Attachment C

ACCESS DISPUTES BETWEEN HUTCHISON TELECOMMUNICATIONS (AUSTRALIA) LTD AND HUTCHISON 3G AUSTRALIA PTY LTD (ACCESS SEEKERS) AND OPTUS NETWORKS PTY LIMITED, OPTUS MOBILE PTY LTD AND OPTUS VISION PTY LTD (ACCESS PROVIDER)

DOMESTIC MOBILE TERMINATING ACCESS SERVICE (MTAS)

Access Disputes Notified under subsection 152CM(1) of the *Trade Practices Act 1974* (the Act) on 24 February 2005

Statement of Reasons for the Interim Determinations

BACKGROUND

1. On 24 February 2005, the Australian Competition and Consumer Commission (the Commission) received separate written notifications (the notifications) from Hutchison Telecommunications (Australia) Limited (HTAL) and Hutchison 3G Australia Pty Limited (H3GA) (together Hutchison) that an access dispute in relation to the supply, by Optus Networks Pty Limited, Optus Mobile Pty Ltd and Optus Vision Pty Ltd (together Optus), to Hutchison, of the Domestic Mobile Terminating Access Service (the MTAS). Hutchison's notifications were provided to the Commission pursuant to subsection 152CM(1) of the Act.
2. The Commission is conducting an arbitration of these access disputes under Division 8 of Part XIC of the Act. As outlined in the Commission's *Resolution of telecommunications access disputes – a guide, March 2004 (revised),* (the Guidelines), a preliminary case management meeting was held between Commission staff, Hutchison and Optus on 23 March 2005.
3. On 12 May 2005, the Commission proposed that a single administrative process apply to the HTAL and Optus, and H3GA and Optus access disputes. The arbitrations would proceed as usual, and the Commission (as constituted for each arbitration) would separately make decisions with respect to each arbitration. For the purposes of administrative simplicity, however, only one set of correspondence, submissions and decision papers would be prepared to cover both disputes. The Commission did not receive any objection to this approach from the parties.
4. On 12 May 2005, the Commission also requested that the parties to this dispute provide submissions on whether or not the Commission should defer consideration of this arbitration and whether an interim determination should be made in this arbitration and what such a determination (if any) should be.
5. Both parties provided initial submissions on 19 May 2005. On 3 June 2005, Hutchison provided a submission in response to Optus's initial submission. Optus elected not to make a submission in response to Hutchison's submission.

6. On 1 July 2005, the Commission gave a draft interim determination to the parties in accordance with subsection 152CP(4) of the Act. The Commission also gave the parties a draft supporting statement of reasons.

7. On 1 July 2005, the Commission further decided, on balance, to not defer consideration of the access dispute and provided parties with the reasons for this decision.

8. Parties provided written submissions in response to the Commission's draft interim determination and draft statement of reasons on 15 July 2005. Hutchison made a further submission on 20 July 2005.

9. On 1 July 2005, the Commission also requested that the parties provide submissions on the Commission's draft interim determination and the accompanying draft statement of reasons.

10. The notification specifies that the disputes are about the price at which the MTAS is to be supplied by Optus to Hutchison. The notification states that the access agreement between Optus and Hutchison was most recently amended on [redacted]. The review date for this agreement was [redacted]. Hutchison and Optus are unable to agree on the price at which Optus will supply the MTAS to Hutchison from 1 January 2005.

11. The Commission understands that Optus is currently charging Hutchison [redacted] cpm for the MTAS.

Reasons for Decision

12. Subsection 152CPA(1) of the Act provides that a determination may be expressed to be an interim determination.

13. Subsection 152CP(5) of the Act provides that, when the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination. The Commission's reasons are set out below. The reasons address, in turn, the questions of:

- whether the Commission should make an interim determination in these disputes; and
- if so, what the content of such an interim determination should be.

SHOULD THE COMMISSION MAKE AN INTERIM DETERMINATION?

14. Part XIC of the Act does not specify matters that the Commission is required to take into account in deciding whether to make an interim determination.[3] While the Commission is free to have regard to the matters that it would be required to take into account in making a final determination when making an interim determination,[4] it is not required to take those matters into account, and does not have a duty to consider whether to take those matters into account.[5]

[3] Subsection 152AQA(6) of the Act provides that the Commission must have regard to any Pricing Principles Determination if it is required to arbitrate an access dispute under Division 8 in relation to the declared service.
[4] Subsection 152CR(3) of the Act.
[5] Subsections 152CR((4) of the Act.

15. In accordance with the matters set out in section 7.1 of the Guidelines, in deciding whether to issue an interim determination in this matter, the Commission has considered the following factors:

- whether the Commission is satisfied that it has sufficient information on which to make an interim determination; and
- whether the Commission is satisfied that, in all the circumstances, it is appropriate to make an interim determination.

16. The Commission has had regard to the parties' submissions in this respect. Each party provided submissions on the two factors considered relevant by the Commission and as set out in paragraph 15 above. These matters are addressed in turn below.

17. The Commission has had regard to all submissions made by the parties in relation to the making of any interim determination to date.

Does the Commission have sufficient information on which to make an interim determination?

Parties' submissions

18. Optus submits that the Commission currently has all the information that is sufficient to provide a reasonable basis for considering whether an interim determination should be issued in respect of the disputes. Optus notes that this includes information provided to the Commission in support of its MTAS access undertaking[6], information forming part of the Commission's MTAS Final Report[7] and additional information provided by Optus in its submissions to the disputes (including Attachments 2 and 3 to its submission dated 19 May 2005).

19. Optus submits that the Commission must have particular regard to the information provided by Optus in support of its MTAS access undertaking because that information addresses the issue of what the price of access should be.

20. Optus submits that the only reasonable basis for considering whether an interim determination should be issued is for the Commission to consider all the information before it. Optus considers that for the Commission to do otherwise would be to disregard its own processes set out in the MTAS Discussion Paper[8], the MTAS Final Report[9] and the Guidelines.

21. Optus submits that the Commission's MTAS pricing principle (the MTAS Pricing Principles Determination[10]) is not binding but indicative only. Optus submits that the MTAS pricing principle should not be applied to an interim determination. Optus further submits that the evidence it submitted to the Commission in support of its MTAS access undertaking, and that set out in

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[6] Optus lodged its access undertaking with respect to the MTAS (it uses the term Domestic GSM Terminating Access Services or DGTA in its submission) on 23 December 2004.
[7] ACCC, *Mobile Services Review Mobile Terminating Access Service Final Decision*, (the MTAS Final Report) June 2004.
[8] ACCC, *Mobile Services Review: An ACCC Discussion Paper* (the MTAS Discussion Paper), April 2003.
[9] ACCC, MTAS Final Report, June 2004.
[10] Appendix D to the MTAS Final Report.

Attachments 2 and 3 to its submission (dated 19 May 2005) to these disputes, is sufficient to provide a reasonable basis for an interim determination.

22. Optus also submits that the Guidelines make it clear that in determining what information will be sufficient to pass the 'reasonable basis' threshold, the Commission should only have regard to reasonableness in light of the substantive issues before the Commission and not the complexity of the information or the time it will take to consider such information given the complexity.[11]

23. Optus further submits that the Commission, in paragraph 28 of the draft interim determination, states that it does not consider that the submissions by Optus have rendered the MTAS Pricing Principles Determination inapplicable for considering the content of this interim determination and the Commission has not provided any reasons why it has arrived at its view. Optus submits that as the Commission has not properly considered the information which is in its possession, it should not make an interim determination.[12]

24. Hutchison submits that to make an interim determination, the Commission does not require all of the information necessary to resolve the overall dispute. Hutchison submits that the Commission has sufficient information currently before it with which to make an interim determination, including material on which the Commission based its MTAS Final Decision and Optus's modelled costs of providing the MTAS submitted in support of its proposed access undertaking. Hutchison submits that only the first class of information can be considered with the degree of expedition necessary for the making of an interim determination.

25. Hutchison submits that the Commission should not use Optus's modelled costs and the supporting material in making an interim determination as it has not been audited or thoroughly analysed by any independent or other party, and it is not possible for the Commission to expeditiously consider this information.

26. Hutchison submits that when the Commission is arbitrating an access dispute, it is required to have regard to any pricing determination in relation to the declared service the subject of the arbitration under subsection 152AQA(6) of the Act. Hutchison also submits that the Commission is required to have regard to the MTAS pricing principle in relation to any decision it makes regarding an interim determination.

Commission's view

27. The Commission considers that, in deciding whether it does have sufficient information on which to make an interim determination, the information it relies upon should provide a reasonable basis for the terms and conditions set out in an interim determination.

