

ACCESS DISPUTE BETWEEN
EFTel LIMITED ('ACCESS SEEKER')
AND TELSTRA CORPORATION LIMITED ('ACCESS PROVIDER')

LINE SHARING SERVICE (LSS)

Access Dispute Notified under section 152CM of the
Trade Practices Act 1974 on 21 December 2007.

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

Background

1. On 21 December 2007, the Australian Competition and Consumer Commission (the ACCC) received a written access dispute notification (the notification) from EFTel Limited (EFTel) that an access dispute existed in relation to the supply by Telstra Corporation Limited (Telstra) of the Line Sharing Service (LSS). EFTel's notification was provided to the ACCC pursuant to section 152CM of the *Trade Practices Act 1974* (the Act).
2. 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 broadband services while another provider supplies a PSTN voice service over the lower frequency part of the same line.
3. After a public inquiry, the ACCC declared the LSS, pursuant to subsection 152AL(3) of the Act, on 30 August 2002. The declaration was published in the *Commonwealth of Australia Gazette* GN41 on 16 October 2002, to apply until 30 October 2007. Since this time, the ACCC has re-declared the service twice:
 - From 1 November 2007 until 31 July 2009 - *Commonwealth of Australia Special Gazette* No. S214 on 29 October 2007, pursuant to subsection 152ALA(4) of the Act.
 - From 1 August 2009 to 31 July 2014 - *Commonwealth of Australia Gazette*, No. GN28 on 22 July 2009 pursuant to subsection 152ALA(4) of the Act.
4. The ACCC made pricing principles on 3 December 2009 - *Pricing Principles for the Line Sharing Service (LSS) Determination 2009* - for the declared LSS pursuant to section 152AQA of the Act.¹
5. 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 LSS

¹ *Pricing Principles for the Line Sharing Service (LSS) Determination 2009*

- Telstra has an obligation under subsection 152AR(3) of the Act to supply the LSS to EFTel and
 - EFTel is unable to agree with Telstra about the terms and conditions of access to the LSS addressed in the final determination.
6. On 22 February 2008, the ACCC made an interim determination. The interim determination was extended on 18 February 2009 until 21 February 2010.
 7. Pursuant to subsection 152CP(1) of the Act, this instrument is the final determination relating to the terms and conditions of access by EFTel to the LSS provided by Telstra.

Terms and conditions of access

8. This Final Determination specifies:
 - LSS monthly charges, as per Schedule 1
 - LSS single connection and disconnection charges, as per Schedule 2
 - LSS MNM charges, as per Schedule 3
 - LSS MNM non-price terms, as per Schedule 4
 - LSS Network modernisation and upgrade terms, as per Schedule 5
9. Subject to clause 10, other terms and conditions upon which EFTel and Telstra have agreed for the supply of the LSS are to continue to apply.
10. Except where the parties expressly agree otherwise, in the event of any inconsistency between the terms and conditions upon which Telstra and EFTel have agreed for the supply of the LSS and the intended operation of this determination, this determination is taken to apply and overrides any pre-existing agreement to the extent of any inconsistency.
11. All charges expressed in this Final Determination are expressed on a GST exclusive basis.

Settlement of over or under paid amounts and interest

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

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

13. Interest is payable on the settlement amount, compounded daily at the applicable monthly rate specified in the Small Business Variable Other Overdraft Indicator Rate published by the Reserve Bank of Australia, for the

period commencing on the date that the charge specified in this determination commences, and ending on the date that this determination takes effect.

