



Australian
Competition &
Consumer
Commission

WLR Access Dispute

Digiplus / Telstra

Reasons for Final Determination

August 2010



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Abbreviations and terms

2009 Pricing Principles	ACCC, <i>2009 Pricing principle determinations and indicative prices</i> , December 2009
Access Dispute Guidelines	ACCC, <i>Resolution of telecommunications access disputes — a guide</i> , March 2004 (revised)
ACT Utilities Tax	A tax payable under the <i>Utilities (Network Facilities Tax) Act 2006 (ACT)</i>
Commission	Australian Competition and Consumer Commission
Consultation Paper	WLR and LCS access disputes consultation paper on draft determinations, June 2010
ESAs	exchange service areas
FD	final determination
ID	interim determination
LCS	local carriage service
LTIE	long-term interests of end users
kHz	Kilohertz
NBN	national broadband network
RMRC	retail-minus-retail-costs
SAO	standard access obligation
Telstra	Telstra Corporation Limited
TPA	<i>Trade Practices Act 1974</i>
Tribunal	Australian Competition Tribunal
TSLRIC	total service long-run incremental cost
WLR	wholesale line rental service

Currency contained in this report is Australian dollars unless otherwise stated.

References to legislation in this document are references to the *Trade Practices Act 1974 (TPA)* unless otherwise stated.

1 Introduction

1.1 Purpose

Digiplus Pty Limited (Digiplus) and Telstra Corporation Limited (Telstra) (together, the parties) are in dispute over the monthly price of access to the wholesale line rental service (WLR) (the dispute). This dispute was notified to the Australian Competition and Consumer Commission (the Commission) for arbitration and the Commission has made a final determination (FD). This document sets out the reasons for making the FD.

1.2 Background to arbitration and FD

Digiplus notified the Commission of the dispute on 20 December 2007. The parties remained unable to resolve the issue in dispute.

It should be noted that on 23 January 2008 Telstra notified the Commission of a dispute with Digiplus regarding the price for local carriage service (LCS) (the LCS dispute). The WLR dispute hearing and the LCS dispute hearing were joined on 7 April 2008. A separate statement of reasons has been issued in relation to the LCS dispute.

1.3 Consultation process

The Commission issued parties with a consultation paper on 11 June 2010 seeking submissions on the content of the FD (Consultation Paper). The Commission received submissions from the parties on 9 July 2010, and a submission in reply from Digiplus on 23 July 2010.

A full chronology of the consultation process is outlined in appendix A.

2 Preliminary matters

2.1 The WLR

The WLR is a declared service which allows an end-user to connect to a carrier or carriage service provider's public switched telephone network. The WLR provides the end-user with:

- an ability to make and receive any 3.1kHz bandwidth calls (subject to any conditions that might apply to particular types of calls), including, but not limited to, local calls, national and international long distance calls, and
- a telephone number

except where the supply of the line rental telephone service is within the Central Business District Area of Sydney, Melbourne, Brisbane, Adelaide or Perth.

The WLR has been a declared service under section 152AL of the *Trade Practices Act 1974* (TPA) since 1 August 2006. The current WLR declaration is due to expire on 31 July 2014.

2.2 Pricing principles

The Commission has determined principles relating to the price of access to the WLR under section 152AQA. The relevant pricing principles for the current disputes are the 2009 pricing principle determinations and indicative prices (2009 Pricing Principles) which the Commission made in December 2009.¹

The Commission notes that the 2009 Pricing Principles do not depart from the earlier pricing principles and indicative prices but rather consolidate those principles and indicative prices into a single document.²

2.3 Access obligations and existence of a dispute relating to access

The Commission believes that the requirements of subsection 152CM(1) have been satisfied for this dispute. That is:

- Telstra is a carrier
- Telstra supplies the declared WLR
- Telstra has an obligation under subsection 152AR(3) to supply the WLR to Digiplus
- Digiplus is unable to agree with Telstra about the terms and conditions of access to the WLR addressed in the FD.

3 General approach

3.1 Use of pricing principles

Introduction

Subsection 152AQA(6) requires that the Commission have regard to the relevant pricing principles determination in arbitrating an access dispute. As noted above, the relevant pricing principle determination in this dispute is the 2009 Pricing Principles, which uses the retail-minus-retail cost (RMRC) pricing approach for the WLR. The RMRC pricing approach subtracts avoidable retail costs from the unbundled retail price.

The relevant WLR indicative prices contained in the 2009 Pricing Principles are:

Period	HomeLine Part	BusinessLine Part
7 August 2007 – 31 December 2007	\$23.12 per month	\$25.84 per month
1 January 2008 – 31 December 2010	\$25.57 per month	\$26.93 per month

¹ ACCC, *Pricing principles and indicative prices for LCS, WLR, PSTN OTA, ULLS, LSS*, 1 August 2009 to 31 December 2010.