28. As indicated in the Guidelines, the Commission considers that, for the purpose of making an interim determination, it does not need to have in front of it all of the information that it would need for the purpose of making a final determination. Further, the Commission does not believe it needs to have reached a view on all outstanding issues in an access dispute before it can make

[11] Optus submission, 15 July 2005, paragraph 3.3

[12] Optus submission, 15 July 2005, paragraphs 3.4 – 3.5.

an interim determination. To set the information threshold at levels equivalent to those necessary to issue a final determination, or equivalent to that necessary to resolve all matters in a dispute, would unnecessarily restrict the Commission's ability to make an interim determination. Furthermore, requiring the Commission to thoroughly consider all such information could have the potential to unnecessarily delay a decision on the making of an interim determination, and therefore detract from the intention of the regime with respect to the Commission being able to make an interim determination in advance of a final determination.

29. This view is also supported by the intention underlying subsections 152CR(3) and (4) of the Act. These two subsections were introduced in recognition that requiring the Commission to take into account the matters it must consider in making a final determination would be likely to slow considerably the issue of an interim determination, thus detracting from the utility of interim determination arrangements.[13] In addition, subsection 152CR(4) of the Act provides that, in making an interim determination, the Commission does not have a duty to consider whether to take into account a matter specified in subsection 152CR(1) of the Act.[14] Given the Commission does not have a duty to consider whether to take those specified matters into account, and clearly is not obligated to take each of those matters into account, then it follows that a lower information threshold is sufficient for making an interim determination.

30. As indicated in the Guidelines, the Commission's view is that it is able to make an interim determination if it is based on information that provides a reasonable basis for the terms and conditions set out in the determination. Accordingly, the Commission does not consider that it necessarily has to thoroughly assess all information which may be relevant to the making of a final determination if it has given consideration to information that provides a reasonable basis for the making of an interim determination.

31. The Commission notes Optus has submitted a large volume of material for the purposes of considering the matter of an interim determination. This includes material submitted by Optus in support of its MTAS access undertaking. The Commission notes the submissions by Optus in this regard. However, given the detail and complexity of much of that material, and given the timely and provisional nature of an interim determination, the Commission believes that it would not be feasible or appropriate for it to conduct a full assessment of all of the material submitted by Optus at this stage. This is particularly the case with respect to the material submitted by Optus which it has also submitted in support of its MTAS access undertaking. The assessment of an undertaking is a process that the Act envisages could take six months or longer to complete.[15] Therefore, a full assessment of the undertaking material submitted by Optus would be more appropriate and relevant for considering the content of a final, rather than an interim, determination. Accordingly, while the Commission notes the submissions, in the absence of thoroughly assessing all the arguments

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[13] Supplementary Explanatory memorandum to the Telecommunications Legislation Amendment Bill 1998, items 36F and 36G, page 30.

[14] Section 125CR(1) of the Act specifies the matters the Commission must take into account in making a final determination.

[15] Subsections 152BY(7) and (9) of the Act.

made in those submissions, the Commission has not given those particular arguments weight for the purpose of considering an interim determination.

32. The Commission is of the view that the MTAS Pricing Principles Determination is relevant to the question of what the content of any interim determination should be. Further, the MTAS Final Report that accompanied release of the MTAS Pricing Principles Determination is relevant to the extent that it explains and supports the decisions reached in the MTAS Pricing Principles Determination. The Commission notes the MTAS Pricing Principles Determination was the product of a thorough review process based on consideration of substantial input from a range of interested parties (including parties in these access disputes).

33. The Commission considers that it should afford parties to the disputes the opportunity to provide submissions concerning the relevance and application of the MTAS Pricing Principles Determination. The Commission notes, however, that it would be unlikely to be able to assess within an appropriate time frame any submissions of a particularly complex or detailed nature for the purposes of considering an interim determination. That said, the Commission notes the current process relates to an interim determination and that a final determination, based on a thorough consideration of all relevant information, could be backdated in the event it was appropriate to do so.

34. The Commission notes Optus has provided submissions against the application of the MTAS Pricing Principles Determination. That said, and for the reasons outlined in paragraphs 27 to 33 above and 129 to 138 below, the Commission does not consider that the submissions by Optus (including its MTAS access undertaking material) has rendered the MTAS Pricing Principles Determination inapplicable for considering the content of any interim determination in the current dispute. That is, the Commission is of the view that, on the information currently before it, the MTAS Pricing Principles Determination remains a reasonable basis upon which to determine an interim price for the MTAS.

35. Having regard to the timely and provisional nature of an interim determination, the MTAS Pricing Principles Determination, the supporting MTAS Final Report and the submissions by Optus and Hutchison, the Commission is of the view that it has sufficient information on which to make an interim determination. In particular, the Commission is of a view that the MTAS Pricing Principles Determination provides a reasonable basis for making an interim determination.

Whether the Commission is satisfied that, in all the circumstances, it is appropriate to make an interim determination

36. The Guidelines note that in considering if an interim determination is appropriate, in all the circumstances, the Commission considers a range of matters including:

- the nature of any contractual arrangements between parties;
- whether backdating a final determination would provide an adequate alternative to making an interim determination;
- the likely impact of an interim arrangement on end-users;
- the timing of the final determination;

- international treaty obligations; and
- other matters.

These are considered in turn below.

Nature of any contractual arrangements

Parties' submissions

37. Optus submits that an interim determination is not necessary in these disputes since it has been the consistent practice of both parties to provide services to each other whilst the price is being negotiated, and then to backdate the agreed price to the start of the relevant term. Optus submits that the Commission should allow this process to be applied to the current circumstances.

38. Optus submits that the nature of contractual arrangements other than price are not relevant to these disputes as the disputes only relate to the price of access.

39. Optus has submitted that it is willing to supply the MTAS at its proposed Undertaking Rate upon request by any access seeker.

40. Optus submits it supports the Commission's clarification in paragraph 38 of the draft interim determination decision that Hutchison is entitled to the Optus proposed undertaking rate for 2005. Optus further submits that this and Optus's consistent offer in that regard mean that parties are now in agreement over the interim payment arrangements. Thus, Optus submits there is no uncertainty as to the price which Hutchison is required to pay Optus and the reasons the Commission has identified in paragraph 40 of its draft decision no longer exist so the Commission should not issue an interim determination.[16]

41. [redacted]

42. Hutchison submits that the Commission should grant an interim determination to provide interim certainty as to the price that applies to the supply of the MTAS, thereby clarifying the parties' commercial relationship. Hutchison further submits that an interim determination that reflects the Commission's target price of 12 cpm would encourage the parties to engage in further commercial negotiations by creating an incentive to secure long-term certainty.

43. Hutchison submits that if Optus unequivocally guarantees supply in circumstances where Hutchison pays 12 cpm, given that the parties agreement is that the appropriate prices is 12 cpm or more, there would be no need for an interim determination (and deferral of the arbitration would be appropriate).

Commission's view

44. In accordance with the Guidelines, the Commission has considered the nature of any contractual arrangements between the parties. In this regard, an important objective of the regime outlined in Part XIC of the Act is to encourage commercial negotiation between the parties where possible. Accordingly, when

[16] Optus submission, 15 July 2005, paragraphs 3.8 – 3.10

the parties have entered into a contractual arrangement specifically in lieu of an interim determination, the Commission is likely to be reluctant to override such an arrangement.

45. Notwithstanding the confusion that Hutchison believes it is not entitled to the proposed Optus Undertaking Rate at 19.25 cpm, the Commission has proceeded on the basis that Hutchison could, if it sought it, enter into an arrangement to receive the MTAS from Optus at 19.25 cpm.

46. Nevertheless, there may be a case for making an interim determination varying an arrangement made between the parties where it is shown that there has been a material change of circumstances since the arrangement was made. Also, in some instances, there may be a case for making an interim determination if the terms of the arrangement reflect a significant disparity in the bargaining position of the parties which is unlikely to be ameliorated through the making of a final determination in the near future. In this regard, the Commission considers that when the parties to a dispute have entered into a contractual arrangement for the declared service, the making of an interim determination may override that arrangement if necessary.

47. [redacted] While Hutchison may be able to acquire access from Optus at [redacted] cpm, this does not mean the parties have reached agreement as to what would be an appropriate interim price for the MTAS during the course of this access dispute. Further, the Commission notes Hutchison has expressed reluctance to pay this price and has also expressed concern that in the event it was unwilling to pay the price demanded by Optus, Optus may refuse to continue to supply the MTAS to Hutchison.

Whether backdating a final determination would provide an adequate alternative to making an interim determination

Parties' submissions

48. Optus submits that the critical issues to be addressed by the Commission in relation to this issue are:

- whether an interim determination provides any additional certainty, than that associated with the backdating of a final determination;
- whether an economically rational access seeker will base its downstream services at the Optus Undertaking Rate[17], irrespective of whether a lower rate is specified in an interim determination; and
- whether an economically rational access seeker will act in the same way, irrespective of whether an interim determination is made or a final determination is backdated.