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

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

Commencement and expiry

15. This determination comes into effect 21 days after the date it is made.
16. The determination will remain in force until 31 December 2010 for the following schedules:
- LSS monthly charges (Schedule 1)
 - LSS single connection and disconnection charges (Schedule 2)
 - LSS MNM charges (Schedule 3)

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

Definitions

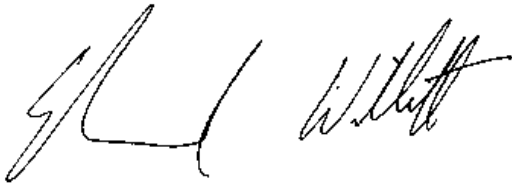
17. For the purpose of this Final Determination, the following definitions apply:
- (i) 'Band' refers to the geographic classification of exchange service areas (ESAs).
 - (ii) 'Band 1' means the following central business districts:
 - (a) NSW (City South, Dalley, Haymarket, Pitt, Kent)
 - (b) QLD (Charlotte,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

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

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

Note 3: Brief descriptions of the four Bands are:

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

Handwritten signature of Edward Campbell Willett in black ink.

Edward Campbell Willett
Presiding Member

Handwritten signature of Joseph Dimasi in black ink.

Joseph Dimasi
Commissioner

DATED: 7 April 2010

Schedule 1 - LSS Monthly Charges

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

2007-08	1 July 2008 – 31 July 2009	1 August 2009 – 31 December 2010
\$2.50	\$2.50	\$2.50

2. Except where the parties subsequently agree otherwise, there is no minimum period for which a LSS must be acquired, and LSS monthly charges are not payable for a LSS following EFTel ceasing to acquire it.

Application

3. The charges specified in this Schedule do not apply to:
 - (a) the supply of the LSS on or before 1 February 2008; or
 - (b) the supply of the LSS after 31 December 2010.

Schedule 2 - LSS single connection and disconnection charges

LSS single connection charges

1. Except where the parties subsequently agree otherwise, the charge payable for the connection of a LSS outside a Managed Network Migration (MNM) is as follows:

1 July 2007 to 30 June 2008	\$41.40
1 July 2008 to 31 July 2009	\$43.10
1 August 2009 to 31 December 2010	\$43.10

LSS single disconnection charges

2. Except where the parties subsequently agree otherwise, and subject to clause 3, the charge payable for the disconnection of a LSS outside of a MNM is as follows:

1 July 2007 to 30 June 2008	\$37.10
1 July 2008 to 31 July 2009	\$38.70
1 August 2009 to 31 December 2010	\$38.70

3. A disconnection charge is not payable if either:
 - (a) the disconnection is made pursuant to a Telstra LSS churn process; or,
 - (b) EFTel is participating in the Telstra LSS churn process and Telstra (Bigpond) is not participating in the Telstra LSS churn process.

Application

4. The terms specified in this Schedule do not apply to:
 - (a) LSS connections or LSS disconnections in Band 4;
 - (b) LSS connections where the line on which the LSS is to be connected is being used to supply a ULLS; or
 - (c) LSS connections or LSS disconnections which were made prior to 1 February 2008 or after 31 December 2010.

Definitions:

5. For the purposes of this Schedule:
 - (a) a reference to the connection or disconnection of a LSS outside a MNM refers to all instances of LSS connections or LSS disconnections other than those that are made as part of a MNM;
 - (b) a MNM is the transfer or migration of services that is achieved by the project management of Telstra in coordinating the cancellation and connection of services;
 - (c) the "Telstra LSS churn process" is a Telstra process by which services can be transferred between LSS, and between LSS and DSL services.

Schedule 3 – LSS Managed Network Migration (MNM) charges

This Schedule applies to connections where the LSS is being connected as part of a MNM involving the transfer of end user data services from a Telstra wholesale ADSL service.

Connection charge

1. Except where the parties subsequently agree otherwise, the connection charges payable for the connection of a LSS as part of a MNM where the service is to be connected on a line that Telstra is using to supply a wholesale ADSL service are:

For 1 July 2007 to 30 June 2008

Component	Charge
Fixed amount (per MNM)	\$134.50
Variable amount (per connection)	+ \$30.90

For 1 July 2008 to 31 July 2009

Component	Charge
Fixed amount (per MNM)	\$140.10
Variable amount (per connection)	+ \$32.20

For 1 August 2009 to 31 December 2010

Component	Charge
Fixed amount (per MNM)	\$140.10
Variable amount (per connection)	+ \$32.20

Minimum connection charge per MNM per exchange

2. Except where the parties subsequently agree otherwise, the minimum connection charge per exchange for a MNM where the LSS is to be connected on a line that Telstra is using to supply a wholesale ADSL service is:

For 1 July 2007 to 30 June 2008

\$752.50 per exchange per MNM

For 1 July 2008 to 31 July 2009

\$784.10 per exchange per MNM

For 1 August 2009 to 31 December 2010

\$784.10 per exchange per MNM.