² The earlier pricing principles and indicative prices are: *Pricing Principles for the Local Carriage Service, Wholesale Line Rental Service and Public Switched Telephone Originating and Terminating Service*, 29 November 2003; *Pricing Principles for the Local Carriage Service and the Wholesale Line Rental Service*, 30 July 2008.

In its Consultation Paper, the Commission's preliminary view was that the FD should adopt the WLR indicative prices set out in the 2009 Pricing Principles due to the existing uncertainty with regards to the future regulatory framework. This uncertainty includes both the proposed new costing framework,³ and the uncertainty relating to legislative reforms and the establishment of the national broadband network (NBN). The Consultation Paper sought parties' views on the use of the 2009 Pricing Principles for any of the matters that were to be considered in the joint hearing.

Submissions

Telstra submits that the Commission must have regard to the 2009 Pricing Principles when arbitrating the dispute. Telstra submits that it does not agree that the RMRC methodology on which the Commission's proposed prices are based is appropriate. However, Telstra submits that adopting the indicative WLR prices in the 2009 Pricing Principles is sensible and pragmatic "in light of the fact that the events which caused regulatory uncertainty are still awaiting resolution".⁴ Telstra therefore submits that the WLR prices that should be applied in the current dispute are the indicative prices in the 2009 Pricing Principles.

Digiplus also accepts the adoption of the indicative prices in the 2009 Pricing Principles for the purpose of the dispute.⁵

Commission's view

The Commission is required to have regard to the 2009 Pricing Principles in arbitrating this access dispute. The 2009 Pricing Principles cover the period of the current dispute and contain WLR indicative prices that reflect the RMRC of providing access to the WLR.

Both parties accept the adoption of the indicative prices contained in the 2009 Pricing Principles for the purpose of the dispute.

When the Commission made the 2009 Pricing Principles for the period of 1 August 2009 to 31 December 2010, it did so to provide certainty regarding access to regulated services in a period of significant regulatory and industry change, and considered that doing so was in the long term interests of end-users (LTIE). This uncertainty included both the proposed new pricing framework,⁶ legislative reforms, and the establishment of the NBN.

Given the views of the parties, the fact that the 2009 Pricing Principles cover the period of the current dispute, and the ongoing climate of uncertainty, the Commission considers that it is appropriate to adopt the WLR indicative prices contained in the 2009 Pricing Principles in the current dispute.

The Commission has commenced the process of consulting with industry on a new cost-based pricing methodology for the WLR with a view to publishing new indicative prices for the WLR from January 2011.⁷

³ ACCC, *Review of 1997 Guide to Telecommunications Access Pricing Principles and Fixed Line Services Discussion Paper*, December 2009.

⁴ Telstra primary submission, pp. 1-2.

⁵ Digiplus primary submission, p. 3.

⁶ ACCC, *Review of 1997 Guide to Telecommunications Access Pricing Principles and Fixed Line Services – Discussion Paper*, December 2009.

⁷ *ibid.*

3.2 Relevant legislation

Introduction

In its Consultation Paper the Commission identified provisions of the TPA which it considered relevant to the making of the FD. Parties' views were sought.

Submissions

Telstra does not comment directly on the relevant provisions of the TPA which are relevant to the dispute.

Digiplus submits that it agrees with and accepts the Commission's view as to which legislation is to apply in the making of an FD, and further submits that Division 8 of Part XIC of the TPA in its entirety is relevant and applicable to the dispute.⁸

Commission's view

The Commission considers that Part XIC of the TPA is relevant to the making of the FD. In particular, the following provisions of the TPA are of direct relevance to the making of an FD in this dispute:

- subsection 152CP(1), which provides that unless the Commission terminates the arbitration, it must make a written determination on access by the access seeker to the declared service
- subsection 152CP(2), 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 the notification of the dispute
- subsection 152CP(4), which requires that before making a determination, the Commission must give a draft determination to the parties
- subsection 152CP(5), which requires the Commission to give the parties its reasons for making a determination
- section 152CQ, which sets out restrictions on access determinations
- subsection 152CR(1), which requires that when making a determination the Commission is to take certain matters into account including the LTIE as defined in section 152AB
- subsection 152CR(2), which provides that the Commission may take into account any other matters that it thinks are relevant
- subsection 152AQA(6), which requires that the Commission must have regard to a pricing principles determination (made in accordance with subsection 152AQA(1)) if it is required to arbitrate an access dispute under Division 8, Part XIC of the TPA in relation to the declared service

3.3 Subsection 152CR(1) criteria

Introduction

The Commission must have regard to the criteria specified in subsection 152CR(1) when making an FD. These criteria are:

⁸ Digiplus primary submission, p. 3.