49. Optus submits that backdating provides an adequate alternative to an interim determination in this matter. In this regard, Optus submits that Hutchison, as an economically rational access seeker, will base the price of its downstream services on the Optus Undertaking Rate irrespective of whether a lower rate is

[17] Optus Undertaking rate is 19.25 cpm Optus submission, 19 May 2005, p3.

specified in an interim determination, due to the substantial risk that the final price will be the Optus Undertaking Rate. Optus submits that if an interim determination or a final price is determined at a lower rate, Hutchison will retain the difference as a windfall. In support of this position, Optus also provides Attachment 2 to its submission dated 19 May 2005. Optus's view on the likely extent (or lack thereof) of pass-through to end users from an interim determination that contains a lower price for the MTAS than the Optus Undertaking Rate is discussed below in paragraphs 79 to 80.

50. In response to the draft statement of reasons, Optus submits that the Commission seems to be indicating that backdating a final determination will rarely promote the LTIE. Optus submits this implies that the Commission will always issue an interim determination regardless of the circumstances. Optus submits that this is inconsistent with the Act and the Guidelines.

51. Hutchison submits that backdating is not an appropriate alternative to an interim determination and declining to make an interim determination eliminates the possibility that any reduction in the MTAS will be passed through to end-users.

52. Hutchison submits that while it is unable to give the Commission a guarantee that an interim determination would lead to further reductions in its retail prices, it remains a possibility that this will in fact occur.

53. Hutchison further submits that backdating will not clarify the parties' current obligations. Hutchison submits the Commission's Guidelines note that an important objective of the Part XIC regime is to encourage negotiations between parties where possible. Hutchison submits that an interim determination may act as a catalyst to recommence commercial negotiations.

Commission's view

54. The Commission notes in its Guidelines that, in some instances, backdating may provide an alternative to making an interim determination. The provisions allowing for backdating a final determination, as outlined in the Explanatory Memorandum to the *Telecommunications Legislation Amendment Bill 1998,* are intended to:

> ...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 period which may otherwise be covered by an interim determination or a commercial agreement which one or more parties may be disputing.[18]

55. In its Guidelines, the Commission also notes that in some instances backdating may be a poor substitute for an interim determination. In this regard, the Guidelines refer, as an example, to the situation where an interim determination enables the access price to be reduced towards that which the Commission is likely to set in a final determination. In this example, the Guidelines suggest that an interim determination:

> ...can help improve the conditions for competition. If these price changes flow through to end-users, the benefits can be realised more quickly than otherwise. Although backdating a final determination could compensate a party that has paid higher prices

[18] Supplementary explanatory memorandum for the *Telecommunications Legislation Amendment Bill 1998*, Item 39B – Insertion of new section 152DNA of the Act (Backdating of final determinations), p. 33.

during the period until a final determination is made, it would not have the effect of promoting outcomes in the long-term interests of end-users during that period.[19]

56. Importantly, however, the Commission notes that this particular example should not be interpreted as the *only* instance in which the Commission would consider backdating to be a poor substitute for an interim determination. Rather, this example represents one particular set of circumstances where the Commission is likely to more strongly favour issuing an interim determination.

57. Further, it should be noted that the Commission does not consider an interim determination and the backdating mechanism to be necessarily substitutes for each other. That is, the Commission may still backdate a final determination in circumstances where it has issued an interim determination in an access dispute.

58. In the context of these disputes, the Commission is of the view, based on the available information at this time, that the appropriate price of the MTAS is likely to be lower than that currently charged by Optus to Hutchison. In this regard, the Commission notes that, in the MTAS Final Report that accompanied release of the MTAS Pricing Principle Determination, the Commission considered a price that was more closely associated with the total service long-run incremental cost (inclusive of a mark-up to account for some contribution to common organisational-level costs – so-called TSLRIC+) of providing the service would best promote the long-term interests of end-users (LTIE). Further, the Commission found that, based on information available to it at that time, the TSLRIC+ of providing the MTAS was likely to lie somewhere in the range of 5 to 12 cents per minute. The Commission further considered that pricing principles that provided an adjustment path towards such a closer association of the price of the MTAS and its TSLRIC+ would best promote the LTIE. Based on a range of reasonable estimates of the TSLRIC+ of providing the MTAS available to the Commission at the time of making the MTAS Pricing Principles Determination, the Commission believed a price of 18 cpm would best promote the LTIE during the 2005 calendar year and 15 cpm for the 2006 calendar year.

59. While the Commission may ultimately find that the prices proposed by Optus in its MTAS access undertaking would, alternatively, better promote the LTIE, the Commission believes the material provided by Optus in support of its MTAS access undertaking has not been subject to a full assessment process such that the Commission can have confidence this would be the case. Accordingly, based on the information before it at this point in time, the Commission believes it likely that a significant differential exists between the access price for the MTAS it considers would best promote the LTIE and the access price currently paid by Hutchison to Optus.

60. The Commission believes that if it were to set a price for the MTAS in an interim determination that ensured a closer association of the price of the service and its TSLRIC+ than that currently charged by Optus to Hutchison, this would likely generate benefits for end-users that would otherwise not arise.

61. In contrast, while backdating can compensate a party to an access dispute for any cash-flow losses it incurs during the period from when commercial

[19] ACCC, the Guidelines, p. 52.

negotiations commenced to the issuing of a final determination,[20] it would not have the effect of creating the conditions for promoting the LTIE that would be expected from issuing an interim determination.

62. The Commission also does not accept Optus's submission that the Commission seems to be indicating that backdating a final determination will rarely promote the LTIE, thereby implying that the Commission will always issue an interim determination. The Commission considers that whether or not an interim determination is issued in a particular dispute, or a final determination is backdated, depends on the circumstances prevailing at the time in a particular dispute. For instance, where the Commission does not have sufficient information before it to issue an interim determination, it may be appropriate not to issue an interim determination and to issue a backdated final determination.

63. Consequently, the Commission does not believe that backdating will be an adequate or complete substitute for it issuing an interim determination in this particular dispute.

64. Optus submitted that Hutchison has absolute certainty that the Optus Undertaking Rate will apply from 1 January 2005 and that it will receive the benefits of that lower rate from January 2005 billing period. The significance of this argument is unclear to the Commission given that Optus's MTAS access undertaking has not at this time been accepted and that a final determination in the arbitration may be backdated irrespective of whether an interim determination is made. For the reasons set out above, the Commission does not consider that backdating a final determination will be an adequate or complete substitute for an interim determination.

The likely impact of an interim arrangement on end-users

Parties' submissions

65. Optus submits that an interim determination is only appropriate in this dispute if Hutchison is able to establish with certainty that the material benefits of an interim determination will flow through to end-users, and that such benefits will be materially higher than the benefits that flow through under a backdated final determination that contains a price for the MTAS at the proposed Optus Undertaking Rate.

66. As noted in paragraph 49 above, Optus submits that Hutchison will not pass through to consumers any additional benefits if an interim determination contains a price for the MTAS lower than the proposed Optus Undertaking Rate because of the risk that Hutchison will not be able to recover those benefits from consumers should the finally determined price be the proposed Optus Undertaking Rate.

67. In support of this position, Optus provides Attachment 2 to its submission which, it claims, shows that there will be no substantial benefit to end-users from an interim determination that contains a price of 18 cpm. Optus notes that Attachment 2 contains a simple game theoretic construct which is designed to provide insight into the likely decision process for parties to pass-through any

[20] Including the repayment of an 'interest component' and an allowance for the opportunity cost of funds being employed elsewhere.

interim determination below the proposed Optus Undertaking rate of 19.25 cpm. On the basis of this analysis, Optus concludes that if two players are faced with a choice to 'pass through' or 'not pass through' an interim determination price of 18 cpm, both players will have a dominant strategy not to pass through any of these cost savings given that there is some risk that a final determination will contain a price of 19.25 cpm.

68. Therefore, Optus submits that an interim determination is not appropriate in these circumstances and that backdating of a final determination would provide an adequate alternative.

69. In response to the draft statement of reasons, Optus submits that the Commission has relied on the argument that lower prices for the MTAS will better enable Hutchison to offer lower retail prices without any analysis of the substantive validity of this argument.

70. Optus further submits that the Commission appears to accept that Hutchison would construct an expected value risk assessment on the likely final determination in deciding whether to pass through lower MTAS rates in an interim determination but ignores the fact that this assessment would apply in the circumstance that the Commission does not issue an interim determination.

71. As noted above Hutchison submits that while it is unable to give the Commission a guarantee that an interim determination would lead to further reductions in its retail prices it remains a possibility that this will in fact occur.

72. Hutchison submits in its response to the draft interim determination that the presence of network effects is an additional factor in favour of pass through and that the game-theoretic construct employed by Optus does not sufficiently accommodate the potential value of subscribers to a telecommunications carrier.