Disconnection charges

3. Except where the parties subsequently agree otherwise, no charge is payable for the disconnection of a LSS where this is done as part of a MNM, e.g., a migration of the LSS to an ULLS or a wholesale ADSL platform.

Application

4. The terms specified in this Schedule do not apply to:
 - (a) MNMs in Band 4; or
 - (b) MNMs which were ordered prior to 1 February 2008 or after 31 December 2010.

Definitions

5. For the purposes of this Schedule:
 - (a) a reference to the connection or disconnection of a LSS as part of a MNM refers to a LSS connection or disconnection to be made in the context of a "Managed Network Migration";
 - (b) a "Managed Network Migration" is the transfer or migration of services that is achieved by the project management of Telstra in co-ordinating the cancellation and connection of services.

Schedule 4 – LSS Managed Network Migration (MNM) Non-price terms

Minimum number of services

1. Except where the parties subsequently agree otherwise, it is at the discretion of EFTel whether a particular service is to be connected as part of a MNM, or outside of a MNM.
2. EFTel will notify Telstra at the time the order is made whether a particular service is to be connected as part of a MNM or outside of a MNM.
3. Except where the parties subsequently agree otherwise, there is no minimum number of connections applying as a pre-requisite for requesting a MNM.

Limits on number of exchanges per State per day at which MNM cutovers can be scheduled

4. Except where the parties otherwise agree, and subject to clause 5, Telstra must not refuse to schedule a cutover for a MNM at an exchange because EFTel has requested a MNM cutover at other exchanges in that State on the same day.
5. Telstra may refuse a requested MNM cutover date where it would be inconsistent with a capacity limitation notice ('the Notice') it has provided to EFTel.
6. The Notice must specify:
 - (a) the limit that is to apply regarding the number of exchanges within a State where MNM cutovers may be performed;
 - (b) the period to which it applies;
 - (c) the exchange service areas to which it applies; and
 - (d) the reasons for the limit being necessary by reference to EFTel forecast demands and available capacity at the relevant exchange service areas.
7. The Notice lapses 60 Calendar Days after it is received by EFTel, unless earlier withdrawn.

Note: Another Notice may be issued to replace a lapsed Notice.

8. Telstra must not unreasonably refuse to vary or withdraw the Notice on the request of EFTel.

Note: Where EFTel disagrees with a decision made not to vary or withdraw the Notice, EFTel may implement the dispute resolution provisions of its Customer Relationship Agreement.

Application

9. The terms specified in this Schedule do not apply in respect of MNMs that are ordered prior to this determination coming into effect.

Definitions

10. For the purposes of this Schedule:

- (a) a reference to the connection of a LSS as part of a MNM refers to a LSS connection or disconnection to be made in the context of a "Managed Network Migration";
- (b) a "Managed Network Migration" is the transfer or migration of services that is achieved by the project management of Telstra in co-ordinating the cancellation and connection of services.
- (c) 'Calendar Day' means a day reckoned from midnight to midnight.

Schedule 5 – LSS Network Modernisation and Upgrade Terms

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

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

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

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

Information to be provided in the notices

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

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

Emergency Network Modernisation and Upgrade

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

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

Coordinated Capital Works Program forecast

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

Coordinated Capital Works Program schedule

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

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

Negotiations in good faith

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

Dispute Resolution

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

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

Application

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

Miscellaneous

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

Definitions

26. For the purposes of this Schedule:

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

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

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

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

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

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

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

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

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