- (a) whether the determination will promote the LTIE of carriage services or services provided by means of carriage services
- (b) the legitimate business interests of the carrier or the provider and the carrier's or the 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 costs 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.

The Commission provided the parties with its preliminary views on how these criteria should be interpreted in the Consultation Paper and sought the parties' comments.

The Commission is satisfied with its approach towards the interpretation of the criteria listed in subsection 152CR(1). Each criterion listed in that subsection has been taken into account in making the FD.

The Federal Court has recognised the potential tension between each of the criteria in subsection 152CR(1) of the TPA, and the need for the Commission to give each of them varying weight in the decision making process.⁹

The parties' submissions on the criteria, and the Commission's views on those criteria, are set out below.

3.3.1 Paragraph 152CR(1)(a) - LTIE

Submissions

Digiplus accepts the propositions set out in section 3.3.1 of the Consultation Paper. Digiplus also submits that the prices set out in the draft determination in the dispute promote competition in relevant retail telecommunications markets by enabling the provision of bundled voice and data services by Digiplus, but acting as an intermediate step to other, higher spectrum broadband services and by enabling Digiplus to offer services to customers who would like, but who are unable to obtain, higher spectrum broadband services.¹⁰

Digiplus submits that the objective of achieving any-to-any connectivity contained in paragraph 152AB(2)(d) is not directly relevant to the dispute.¹¹

Digiplus submits that it is critical for the Commission to set access charges at a level which promotes efficient investment in infrastructure by both the access provider and access seekers. It also submits that Telstra's legitimate commercial interests, including its ability to exploit economies of scale and scope, are satisfied by the

⁹ 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].

¹⁰ Digiplus primary submission, pp. 3-9.

¹¹ *ibid.*, p. 9.

supply of the WLR to Digiplus at the prices contained in the 2009 Pricing Principles.¹²

Telstra states that it does not accept that the CAN is a natural monopoly or the source of Telstra's dominance. Telstra points to the Commission's statement in the Consultation Paper that "recent analysis has shown that the retail bundled broadband and voice markets (in the areas where Telstra sought an exemption) are characterised by an ever-increasing level of competition".¹³ Telstra notes that this was one of the reasons the Commission granted exemptions for WLR and LCS in certain areas in August 2008.¹⁴

In reply, Digiplus asserts that the CAN is indeed a natural monopoly.¹⁵

Commission's view

The Commission has published a guideline explaining what it understands by the phrase 'long-term interests of end-users' in the context of its declaration responsibilities.¹⁶ The Commission considers that a similar interpretation is appropriate to making an FD in this dispute.

In the Commission's view, particular terms and conditions promote the interests of end-users if they are likely to contribute towards the provision of:

- goods and services at lower prices
- goods and services of a high quality, and/or
- a greater diversity of goods and services.

The Commission also notes that the Australian Competition Tribunal (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):¹⁷

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:

**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.*

To consider the likely impact of particular terms and conditions on the LTIE, the TPA requires that the Commission have regard to whether the terms and conditions are likely to result in:¹⁸

¹² *ibid.*, pp. 10-11.

¹³ Consultation Paper, p. 10.

¹⁴ Telstra primary submission, [10]-[14].

¹⁵ Digiplus reply submission, pp. 1-2.

¹⁶ ACCC, *Telecommunications services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act*, July 1999.

¹⁷ *Seven Network Limited (No 4)* [2004] ACompT 11, [120].

- 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:
 - the 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.

Promoting Competition

The Commission considers it relevant, in assessing whether particular terms and conditions (such as the WLR price) will promote competition, to analyse the relevant markets in which the WLR is supplied (retail and wholesale) and to consider whether the particular terms set in those markets will remove obstacles to end-users gaining access to telephony and broadband services.¹⁹

Obstacles to accessing these services include the price, quality and availability of the services and the ability of competing providers to provide telephony and broadband services. However, it is important to note that Part XIC of the TPA does not require the Commission to precisely define the scope of the relevant markets for the purpose of arbitrating access disputes. In arbitrations, it is the Commission's view that it is sufficient to broadly identify the scope of the relevant markets likely to be affected by the Commission's FD.

The Commission is of the view that the relevant markets are:

- the market for the retail and wholesale supply of voice services (excluding Voice over Internet Protocol (VoIP) and mobile originated calls), and
- the market for the retail supply of a bundle of voice and broadband services.

The WLR is a prerequisite for competition in the provision of retail broadband and telephony services such as local, long distance and international calls using the LCS and the PSTN OTA.