73. Hutchison submits this is illustrated in the context of on-net calls. Hutchison submits that by offering a lower retail price, Hutchison can attract additional users who will then attract further users who wish to make cheap on-net calls to the first additional users. Those further users will then attract other users and so on. Hutchison submits that the additional profit made as a result of additional users may exceed the amount Hutchison loses if input costs subsequently rise, for example if the price in the final determination exceeds the price of the interim determination.[21]

Commission's view

74. The Commission considers that an interim determination which contains a lower price for the MTAS than is currently charged by Optus will be likely to be in the LTIE. As indicated in paragraph 175 below, the Commission's view, based on the information available to it at this point in time, is that a price of 18 cpm would be an appropriate interim price for this service for the remainder of the 2005 calendar year, and that a price of 15 cpm would be appropriate for the period from 1 January 2006 until 12 months from the commencement date of an interim determination.

[21] Hutchison submission, 15 July 2005, paragraph 6.

75. Based on the information available to it at this point in time, the Commission believes that Hutchison faces prices for the MTAS in excess of the TSLRIC+ of providing this service. To the extent that there are asymmetries in the volume of minutes Hutchison and Optus terminate on each other's mobile networks, this will enable one party to raise the input costs of its rival in the market for retail mobile services. This will occur irrespective of whether there are reciprocal arrangements in place between the two parties in relation to the prices they charge each other for the MTAS.

76. By lowering the price of the MTAS towards its underlying (TSLRIC+) cost of production, the Commission believes this will help to put in place necessary preconditions for improved competition in the market within which retail mobile services are provided, by enabling the parties to compete on the basis of their underlying costs of production.

77. Further, the Commission notes that a price for the MTAS which is above underlying cost is unlikely to be associated with a structure of prices for retail mobile services that are allocatively efficient, and therefore not in the LTIE. In this regard, the Commission considers that an interim determination which sets out prices for the MTAS which are more reflective of the TSLRIC+ of providing the service will be likely to promote the economically efficient use of the infrastructure used to provide mobile services. As noted in the Commission's MTAS Final Report, the Commission believes that a pricing structure has emerged across mobile services that involves above-cost pricing of the MTAS and subsidised pricing of some retail mobile services. The Commission expects that this pricing structure will generate greater than efficient consumption of retail mobile subscription services and, in turn, may be encouraging excessive investment in the infrastructure used to provide retail mobile services. For example, the Commission noted in its MTAS Final Report that such a pricing structure may be leading to a greater than efficient turnover of mobile handsets by consumers in the face of subsidised handset prices, as well as excessive investment in the infrastructure used to develop new handsets.

78. Overall, therefore, the Commission believes that an interim determination that contains a price for the MTAS that is more reflective of the underlying cost of providing this service will promote the LTIE.

79. The Commission notes the concerns raised by Optus that lower prices for the MTAS will not be passed through to consumers. The Commission does not believe, however, that the extent of pass-through should be seen as the only measure of the extent to which a lower price for the MTAS promotes competition, or the LTIE more generally. In the first instance, the LTIE test under section 152AB of the Act requires consideration of the extent to which an action, *inter alia*, promotes competition and encourages efficiency. An interim determination might put in place necessary preconditions for improved competition and efficient use of and investment in infrastructure. Putting into place those preconditions can itself be in the LTIE, even if there is no certainly that the necessary preconditions will be taken advantage of.

80. Secondly, to the extent that such preconditions are taken advantage of, improved competition can manifest itself in many forms other than just price reductions. In particular, improved competition may be associated with improvements in the quality of services provided. Further, lower input costs

may lead to a pricing structure across all retail mobile services (including services other than mobile to mobile (MTM) call services) that would promote the LTIE. Hence, while MTM call prices may not fall by the same amount as the price of the MTAS as a result of this interim determination, the LTIE can still be promoted if there is a closer association of prices and costs for other retail mobile services (such as SMS, mobile-to-fixed, mobile subscription etc).

81. The Commission recognises that setting an access price in an interim determination does not remove uncertainty about the price the Commission will eventually set in a final determination. Further, the Commission considers that if Hutchison were faced with only two options in the event of an interim determination that contained a price of 18 cpm – to either act upon *all* or *none* of the cost savings from an interim determination, as the game theoretic scenario in Attachment 2 to Optus's 19 May 2005 submission implies – it is possible that Hutchison would find it preferable not to act upon any cost savings it receives as a result of an interim determination.

82. However, it need not be assumed that Hutchison is faced with this decision, as is implied in the decision-theory analysis provided by Optus. The Commission notes that, in reality, Hutchison will have the option of acting upon any magnitude of the cost savings it receives from a lower MTAS price in an interim determination. Therefore, in the event that an interim determination contained a price of 18 cpm, the Commission would expect that Hutchison would conduct some risk assessment of the likely outcomes in a final determination and would seek to determine the 'optimum' business strategy that will maximise its expected profits over the period to which the interim determination price is set to apply.

83. The Commission also notes that there should be no presumption, at this point, that the Commission could only revise upwards a price for the MTAS in a backdated final determination for the period covered by an interim determination. In this regard, the Commission notes that there is nothing to prevent it from setting a lower price for the MTAS in a backdated final determination for the period covered by an interim determination if it considered that the information before it suggested a lower price was more likely to meet the criteria under subsection 152CR(1) of the Act. When determining an appropriate price for the MTAS for the purposes of a final determination, the Commission would not simply be assessing whether it should set a final price of 18 cpm in accordance with its proposed adjustment path in the MTAS Pricing Principles Determination, or 19.25 cpm as proposed by Optus in its MTAS access undertaking. Rather, the Commission will properly consider the appropriate price for the MTAS based on all the available and relevant information it has before it.

84. That said, the Commission notes that, based on the information currently before it, it is unlikely that it would set a price for the MTAS in an interim determination that is above 19.25 cpm. Clearly, this would depend on the further information that is submitted during the course of the arbitration and the assessment of such information.

85. In light of these possibilities, and the option to act upon any amount of the cost savings from an interim determination, the Commission expects that Hutchison will form a risk-adjusted view of the 'expected' price it will pay over the period

covered by an interim determination (in light of the possibility of a backdated final determination that was set at a level inconsistent with the interim determination). The Commission considers it likely that a risk adjusted view of the 'expected' price for the MTAS over period to which the interim determination applied would be lower than 19.25 cpm in this particular instance.

86. Based on the information available to it at this point in time, the Commission believes this 'expected' price would be one that is more closely associated with the TSLRIC+ of providing the MTAS. In turn, the Commission believes this will be likely to better promote the LTIE than if the Commission did not issue an interim determination in this matter.

87. The Commission notes Optus's submission that the Commission appears to accept that Hutchison would construct the same expected value risk assessment on the likely final determination regardless of whether the Commission issues an interim determination or not. Based on the information available to it at this point in time, however, the Commission believes that a price of 18 cpm for the 2005 calendar year and 15 cpm for the 2006 calendar year will be more likely to promote the LTIE than that offered by Optus in place of an interim determination. Were the Commission not to issue an interim determination consistent with this information, the Commission believes it would generate greater uncertainty to Hutchison, and likely alter its expected price for the MTAS for the period under dispute. Accordingly, the Commission continues to believe that an interim determination would be likely to generate benefits for end-users.

The timing of the final determination

Parties' submissions

88. Optus submits that an interim determination or a final determination has no effect to the extent to which it is inconsistent with an access undertaking that is in operation. As a result of the operation of clauses 2.3 and 2.4 of Optus's' MTAS access undertaking, any interim determination issued by the Commission will be inconsistent with the Optus MTAS access undertaking. Therefore, Optus submits that an interim determination is not appropriate in these circumstances.

89. Hutchison submits that the Optus undertaking may not apply to Hutchison because the Service Agreements to which Optus and Hutchison are a party did not expire on or before 31 December 2004 and are still on foot.

Commission's view

90. The Commission notes the argument presented by Optus that an interim determination would have no effect due to inconsistency with its access undertaking. The Commission notes, however, that at this time the Optus undertaking has not been accepted and is therefore not in operation. The Commission also notes the arguments provided by Hutchison to support its view that Optus' undertaking would not apply to Hutchison. In the Commission's view, given that a dispute currently exists, any arbitration determination which sets the access price cannot be inconsistent with the price accepted in an access undertaking. Accordingly, the Optus access undertaking, if accepted, would have application to Hutchison in the form of any subsequent access arrangements established by way of Commission arbitration. In

considering whether it is appropriate to make an interim determination, the Commission has not giving these arguments weight.

91. In the Guidelines, the Commission indicates that the timing of an interim determination is relevant in two ways. First, if the period of time between notification of the dispute and making the final determination is likely to be substantial, then an interim determination may be appropriate. Second, the period of time between the interim determination and final determination should be considered. If a final determination is to be made within a relatively short period of time (say two to three months), then the case for making an interim determination is likely to be weaker. It is also noted in the Guidelines that making an interim determination uses resources that could otherwise be used to finalise the arbitration, potentially delaying finalisation of the arbitration.

