid.*

⁷³⁰ ACCC, *Expiry Date for ULLS and LSS Final Determinations*, 7 December 2009.