Having regard to Telstra's submissions, the Commission is still of the view that the majority of retail voice customers rely on telephony services provided by Telstra's customer access network (CAN). This is despite the increase in competition in the downstream fixed voice market, evidenced by the strong take-up of the regulated unconditioned local loop service (ULLS), and a decrease in Telstra's market share in retail fixed voice since the declaration of the LCS, the WLR and the ULLS.

The Commission notes that the Tribunal considered it to be in the LTIE to exempt Telstra from the standard access obligations (SAOs) in respect of the WLR in exchange service areas (ESAs) that are characterised by a sufficient level of competition due to access seeker take-up of the regulated ULLS service (subject to conditions and limitations).²⁰ The Commission notes that exempt access services will

¹⁸ Subsection 152AB(2) of the TPA.

¹⁹ Subsection 152AB(4) of the TPA. This approach is consistent with the approach adopted by the Tribunal in *Telstra Corporations Limited (No 3)* [2007] A CompT 3, [92]; *Telstra Corporation Limited* [2006] A CompT, [97], [149].

²⁰ Australian Competition Tribunal, Order under paragraph 152AW(1)(b) exempting Telstra from standard

not be subject to the access dispute regime in Division 8, Part XIC of the TPA from the date the exemptions take effect.

The Commission is of the view the RMRC-based WLR prices set in this dispute will promote competition in the relevant markets.

Any-to-any connectivity

The Commission's considers that the terms of access addressed in this dispute do not directly affect the objective of achieving any-to-any connectivity.

Efficient investment in and use of infrastructure

In determining the extent to which terms and conditions are likely to encourage the economically efficient use of and investment in infrastructure, regard must be had to:²¹

- whether it is technically feasible for the services to be supplied and charged for with regard to 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
- 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.

In the Commission's view, the phrase 'economically efficient use of, and economically efficient investment in...infrastructure' refers to the concept of economic efficiency that consists of three components:

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

The Commission is of the view that the RMRC-based WLR prices set in this dispute will provide incentives for Telstra and access seekers to make efficient use of and investment in infrastructure. By promoting competition, these prices will also encourage dynamic efficiency.

access obligations in respect of the WLR, 24 August 2009.

²¹ Subsections 152AB(6) and (7A) of the TPA.

3.3.2 Paragraph 152CR(1)(b) – legitimate business interests of the carrier or provider

Submissions

Telstra does not submit directly on the paragraph 152CR(1)(b) criterion.

Digiplus accepts the propositions set out in section 3.3.2 of the Consultation Paper. Digiplus also submits that Telstra's legitimate business interests are satisfied by a WLR charge which reflects the efficient cost of providing the service. However, Digiplus submits that it is not a legitimate business interest of Telstra to derive supra-normal profits from declared services provided over the CAN (over which it has a monopoly).²²

Commission's view

As outlined in the Access Dispute Guidelines,²³ the Commission considers it is a legitimate business interest for an access provider to earn a normal commercial return on its investment.²⁴ In this regard, the Commission 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 TPA.

For completeness, the Commission notes that it would be a legitimate business 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. However, 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.²⁵

The Tribunal has taken a similar view of the expression 'legitimate business interests'.²⁶

The Commission is of the view that the RMRC-based WLR prices set in this dispute will accommodate the legitimate business interests of Telstra.

3.3.3 Paragraph 152CR(1)(c) – the interests of all persons who have the right to use the service

In relation to paragraph 152CR(1)(c), the Commission sought submissions on whether there would be any impact of the FD on the interests of third parties who have a right to use the WLR. In particular, the Commission queried whether the FD would affect the prices in third party contracts due to so called parity clauses.²⁷

Submissions

Telstra submits that the following issues are irrelevant to the Commission's consideration of the price to be determined in the FD:

²² Digiplus primary submission, pp. 11-12.

²³ ACCC, *Resolution of telecommunications access disputes – a guide*, March 2004 (revised) (Access Dispute Guidelines).

²⁴ Access Dispute Guidelines, p. 56.

²⁵ ACCC, *Access pricing principles—telecommunications*, July 1997, p. 9.

²⁶ *Telstra Corporation Limited* [2006] ACompT 4 at [89].

²⁷ In this context, a parity clause refers to a clause contained in a contract which has the effect of altering price terms if specified preconditions are satisfied.

- whether or not the terms of the FD are appropriate if circumstances are such that different commercially agreed terms exist for equivalent services currently in the market, and
- whether or not the FD will affect prices in third party contracts due to parity clauses.²⁸

[REDACTED]

Digiplus agrees with the propositions set out in section 3.3.3 of the Consultation Paper.²⁹ Digiplus makes no submission with regards to the consideration of third party interests.³⁰

Commission's view

The Commission considers that this criterion requires it to have regard to the interests of access seekers. The Tribunal has also taken this approach.³¹ Such interests would not be served by higher access prices as it inhibits their ability to compete with Telstra in the provision of retail services.³²

As noted in the Access Dispute Guidelines, people who have rights to currently use a declared service will generally use that service as an input to supply the carriage services, or a service supplied by means of carriage service, to end-users. In the case of the WLR, the access service could also be used to provide a wholesale service to another service provider.