92. The Commission believes the length of time it will take to assess Optus's MTAS access undertaking is an important consideration with respect to how long it will take the Commission to make a final determination in these disputes. In this regard, it is expected that the Commission's assessment of Optus's material in support of its MTAS access undertaking will be a complex exercise. The Commission considers the complexity of this material is likely to mean that a full and proper consideration of Optus's MTAS access undertaking will take a substantial period of time. While the Commission will endeavour to conduct its public inquiry into Optus's MTAS access undertaking as expeditiously as possible, it notes that it released a Discussion Paper in relation to this material on 25 February 2005 and the closing date for submissions passed on 25 May 2005.

93. Following consideration of these issues, the Commission does not expect that it will be in a position to make a final determination in relation to these disputes until late in 2005 at the earliest. Hence, the Commission is of the view that the likely timing of a final determination weighs in favour of it making an interim determination at this stage of the arbitration.

International treaty obligations

Parties submissions

94. Neither party made arguments on this issue.

Commission view

95. The Commission does not consider this matter relevant in this arbitration.

Conclusion – whether the Commission should issue an interim determination

96. The Commission considers that it has sufficient information to make an interim determination and that it is satisfied in all the circumstances that it is appropriate to make an interim determination in these access disputes.

CONTENT OF THE INTERIM DETERMINATION

97. In determining the matters that the Commission should have regard to in deciding on the content of these interim determinations, it has considered the submissions provided by Optus and Hutchison. The Commission has also been

guided by the relevant provisions of Part XIC of the Act, including the object of Part XIC, and the Commission's Guidelines. The Commission further notes the timely and provisional nature of an interim determination. Based on a consideration of these matters, the Commission has given particular consideration to the following factors in determining the content of this interim determination:

- whether to take into account matters identified under subsection 152CR(1) and other provisions of Part XIC of the Act;
- Optus's proposal on the form of an interim determination;
- the Commission's MTAS Pricing Principle Determination;
- whether an interim determination should include an adjustment path; and
- the time period over which an interim determination should apply.

Each of these is considered in turn below.

Matters identified under subsection 152CR(1) and other provisions of Part XIC of the Act

Parties' submissions

98. In summary, Optus submits the Commission should have regard to the matters identified under subsection 152CR(1) and that if the Commission decides to issue interim determinations in these disputes, it should consider all the information provided to it by Optus, including:
    - the information provided by Optus as part of its MTAS access undertaking;
    - the information forming part of the Mobile Services Review where the Commission has acknowledged weaknesses in the reasoning that underpins the indicative pricing principles; and
    - additional information provided by Optus in Attachments 2 and 3 to its submission to this access dispute, dated 19 May 2005.

99. Hutchison did not specifically address whether the Commission should have regard to particular criteria in considering the content of an interim determination. Hutchison noted that the Commission has broad discretion with regard to making an interim determination under subsection 152CR(3) of the Act. It also noted that the Commission does not have a duty to consider whether to take into account a matter referred to in subsection 152CR(1) of the Act being those matters which the Commission must have regard in making a final determination in line with subsection 152CR(4) of the Act. Hutchison did, however, address what the content of an interim determination should be and these are discussed further below.

Commission's view

100. The Commission notes that it is required to take into account its MTAS Pricing Principles Determination, including price-related terms and conditions, made under section 152AQA of the Act. The Commission's consideration of this is discussed in detail in paragraphs 129 to 1138 below.

101. The Commission notes that it is giving the parties a draft interim determination pursuant to the requirement in subsection 152CP(4) of the Act.

102. The Commission is not required to consider whether to have regard to the factors set out in subsection 152CR(1) of the Act. Rather, subsection 152CR(4) of the Act provides that, in making an interim determination, 'the Commission does not have a duty to consider whether to take into account a matter referred to in a paragraph of subsection (1)'. Nevertheless, the Commission has considered whether it would take into account any or all of the matters referred to in subsection 152CR(1) of the Act.

103. The Commission has decided not to explicitly take into account the matters listed in subsection 152CR(1) of the Act in determining the content of these interim determinations. The Commission is also of the view that a proper assessment of all of the material before the Commission, including Optus's submitted MTAS access undertaking material, against the matters set out in subsection 152CR(1) of the Act would be an unreasonable approach to determining the content of an interim determination. Such an assessment is more appropriate for a final determination. That said, the Commission notes that the content of the MTAS Pricing Principles Determination to which the Commission must have regard was arrived at taking into account those matters specified under subsection 152CR(1) of the Act. Further, in determining the content of an interim determination, the Commission is cognisant that the object of Part XIC of the Act is to promote the LTIE.

Optus's proposal on the form of an interim determination

Parties' submissions

104. Optus submits that in determining the contents of an interim determination, the Commission must properly consider all the evidence submitted by Optus in support of its MTAS access undertaking. This includes (as outlined in Attachment 1 to Optus's submission):

- Optus Submission to the ACCC on Domestic GSM Terminating Access Service Undertaking;
- International Benchmarking of Mobile Termination Charges – An Update (Charles River Associates, 20 December 2004);
- Mobile Services as Jointly Produced Products: Concepts and Empirics, A Report for Optus (National Economics Research Associates, May 2004);
- Existence and Exercise of Market Power in Mobile Termination, A Report for Optus (National Economics Research Associates, April 2004);
- Pricing Mobile Termination in Australia (Charles River Associates, 22 December 2004); and

- Statement of Jerry Hausman, Macdonald Professor of Economics, MIT (17 December 2004).

105. Further, Optus provided Attachment 3 to its submission dated 19 May 2005, which, among other things, summarises much of the information that is outlined in the CRA international benchmarking report that is listed above in paragraph 89).

106. Optus submits that a proper consideration of this information will lead to an interim determination being based on Optus's proposed Undertaking Rate.

107. In its response to the draft statement of reasons, Optus submits that even though the Commission does not have a statutory obligation to consider the Optus Undertaking in making a decision on the contents of an interim determination, considering this information in the current circumstances is the only means for ensuring the Commission has relied on information that provides a reasonable basis for its decision.

108. Hutchison submits that the Commission should not use Optus Undertaking information in making the interim determination as this information has not been audited or thoroughly analysed by any independent or other party. Hutchison submits that it is not possible for the Commission to consider expeditiously the Optus Undertaking information.

Commission's view

109. In determining the content of these interim determinations, the Commission has noted the material supplied by Optus in its submission. This includes the information it submitted in support of its MTAS access undertaking. That said, the Commission has decided not to thoroughly assess all this material for the purposes of making an interim determination in these disputes and has formed a view to not give this material weight in determining the content of the interim determinations.

110. In the first instance, the Commission considers that under the Act it does not have an obligation to thoroughly assess any, or all, of Optus's MTAS access undertaking material when considering what the content of an interim determination should be. The Commission considers that when determining what the content of an interim determination should be, it has discretion to consider a range of information available to it. Furthermore, the Commission considers assessment of all of Optus's MTAS access undertaking material is a complex exercise which cannot and should not be undertaken within the timeframes the Commission proposed to determine whether or not an interim determination should be made and, if so, what the content of the interim determination should be.

111. The Commission does note, however, that some of the material submitted by Optus in support of its MTAS access undertaking was originally submitted and considered by the Commission during the process it followed when making the MTAS Pricing Principles Determination. In this regard, the Commission notes that the two reports prepared by 'National Economic Research Associates'

(NERA) were originally submitted on behalf of Optus in response to the Commission's Draft MTAS Report[22].

112. The Commission also notes, however, that some of Optus's MTAS access undertaking material – including the CRA report which estimates the welfare maximising price for the MTAS and the Statement of Jerry Hausman – seeks to quantify some of the conceptual arguments which are advanced in the NERA reports.

113. Further, the Commission notes that the CRA report titled 'International Benchmarking of Mobile Termination Charges – An Update' reflects an updated version of a report submitted to the Commission during the Mobile Services Review on 28 May 2004. This updated CRA report seeks to take into account new international developments since the Commission released its MTAS Final Report, and also responds to the Commission's views on the initial CRA international benchmarking report submitted during the Mobile Services Review. Using the UK, Malaysia and Sweden as benchmarks, and taking into account differences in key cost factors between Australia and these countries respectively, CRA estimated that the LRIC level of supplying the MTAS in Australia falls in the range of 9.99 to 20.07 cpm.

114. The Commission considers that the updated CRA report on international benchmarking contains new information to the extent that CRA's estimated range (9.99 to 20.07 cpm) is based on a number of new 'adjustments' to reflect different cost conditions across these countries compared to Australia. The Commission notes, however, the CRA report does not make all the adjustments outlined by the Commission in its MTAS Final Report. There is also reference to four new cost estimates in Austria, Belgium, Sweden and a study undertaken in New Zealand. Aside from Sweden, however, consideration of these additional countries would not appear to be included in CRA's estimated range. The cost estimates derived in these respective countries are discussed below in paragraph 133.