The Commission considers that this class of persons has an interest in being able to compete for the custom of end-users on the basis of their relative merits. This could be prevented from occurring if terms and conditions of access favour one or more service providers over others, thereby distorting the competitive process.³³

However, the Commission does not consider that this criterion calls for consideration to be given to the interests of the users of these 'downstream' services. The interests of end-users will already be considered under other criteria.

[REDACTED] As such, the Commission has not considered the impact of the FD on third party contracts.

The Commission considers that the RMRC-based WLR prices set in this dispute are consistent with the interests of all persons who have a right to use the service.

3.3.4 Paragraph 152CR(1)(d) – the direct costs of providing access to the declared service

Submissions

Telstra does not submit directly on the paragraph 152CR(1)(d) criterion.

²⁸ Telstra primary submission, [15] – [21].

²⁹ Digiplus primary submission, p. 12.

³⁰ Digiplus reply submission, p. 3.

³¹ *Telstra Corporation Limited* [2006] ACompT 4 at [91].

³² *ibid.*

³³ Access Dispute Guidelines, p. 57.

Digiplus accepts the propositions as set out in section 3.3.4 of the Consultation Paper. Digiplus also submits that the WLR access price should be cost based. However, it submits that it is prepared to accept the RMRC approach adopted by the Commission in the absence of a properly constructed and credible TSLRIC model. Digiplus submits that the indicative WLR price in the 2009 Pricing Principles is the best available proxy for measuring the direct costs of providing the declared service.³⁴

Commission's view

The Commission 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 access.

The Commission interprets this criterion, and the use of the term 'direct costs', as allowing consideration to be given to a contribution to indirect costs. This is consistent with the Tribunal's approach.³⁵ A contribution to indirect costs can also be supported by other criteria.

However, the criterion does not extend to permitting compensation for loss of any 'monopoly profit' that occurs as a result of increased competition.³⁶

The Commission also notes that the Tribunal considers the direct costs criterion 'is concerned with ensuring that the costs of providing the services are recovered.'³⁷ The Tribunal has also noted that the direct costs could conceivably be allocated (and hence recovered) in a number of ways and that adopting any of those approaches would be consistent with this criterion.³⁸

The Commission is of the view that the RMRC-based WLR prices set in this dispute will allow Telstra to recover its direct costs of providing access to the WLR service.

3.3.5 Paragraph 152CR(1)(e) – the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else

Submissions

Telstra does not submit directly on the paragraph 152CR(1)(e) criterion.

Digiplus accepts the propositions set out in section 3.3.5 of the Consultation Paper.³⁹

Commission's view

The Commission is of the view that the 152CR(1)(e) criterion is unlikely to be relevant to the dispute.

³⁴ Digiplus primary submission, p. 12.

³⁵ *Application by Optus Mobile Pty Limited and Optus Networks Pty Limited* [2006] ACompT 8 at [137].

³⁶ See Explanatory Memorandum for the *Trade Practices Amendment (Telecommunications) Bill 1996*, p. 44: "[T]he '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."

³⁷ *Telstra Corporation Limited* [2006] ACompT, [92].

³⁸ *Telstra Corporation Limited* [2006] ACompT 4, [139].

³⁹ Digiplus primary submission, p. 12.

3.3.6 Paragraph 152CR(1)(f) – the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility

Submissions

Telstra does not submit directly on the paragraph 152CR(1)(f) criterion.

Digiplus accepts the propositions set out in section 3.3.6 of the Consultation Paper.⁴⁰

Commission's view

The Commission considers that this criterion requires that terms 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 technical requirements or standards to be followed.

The Commission considers that this criterion is less relevant to the current dispute as it only relates to the price of access to a service. Price will have little direct bearing on the adoption of operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility.

However, the Commission acknowledges that, in the long-run, access prices that are persistently below the efficient costs of supplying a service can, indirectly, compromise the safe and reliable supply of the service. Accordingly, the Commission considers that the access prices should be based on a method of supply that meets the relevant operational and technical requirements necessary for the safe and reliable operation of the WLR, facilities used to supply the WLR and the network.

The Commission is of the view that the RMRC-based WLR prices set in this dispute will not compromise the safe and reliable operation of any carriage service, telecommunications network or facility.

3.3.7 Paragraph 152CR(1)(g) — the economically efficient operation of a carriage service, a telecommunications network facility, or a facility

Submissions

Telstra does not submit directly on the paragraph 152CR(1)(f) criterion.

Digiplus accepts the propositions as set out in section 3.3.7 of the Consultation Paper.⁴¹

Commission's view

As noted in the Access Dispute Guidelines, the phrase 'economically efficient operation' embodies the concept of economic efficiency as discussed above at section 3.3.1. That is, it calls for a consideration of dynamic, productive and allocative efficiency. The Access Dispute Guidelines also note that in the context of a determination, the Commission may consider whether particular terms and conditions enable a carriage service, telecommunications network or facility to be operated efficiently.⁴²

⁴⁰ Digiplus primary submission, p. 13.

⁴¹ Digiplus primary submission, p. 13.

⁴² Access Dispute Guidelines, p. 57.

Further, consistent with the approach adopted by the Tribunal, the Commission considers that in applying this criterion, it is relevant to consider:

- the economically efficient operation of downstream services provided by access seekers using Telstra's WLR, or by Telstra itself in competition with those access seekers, and
- the telecommunications networks and infrastructure used to supply the service.⁴³

For reasons outlined in the LTIE discussion above (section 3.3.1), the Commission is of the view that the RMRC-based WLR prices set in this dispute will meet the paragraph 152CR(1)(g) criterion.

3.4 Additional matters

The Commission has had regard to the following additional matters and information in making the FD:

- the decisions of the Tribunal that are referred to in this Statement of Reasons, and
- the Commission's FD in the LCS dispute.

4 WLR price

The following sections set out the Commission's position in relation to the facts of the dispute and give its reasons for making the FD.

Introduction

In the Consultation Paper, the Commission proposed to adopt the WLR indicative prices set out in the 2009 Pricing Principles. The views of the parties and the reasons for the Commission's decision are discussed below.

Submissions

WLR price

Both parties consider that the Commission should adopt the WLR indicative prices set out in the 2009 Pricing Principles. Their submissions are summarised in section 3.1 above.

ACT Utilities Tax

Telstra submits that under the *Utilities (Network Facilities Tax) Act 2006* (ACT) (ACT Utilities Tax) it must pay a tax in respect of telecommunications cabling and other network facilities in the ACT or Jervis Bay. Telstra submits it will need to recover the ACT Utilities Tax from its wholesale and retail customer base.⁴⁴

Accordingly, Telstra submits that the Commission should not include an amount or a methodology for calculating the amount of any surcharge for the ACT Utilities Tax in the FD given that Digiplus did not include the amount of the ACT Utilities Tax as an issue in its dispute notification.⁴⁵

Telstra submits that the following clause should be included in the FD:

⁴³ *Telstra Corporation Limited* [2006] ACompT, [94]-[95].

⁴⁴ Telstra primary submission, [5]-[9].

⁴⁵ *ibid.*

*“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.”*⁴⁶

In reply, Digiplus submits that the FD ought to remain silent on the question of the ACT Utilities Tax, as this matter has not previously been raised by Telstra in the dispute. Digiplus considers that Telstra’s proposed wording (above) would effectively impose new contractual terms on the parties in respect of a matter that is not the subject of the dispute.⁴⁷

Commission’s view

WLR prices

The Commission has had regard to and is guided by the indicative WLR prices contained in the 2009 Pricing Principles and believes they should be adopted in the dispute.

Period	HomeLine Part	BusinessLine Part
1 August 2006 – 31 December 2007	\$23.12 per month	\$25.84 per month
1 January 2008 – 31 December 2010	\$25.57 per month	\$26.93 per month

For the reasons set out above in section 3.1 and having regard to the subsection 152CR(1) criteria, the Commission is of the view that applying the indicative prices from the 2009 Pricing Principles for the WLR for the period 7 August 2007 to 31 December 2010 is in the LTIE and will provide a degree of certainty regarding access to regulated services in a period of significant regulatory and industry change and associated uncertainty.

ACT Utilities Tax

The Commission considers that it is appropriate for the FD to specify that the FD does not preclude Telstra’s imposition of an additional reasonable amount for the recovery of the ACT Utilities Tax.

The Commission agrees with Telstra’s view that it should not set an actual charge or methodology for the recovery of the ACT Utilities Tax as it has not been specified as an issue in dispute and the recovery of the tax extends beyond the service which is being arbitrated in this access dispute. In addition, the Commission 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.

The Commission believes that the most appropriate means of determining the charge for the recovery of the ACT Utilities Tax should be through its inclusion in the relevant service agreements.

⁴⁶ *ibid.*

⁴⁷ Digiplus reply submission, p. 1.

5 Period for FD

5.1 Commencement date

Introduction

Subsection 152DNA(1) states that any or all provisions of an FD may be expressed to have taken effect on a specified date that is earlier than the date on which the FD takes effect. The specified date (commencement date) must not be earlier than the date on which the parties to the FD commenced negotiations with a view to agreeing on the terms and conditions of access (subsection 152DNA(2)).