115. The Commission considers that it would not be feasible or appropriate for it to conduct a full assessment of all of the material submitted by Optus in support of its MTAS access undertaking material at this stage. Further, the Commission notes that it is currently conducting a public consultation process in relation to the Optus undertaking. In this regard, the Commission released a Discussion Paper on 25 February 2005 and notes that the closing date for submissions passed on 25 May 2005. The Commission does not expect to be in a position to have reached a final view on Optus's undertaking until late in 2005 at the earliest. In this regard, the Commission notes that the assessment of an undertaking is a process that the Act envisages could take six months or longer to complete. Therefore, a full and proper assessment of Optus's MTAS access undertaking material would be more appropriate and relevant for considering the content of a final, rather than an interim, determination.

116. That said, the Commission does make some preliminary observations with respect to some of the material submitted by Optus in support of its undertaking. These are made in paragraphs 133 and 137 below. The Commission notes, however, that none of these observations persuade it to believe that the content

[22] ACCC, *Mobile Services Review: Mobile Terminating Access Service Draft Decision*, March 2004.

of an interim determination should be consistent with that contained in Optus's MTAS access undertaking. Further, the Commission notes that none of these observations persuade it to believe that basing an interim determination on the MTAS Pricing Principles Determination would be inappropriate.

117. Accordingly, the Commission does not propose to rely on the supporting material to Optus's MTAS access undertaking outlined in paragraph 104 above, for the purpose of deciding on the content of these interim determinations.

The Commission's Pricing Principles Determination

Parties' views

118. Optus submits that the Commission's MTAS pricing principle – as outlined in the MTAS Pricing Principles Determination – should not apply to the interim determinations in these disputes.

119. In support of this position, Optus provides Attachment 3 which it describes as 'evidence supporting Optus's argument that the indicative pricing principles should not be applied to an interim determination in respect of the Access Disputes'.

120. In this Attachment, Optus submits that relevant changes in circumstance since June 2004 mean that the MTAS Pricing Principles Determination (and the indicative pricing principles contained within it) can no longer be implemented in their current form. In this regard, Optus considers that these relevant changes include the new cost estimates of the cost of supplying the MTAS in overseas jurisdictions (including in Austria, Sweden, Belgium, and a survey study in New Zealand) and the updated CRA benchmarking analysis which seeks to make a number of the adjustments recommended by Analysys, and constructs a new range of indicative costs between 9.99 and 20.07 cpm based on cost estimates in the UK, Malaysia and Sweden. It also, notes that subsequent to the release of the MTAS Pricing Principles Determination, Vodafone and Optus have submitted detailed cost studies on the efficient cost of supplying the MTAS in Australia.

121. Attachment 3 also contains Optus's views as to why the Commission's MTAS Pricing Principles Determination (and the indicative prices contained within) are flawed and should not be preferred to Optus's proposed Undertaking Rate, including that:

- the international benchmarks are out of date;
- the international benchmark data was not adjusted;
- reliance on accounting information is contrary to TSLRIC;
- the actual accounting information is out of date and not fully tested;
- reliance on Optus's RAF information is flawed;
- no reference is made to efficient cost models;
- no allowance is made for externalities;
- there is a failure to consider alternative funding mechanisms; and

- not allowing for a network externality creates a distortion between fixed and mobile networks.

122. Optus submits that these new developments and the flaws in the Commission's MTAS Pricing Principles Determination listed in paragraphs 120 and 121 above, raise doubt over the Commission's view that 12 cpm for the MTAS is a conservative target price.

123. Further, Optus submits that the Commission has repeatedly stated that the indicative prices contained within the MTAS Pricing Principles Determination are not binding and that, in the event of arbitration, the Commission would have regard to arguments put forward by a party against the application of those principles. Moreover, Optus submits that to not have proper regard to the information referred to in the Optus submission, including the MTAS access undertaking material submitted by Optus, (outlined in paragraph 104 above) and to only have regard to the MTAS Pricing Principles Determination would be a clear breach of the Commission's publicly stated principles on how it will apply these principles to individual arbitrations.

124. In its response to the draft interim determination, Optus submits that it is critical that the Commission adhere to its publicly stated processes on how it will apply its MTAS pricing principles in arbitrating an access dispute. This includes having regard to arguments put forward by a party against the application of the pricing principles in conducting the arbitration, including a consultation on the contents of the confidential Analysys report.

125. Optus submits that the Commission has not addressed in detail the benchmarking by CRA that is subsequent to the Mobile Services Review. In addition the Commission has not addressed that its consultant, Analysys, recommended adjusting international benchmarks for geographic differences, referring specifically to the Malaysian estimate.

126. Hutchison submits that, under subsection 152AQA(6) of the Act, the Commission is required to have regard to the Pricing Principles Determination contained in the MTAS Final Report in relation to any decision it makes regarding an interim determination. Hutchison notes that the target price arrived at by the Commission in its MTAS Final Report was 12 cpm and that the interim determination should reflect that target price.

127. Hutchison further submits that the Mobile Services Review which led to the MTAS Final Report was a comprehensive review into the appropriate price for this service which took over a year to complete and received submissions from a large number of parties, including Optus which made several detailed submissions and participated in two public hearings.

128. Hutchison submits that the Analysys report addresses the appropriate methodology by which to estimate the cost of supplying the MTAS. With respect to the Analysys Report, Hutchison retained Marsden Jacob Associates, who reported that the Analysys Report was 'reliable and in-line with international best practice'.[23]

Commission's view

[23] Hutchison submission, 20 July 2005, paragraph 2.

129. The Commission notes that, under subsection 152AQA(6) of the Act, it is required to have regard to the MTAS Pricing Principles Determination when arbitrating an access dispute.

130. In determining the content of these interim determinations, the Commission has had regard to the MTAS Pricing Principles Determination (including the price related terms and conditions contained within it). Further, the Commission notes that it has also had regard to the MTAS Final Report that accompanies the MTAS Pricing Principles Determination to the extent that it explains and supports the Commission's decision on the MTAS Pricing Principles Determination.

131. The Commission considers that the MTAS Pricing Principles Determination and the supporting MTAS Final Report, and the analysis undertaken in preparing it, represents the best available evidence for it to consider when determining what the price of the MTAS should be in an interim determination. The Commission notes that the price related terms and conditions outlined in the MTAS Pricing Principles Determination were informed by cost modelling exercises undertaken in a number of overseas jurisdictions, cost information provided by Telstra and Optus under the Regulatory Accounting Framework (RAF), submissions from interested parties provided to the Commission in the course of the Mobiles Services Review (particularly in response to the MTAS Draft Report), and expert advice the Commission sought from Analysys. Consideration of all this evidence led the Commission to conclude in its MTAS Final Report that:

> ... the best cost measures of the MTAS indicate a range of between 5 and 12 cpm. Accordingly, the Commission continues to believe a target price of 12 cpm is appropriate for this pricing principle.[24]

132. The Commission notes Optus's submission that relevant changes in circumstances since the Commission released its MTAS Pricing Principles Determination mean that the indicative pricing principles contained within this Determination can no longer be implemented in their current form. The Commission notes, however, that much of the information submitted by Optus in support of this proposition, and outlined in Attachment 3, forms supporting material to its MTAS access undertaking. As noted in paragraph 31 above, the Commission considers that the assessment of all of Optus's MTAS access undertaking material is a complex exercise which cannot and should not be undertaken within the timeframes the Commission proposed to determine whether or not an interim determination should be made and, if so, what the content of the interim determination should be. The Commission notes that it will thoroughly assess Optus's MTAS access undertaking material before a final determination is made in these disputes.

133. The Commission notes Optus's view that the Commission has not addressed in detail the benchmarking by CRA. Again, the Commission notes that in relation to the new international cost estimates cited by Optus in Attachment 3, the only 'new' country introduced is Sweden, which has estimated costs of supplying the MTAS of less than 10 cpm. Optus and CRA cite the cost estimates generated in Belgium (26 to 33 cpm) and Austria (14 to 16 cpm) and submit that these costs are above the Commission's upper bound of 12 cpm. However, the Commission notes that neither country has published details of, or even claimed

[24] MTAS Final Report, p. 215.

the existence of, cost modelling of a form consistent with that performed in those jurisdictions which the Commission relied upon for the purposes of the MTAS Final Report. The Commission also notes that CRA had sufficient reservations about each country to exclude them from its indicative range. Finally, Optus draws attention to a review of international cost models by the New Zealand Commerce Commission 'providing a range of 10-17 Australian cpm'. However, the Commission notes that this survey began with the same cases as utilised by the Commission yet came to a different conclusion, which implies that a different underlying methodology was used. The Commission is confident that the methodology it used (as outlined on pages 212 to 215, and later at 229 to 237 of the MTAS Final Report) was both appropriate and reasonable.