In its Consultation Paper, the Commission stated its view that backdating would be appropriate in this dispute and proposed a commencement date of 7 August 2007, being the date on which the parties commenced negotiating with a view to agreeing the relevant terms and conditions of access.

The Commission called for parties' views.

Submissions

Both Telstra and Digiplus accept the Commission's proposed commencement date of 7 August 2007.⁴⁸

Commission's view

The Commission is of the view that the appropriate commencement date is 7 August 2007, the date on which the parties commenced negotiating with a view to agreeing the relevant terms and conditions of access.

5.2 Expiry date

Introduction

Subsection 152DNA(4) states that a provision of an FD may be expressed to terminate on a specified date. Although not currently a requirement of the legislation, the Commission would usually expect to limit the duration of an FD to a certain period for price terms.

In its Consultation Paper, the Commission proposed an expiry date for the FD of 31 December 2010. Parties' views were sought.

Submissions

Both Telstra and Digiplus agree with the Commission's proposed expiry date.⁴⁹ Telstra submits that 31 December 2010 is an appropriate expiry date given that it is also the expiry date of the 2009 Pricing Principles.⁵⁰

Commission's view

Consistent with the views of both parties, the Commission considers that an FD expiry date of 31 December 2010 is appropriate.

⁴⁸ Telstra primary submission, [22]-[23]; Digiplus primary submission, p. 15.

⁴⁹ Telstra primary submission, [24]-[25]; Digiplus primary submission, p. 15.

⁵⁰ Telstra primary submission, [25].

5.3 Interest

Introduction

Subsection 152DNA(6) gives the Commission a discretion to require interest to be paid in instances of backdating at a rate specified in the FD. The Commission must have regard to the Access Disputes Guidelines.

In previous arbitration decisions, the Commission has nominated the Reserve Bank of Australia (RBA) Large Business Variable Indicator Rate (which was published as a monthly historical time series statistic) as the interest rate to be applied to the backdated amount. The RBA ceased publishing this particular time series in January 2008.

In its Consultation Paper, the Commission proposed to use the Small Business Variable Other Overdraft Rate that is published by the RBA (the RBA small business rate). The Commission is of the view that this is the appropriate interest rate to be applied to backdated amounts in this dispute.

Parties' views were sought.

Submissions

Telstra submits that the RBA small business rate is not appropriate because the parties to the dispute are likely to be characterised as large businesses. Small business lending rates are typically higher than large business lending rates, and Telstra contends that the use of small business interest rates would overcompensate parties.⁵¹

Telstra submits that the most appropriate rate is the large business, weighted-average rate on credit outstanding variable rate published by the RBA (the RBA large business rate). While noting that this rate is published quarterly, Telstra submits that this rate is the most appropriate rate given it is applicable to large businesses.⁵²

Telstra argues that while the RBA does not define large business, TPG (Digiplus's parent company) is a large business as it employs more than 200 people fulfilling the Australian Bureau of Statistics definition of large business. Further, it notes that TPG's 2009 annual report states that "strong profit growth is forecast to continue" and estimates TPG's total annual revenue for 2009/2010 to increase to \$460 million.⁵³

Telstra submits that TPG/Digiplus is therefore not a small business for financing purposes and so a large business interest rate should apply to backdated amounts.⁵⁴

In reply, Digiplus rejects Telstra's characterisation of it being a "large business" for the purpose of the dispute. Digiplus notes that it is the access seeker in this dispute, not its parent TPG Internet. Digiplus submits that the appropriate interest rate for the present purposes is 15 per cent. Digiplus submits that the figure is typical of an internal discount rate for investments by telecommunications carriers. By way of comparison, Digiplus notes that Telstra has previously publicly stated its return on assets at 18 per cent per annum.⁵⁵

⁵¹ Telstra primary submission, [26]-[43].

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ Digiplus reply submission, pp. 3-4.

Digiplus submits that interest should apply to the backdated amount from 7 August 2007.⁵⁶

Commission's view

As specified in the Access Dispute Guidelines, where interest is to be paid, it will be calculated on the amounts of money that have been overpaid (or underpaid).⁵⁷ The rate of interest should reflect the opportunity cost of the overpayment (or underpayment) and generally, daily compounding will be appropriate. The Guidelines also suggest that the opportunity cost could be assessed by reference to the rate applicable to debt financing.

In this dispute, the Commission considers it appropriate to specify that interest is charged on the under/overpayments that have occurred.

After considering the parties' submissions, the Commission remains of the view that interest should be calculated on a daily basis and compounded. Further, the Commission remains of the view that the RBA small business rate should be used.

The Commission considered the interest rate proposed by Digiplus. The Commission considers that a rate of 15 per cent is not an appropriate rate. Digiplus notes that a 15 per cent rate is typical of an internal discount rate for investments by telecommunications carriers. However, the Commission is not satisfied that overpayments would necessarily have been used to fund long-held investments, as opposed to being used to meet expenses or retire existing debt, or that any such investments would in fact yield the rate of return that Digiplus suggested.

The Commission also considered the alternative RBA large business rate proposed by Telstra. The Commission does not consider that the RBA large business rate represents the opportunity cost of money to parties.

Telstra argued that the businesses involved in this dispute are large businesses, so the RBA large business rate should apply. The Commission considers however that other factors in addition to the size of the business will affect the interest that the 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.⁵⁸

In addition, the RBA large business rate time series is quarterly and the Commission believes that the calculations would be less precise than a monthly time series. Being published quarterly could also delay or complicate the calculation of interest on over/under payments made close to the date of the FD coming into effect.

In these circumstances, the Commission concludes that the RBA small business rate is the appropriate interest rate to apply to over/under payments. The Commission considers that this rate reflects the opportunity cost of capital for the parties.

5.4 Length of settlement period

Introduction

⁵⁶ Digiplus primary submission, p. 15.

⁵⁷ Access Dispute Guidelines, pp. 63-64.

⁵⁸ See notes to RBA, *F5 Indicator Lending Rates*, at <http://www.rba.gov.au/statistics/tables/xls/f05hist.xls> (accessed 16 August 2010).

The TPA states that an FD has effect 21 days after the determination is made. Any interest required to be paid will be calculated up to that date.⁵⁹

In its draft determination, the Commission proposed that settlement of over/under payments and interest should be paid within 42 days after the date on which the FD is made.

Parties' views were sought.

Submissions

Neither Telstra nor Digiplus submitted on the length of the settlement period.

Commission's view

The Commission has determined a 42 day settlement period is appropriate in the dispute as it will allow the parties sufficient time to calculate the settlement amount.

⁵⁹ Subsections 152DN(1) and 152DNA(6)(d) of the TPA.

Appendix A: Consultation process chronology

The following details the consultation process undertaken by the Commission:

Date	Event
20 December 2007	Digiplus notified the Commission of a WLR dispute under Part XIC of the TPA, stating it was unable to agree on a monthly price for the WLR with Telstra.
23 January 2008	Telstra notified an access dispute with Digiplus in relation to the LCS.
25 January 2008	The Chairman constituted the Commission for the purposes of arbitrating this dispute, the members being Chairman Graeme Samuel and Commissioner John Martin.
25 February 2008	The parties were notified on the constitution of the Commission; given a confidentiality order and direction; informed of the case management team; and requested to make submissions on preliminary matters, including whether the WLR dispute and the LCS dispute should be joined.
7 April 2008	The Commission informed the parties that it would join the WLR and the LCS disputes and that a case management meeting would be held “on the papers” in this matter.
12 August 2008	The Commission wrote to parties notifying them of final pricing principles and indicative prices for the LCS and the WLR services for 2008-09, and sought parties’ views on the appropriateness of interim determinations (IDs) in the disputes.
8 January 2009	The Commission issued an ID pursuant to subsections 152CPA (1) and (3). The ID set the following prices for the WLR: \$25.57 per month for HomeLine Part and \$26.93 per month for BusinessLine Part. The ID commenced on 8 January 2009 and expired on 31 July 2009.
11 March 2009	The Commission informed the parties that the Commission for the disputes was reconstituted with Commissioner Edward Willet as the presiding member and Commissioner Joseph Dimasi.
20 August 2009	The Commission published the <i>Draft pricing principles and indicative prices for LCS, WLR, PSTN OTA, ULLS, LSS</i> . ⁶⁰
27 October 2009	The Commission informed the parties of its proposal to roll-over 2008–09 indicative prices for fixed services until 31 December 2010, and requested the parties’ views in relation to the rollover. Telstra and Digiplus both broadly supported the rollover option.
14 January 2010	The Commission advised the parties of its decision to roll-over the indicative prices until 31 December 2010.
11 June 2010	The Commission issued parties with a consultation paper, draft determinations, and directions requiring parties to make primary submissions on the content of the FDs by 9 July 2010 and submissions in reply by 23 July 2010. The Commission received submissions and submissions in reply from Digiplus on those dates. The Commission received a primary submission from Telstra on 9 July 2010, and Telstra notified the Commission on 23 July 2010 that it did not intend to make a reply submission.

⁶⁰ ACCC, *Draft pricing principles and indicative prices for LCS, WLR, PSTN OTA, ULLS, LSS*, August 2009.