134. With respect to Optus's submission on the Malaysian estimate, the Commission agrees that Analysys advised that the LRIC study conducted by the Malaysian regulator 'would provide a useful benchmark when adjusted to Australian traffic and coverage conditions'.[25] However, the Commission also notes that Analysys identified eleven factors that can affect the cost of a mobile network, and discussed these in detail in chapters 2 and 4 of its report. Analysys's general conclusion on these adjustments was that:

> A small number of ... factors can be used to make adjustments that will enable a cost estimate from an international jurisdiction to be transformed .... However, a larger number of other, more complex factors ... do not lend themselves to be used in such a way – in our opinion they are too complex to be captured ... and ultimately can only be resolved with an Australia-specific cost model.[26]

135. As outlined in the MTAS Final Report, the Commission noted that:

> Adjusting overseas cost estimates for each of these factors individually will push the TSLRIC+ of providing the MTAS in different directions and by different amounts. Hence, is unclear in which direction (and by what amount) an overseas estimate of TSLRIC would change if it were adjusted for Australian conditions to account for all of these factors in combination. Accordingly, the Commission believes it would be inappropriate to adjust for only a small subset of these factors in isolation of other possible adjustment factors. Doing so may be more misleading than making no adjustments at all. While the Commission believes it would be possible to adjust for some of these factors, it would not be possible to adjust for others without first conducting a full TSLRIC model in Australia.[27]

136. The Commission continues to believe it would only be appropriate to adjust overseas estimates of cost for Australian-specific factors if it was able to account for all major factors that influence cost in different jurisdictions. Therefore, the Commission continues to believe a range of unadjusted benchmarks provides a better basis for estimating the TSLRIC+ of providing the MTAS in Australia than partially-adjusted benchmarks.

137. Moreover, the Commission notes that many of the issues raised by Optus (listed in paragraph 121 above) in Attachment 3, were issues that were considered and assessed by the Commission during the Mobile Services Review. As such, the Commission considers that although these issues have now been reiterated by

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[25] Analysys, *Examination of mobile termination costs – Final Report*,p. 29

[26] *Ibid.*, p. i.

[27] MTAS Final Report, pg 215.

Optus in the context of this arbitration, this does not alter the Commission's view, at this stage, that the MTAS Pricing Principles Determination represents the most reasonable basis upon which to determine the content of this interim determination.

138. The Commission acknowledges that the price related terms and conditions contained in the MTAS Pricing Principles Determination are indicative only, and also, that the Commission has publicly stated that in the event of arbitration it would consider arguments put forward against the application of those principles (including by making submissions in relation to the consultancy report provided for the Commission by Analysys). That said, and as noted in paragraph 31 above, the Commission considers that it would be more appropriate for it to consider detailed and complex information submitted by Optus arguing against the application of the MTAS Pricing Principles Determination in the context of a final rather than an interim determination. In this regard, and as noted in paragraph 28 above, the Commission notes that the threshold to be established for making an interim determination is lower than that for a final determination. The Commission also notes its view, outlined in paragraph 34 above, that the MTAS Pricing Principles Determination sets out prices for the MTAS which the Commission considers, based on its knowledge of the determination process, provide a reasonable basis for the making of an interim determination.

Whether an interim determination should contain a 'glide' or 'adjustment' path to an MTAS target price

Parties' views

139. Optus submits any interim determination should be based on the Optus Undertaking Rate which implies a price for the MTAS of 19.25 cpm for the 2005 calendar year. This price for the MTAS is based on an adjustment path – outlined by Optus in its proposed MTAS access undertaking – from the current market price of approximately 21 cpm down to the 'Optus Rate' of 17 cpm over a three-year period. Accordingly, Optus submits that if the Commission decides to make an interim determination in this matter, it should contain a price of 19.25 cpm for the MTAS for the 2005 calendar year.

140. Hutchison submits that the Commission's adjustment path, as outlined in the Commission's MTAS Pricing Principles Determination, should not be applied. In this regard, Hutchison notes that the Commission's underlying rationale for the adjustment path was a concern that any move to reduce substantially the price of the MTAS could generate significant disruption to the pricing and business strategies of mobile network operators.[28] Hutchison submits that this rationale does not apply between the parties to this access arbitration as H3GA and its parent, HTAL, together hold only 7 per cent of mobile services market revenue. As a consequence, Hutchison submits that a price of 12 cpm in an interim determination will have no meaningful impact on Optus's pricing or business strategy. Therefore, HTAL submits that 12 cpm represents a reasonable price for the interim determination.

[28] Hutchison reference this to p.216 of the MTAS Decision.

141. In its response to the draft interim determination, Hutchison submits that the Commission should only apply the adjustment path if it is satisfied that to determine a lesser price would adversely affect Optus and, as a consequence the LTIE, so as to outweigh the benefit to the LTIE of an MTAS price of 12 cpm.

142. In this regard, Hutchison undertakes to supply the MTAS to Optus at the rate of 12cpm in the event that the Commission makes an interim determination that Optus supply the MTAS to Hutchison at 12 cpm under a 'Reciprocity Assurance'. Hutchison also submits that this Assurance needs to form part of an interim determination.

143. Hutchison submits that the Commission must balance the certain promotion of the LTIE that is achieved by imposing the target price and the possible detriment to the LTIE that could be caused by disruption to Optus's pricing and business strategies. Hutchison submits that there is no evidence that the impact of an interim determination of 12 cpm on Optus's pricing and business strategies would so affect Optus as to be adverse to the LTIE.

144. Hutchison submits that the target price is the fundamental component of the MTAS Pricing Principle Determination; the adjustment path is a pragmatic mechanism for moving the industry to that target price. Hutchison submits that an interim determination that sets the price at the target price is wholly consistent with the pricing principle and the adjustment path may or may not be relevant, depending on the circumstances of an arbitration. Hutchison submits that in the context of this arbitration, the adjustment path serves no purpose.

145. Hutchison submits therefore that an interim determination should be for a rate of 12 cpm, and not 18 cpm as proposed by the Commission. [29]

Commission's view

146. In determining the content of these interim determinations, the Commission has had regard to the adjustment path outlined in its Pricing Principles Determination. In the MTAS Final Report, the Commission noted that:

> While the Commission believes that a closer association of the price of mobile termination services and its underlying cost TSLRIC+ of production would generate a number of benefits in terms of promoting the LTIE, a sudden decrease could also cause substantial adjustment costs. In particular, any move substantially to reduce the price of MTASs could generate significant disruption to the pricing and business strategies of MNOs. This, in turn, would impinge upon the legitimate business interests of access providers who have, to date, based their business plans around existing pricing structures and the previous retail benchmarking pricing principle. On balance, therefore, the Commission continues to believe it is appropriate that the price related terms and conditions of its pricing principle determination for the MTAS should specify an adjustment path that ensures the price of the service gradually reduces to the target price... [30]

147. The pricing principle determination specified that the price of access to the MTAS for the 2005 calendar year should be 18 cpm, and should be 15 cpm for the 2006 calendar year. This has formed the basis for the Commission's interim price for the MTAS of 18 cpm for the remainder of the 2005 calendar year, and

[29] Hutchison submission, 15 July 2005, paragraph 3.
[30] MTAS Final Report, page 216.

15 cpm from 1 January 2006 until 12 months after the commencement of the interim determination.

148. The Commission notes Hutchison's submission that no such adjustment path should be followed in these interim determinations due to the small proportion of MTAS traffic it would generate for Optus, and the limited impact reductions in the price Hutchison pays for the MTAS would have on Optus's pricing and business strategies. The Commission also notes Hutchison's proposed reciprocity agreement and believes this would further limit the impact of a reduction in the MTAS rate paid by Hutchison to Optus on Optus's pricing and business strategies.

149. The Commission does not believe, however, that that these reasons justify the Commission setting a price for the MTAS in an interim determination that is not based on the MTAS Pricing Principles Determination. In particular, the Commission believes, in this particular case, that there would be the potential for it to set in place conditions that would advantage smaller carriers as opposed to larger carriers were it to set lower rates in arbitrations for those carriers that represented a smaller proportion of the access provider's business. The Commission does not believe such an approach would promote competition, and therefore would not be in the LTIE.

150. The Commission also notes Hutchison's submission that an interim determination that contains a price of 12 cpm would encourage the parties to engage in further commercial negotiations and may result in the settlement of this dispute'.[31] As outlined in paragraph 83 above, the Commission notes that the price contained in an interim determination may not necessarily reflect the price contained in a final determination. To that extent, the Commission considers that it has no basis on which to conclude that an interim determination that contains a price of 12 cpm will necessarily encourage parties to engage in further negotiations, as opposed to an interim determination that is based on the adjustment path contained in the Commission's MTAS Pricing Principles Determination.

151. The Commission notes Optus's submission that the adjustment path should be based on a target price of 17 cpm instead of 12 cpm, and that consequently an interim price for the MTAS should be set at 19.25 cpm for the 2005 calendar year.

152. However, the Commission also notes that Optus's target price for the MTAS of 17 cpm, and therefore also its proposed MTAS price for the 2005 calendar year, is based on the material it submitted in support of its MTAS access undertaking. As noted above, in paragraph 31, the Commission considers that it would not be feasible or appropriate for it to conduct a full assessment of all of the undertaking material submitted by Optus, including the CRA model, at this stage. The Commission also considers that a full and proper assessment of the undertaking material submitted by Optus would be more appropriate and relevant for considering the content of a final, rather than an interim, determination. In light of this, the Commission considers it would not be appropriate to place significant emphasis on Optus's proposed adjustment path

[31] Hutchison submission, 19 May 2005, p.6.

given that it has not conducted a full and proper assessment of the material upon which this adjustment path is premised.

153. The Commission also considers that it should not be assumed that the time period over which adjustments to MTAS prices might be made in a final determination would necessarily be independent of the target price that is determined in a final determination. That is, if the Commission determined that an appropriate 'target price' in a final determination was different to that outlined in the MTAS Pricing Principles Determination, it should not be assumed that the adjustment period would necessarily operate over a three year time period as is currently outlined in the MTAS Pricing Principles Determination.

154. The Commission considers that based on the information currently before it, the adjustment path specified in its MTAS Pricing Principles Determination would be appropriate in promoting the LTIE. Therefore, the Commission concludes that the application of the adjustment path outlined in its MTAS Pricing Principles Determination will ensure that prices for the MTAS in an interim determination are likely to be in the LTIE.

The time period over which an interim determination should apply

Parties' views

155. Hutchison submits that under subsections 152CPA(4) and (5) an interim determination has effect from the date specified in the interim determination and remains in force for the period specified in the determination (which cannot be longer than 12 months).

156. Hutchison submits that an interim determination should remain in force until a final determination is issued by the Commission. That said, Hutchison submits that it is concerned to ensure that a final determination is made as soon as possible, and that the interim determination does not become a *de facto* final determination.

157. Hutchison submits in response to the draft interim determination that the commencement date of the interim determination be the first day of the calendar month following the month in which the interim determination is issued. Hutchison submits this is because its billing systems are set up to bill each calendar month.[32]

158. Optus refers to subsection 152CM(1)(c) of the Act and specifically the precondition of parties being unable to agree before an access dispute can be notified and an interim determination could be issued. Optus submits that the only negotiations, if any, that occurred between Optus and Hutchison occurred in relation to the price of the MTAS for calendar year 2005. Optus submits that no discussions were held in relation to the price of access for 2006 and 2007. Hence, it argued that the access disputes are only in relation to the price of access for 2005. Optus submits, therefore, that the Commission does not have jurisdiction to issue an interim determination in relation to any period outside 2005.

[32] Hutchison submission, 15 July 2005, paragraph 9.

159. In response to the draft interim determination, Optus submits that, contrary to the Commission's arguments, subsection 152CP(2) of the Act does not provide the Commission with an unfettered right to make determinations in any matter. Optus submits that The Australian Competition Tribunal in *Telstra Corporation Limited [2001] ACompT 4 (7 December 2001)* (Telstra decision) clearly held that the power of the Commission under section 152CP(2) is one that is limited to making determinations on matters that are 'contentious' between parties. Optus submits that the price of the MTAS for any part of the 2006 calendar year was never a 'contentious' matter between parties because it was never negotiated between the parties. Therefore, Optus submits that the Commission can only exercise its powers under section 152CP(2) in this dispute for the remainder of the 2005 calendar year.

160. Optus also submits that in correspondence related to the case management meeting, Hutchison stated that the disputes do not relate to any period of the 2006 calendar year.

161. Hutchison submits in response to Optus that while the requirement that the parties be 'unable to agree' enlivens the jurisdiction of the Commission, that jurisdiction is not limited to the matters on which the parties are unable to agree. Hutchison submits this follows from the Commission's broad power under subsection 152CP(2) to make a determination on matters that were not included in the original dispute notification.

162. Hutchison further submits that Optus has placed an unduly limited construction on the Tribunal's comments in the Telstra decision. Hutchison submits that the Tribunal's comments, read in context, are consistent with Hutchison's position. Hutchison submits that the Tribunal sought to confirm the breadth of the Commission's power to make a determination, provided it was not inconsistent with a commercial agreement between the parties, where that agreement is not itself the subject of an access arbitration.

163. Hutchison submits if Optus's construction is preferred, it is a simple matter to clarify that the price of the MTAS in 2006 and 2007 is contentious. Hutchison submits that it offers to acquire the MTAS from Optus in 2006 and 2007 for 12 cpm.

164. Hutchison submits that the amendment to the case management report agreed to by Hutchison in the correspondence referred to in Optus's submission merely concerned particular statements made by Optus at the case management meeting. Hutchison submits that it has at no time accepted that the scope of the Commission's determinations must also be limited to 2005.

Commission's view

165. With regard to the duration of this interim determination, the Commission notes that subsection 152CPA(5) of the Act states that:

> Unless sooner revoked, an interim determination remains in force until the end of the period specified in the determination. The period must not be longer than 12 months.

166. Further, the Commission does not accept Optus's assessment that the Commission may only make an interim determination for the 2005 calendar year.

167. The Commission does not consider that section 152CM of the Act should be read so as to limit the Commission's powers to make a determination (interim and final) according to the scope of the matters in disagreement that led to the dispute notification. The fact that the parties are unable to agree allows the Commission to arbitrate the dispute but it does not also set the limits as to what may be dealt with in a determination.

168. Subsection 152CP(2) of the Act provides that a determination may deal with any matter relating to access by the access seeker, including matters that were not the basis for notification of the dispute. This is a broad provision which, in the Commission's view, is intended to ensure that the Commission is capable of making a determination that will deal with all matters relating to access by an access seeker to the declared service as the Commission considers appropriate in the circumstances. This approach appears to be underlined by the range of examples as to the matters that a determination may address in section 152CP of the Act.

169. In the present case, the Commission considers that it is appropriate in the circumstances to make an interim determination that operates for 12 months and which carries over into 2006. Relevantly, it appears that the parties are likely to be in dispute with respect to the price for the MTAS for the 2006 calendar year. In this regard, the Commission notes that:

    (i) Hutchison stated at the Case Management Meeting on 23 March 2005 that it was seeking a determination in this arbitration for a three year period;

    (ii) Optus submitted the entirety of its MTAS access undertaking material as part of its submissions on the making of an interim determination – which relates to the prices for supply of the MTAS for the 2005 – 2007 period (inclusive); and

    (iii) Hutchison has clarified, in its submission dated 20 July 2005, that the price of the MTAS in 2006 and 2007 is contentious.

170. The Commission does not accept Optus's submission that Hutchison stated that the disputes do not relate to any period other than 2005. Hutchison made it clear in the case management meeting that it was seeking a determination for a three year period.

171. Finally, the Commission believes it is possible that it will not be in a position to make a final determination in relation to this access dispute prior to the end of the 2005 calendar year. As already noted above, the Commission also believes that the parties to this arbitration will likely be in dispute as to the charges that Optus should supply the MTAS to H3GA in subsequent periods. The Commission notes the possibility that a final determination in this dispute may be made that extends in duration beyond 2005. The Commission considers it desirable to safeguard improved conditions for competition in the market that results as a consequence of making this interim determination until such time as it is in a position to make a final determination with respect to this dispute. Accordingly, given the real possibility of a final determination not being made before the end of 2005, the Commission considers it appropriate in this case to extend the interim determination duration beyond the 2005 calendar year.

172. Accordingly, the Commission's view, as outlined in paragraph 9 of the interim determinations, is that the interim determinations should take effect from 5 August 2005, and remain in force for 12 months, or until:

    i. the date a final determination comes into effect; or

    ii. this interim determination is revoked.

173. The Commission notes Hutchison's request that the commencement date for the interim determination be from the first day of the month following the month when the interim determination is made. The Commission considers, however, that the interim determination should commence as soon as possible to ensure its benefits flow to end-users more quickly. That said, the Commission refers to parties to paragraph 9 of this interim determination and notes that where the parties agree otherwise, the interim determination need not cover the period specified by the Commission in the interim determination.

174. The Commission also notes that it is open to parties to a dispute to undertake contemporaneous negotiations for supply of the declared services at any time during a dispute. In this regard, the Commission again refers parties to paragraph 9 of the interim determinations which provide that, except where the parties otherwise agree, the price for the MTAS is as set out in the interim determination.

Conclusion – Content of the interim determinations

175. The Commission considers that, after having regard to the factors outlined above, that the interim determination should include a price for the MTAS of:

- 18 cents per minute (cpm) for the period from 5 August 2005 until 31 December 2005; and
- 15 cpm for the period from 1 January 2006 to the period ending 12 months after 5 August 2005.