

ACCESS DISPUTE BETWEEN OPTUS NETWORKS PTY LIMITED (ACCESS SEEKER)

AND

TELSTRA CORPORATION LIMITED (ACCESS PROVIDER)

PROVISIONING OF UNCONDITIONED LOCAL LOOP SERVICE TO MULTI-DWELLING UNITS

**Access Dispute Notified under subsection 152CM(1) of the *Trade Practices Act 1974*
on 21 September 2006**

Final Determination under section 152CP of the Act

Reasons for Final Determination

BACKGROUND

The Access Dispute

1. On 21 September 2006, the Australian Competition and Consumer Commission (the Commission) received written notification (the Notification) from Optus Networks Pty Ltd (Optus) of an access dispute in relation to the supply by Telstra Corporation Limited (Telstra) of the Unconditioned Local Loop Service (ULLS) in Multi-Dwelling Units (MDUs) to Optus. The Notification was provided to the Commission pursuant to subsection 152CM(1) of the *Trade Practices Act 1974* (the Act).
2. The Notification stated that the dispute concerned the technical and operational quality of the ordering and provisioning provided by Telstra to Optus in respect of the ULLS that Optus claims are not of a quality equivalent to that which Telstra provides itself.
3. Optus has described the access dispute as follows:

...This dispute notice relates specifically to provisioning of ULLS by Telstra in respect of multi-dwelling units (“MDU”) services by a main distribution frame (“MDF”). Optus has encountered a significant ULLS provisioning issue that will impede the take-up of ULLS. The issue relates specifically to the provisioning of a ULL Service to customers who are in an apartment or other form of MDU serviced with a main distribution frame (“MDF”). In particular Telstra provisions ULLS for itself in such a manner that it derives a substantial advantage over the provisioning times that its competitors are able to achieve.¹
4. Telstra has made a number of submissions concerning the Commission’s jurisdiction and ability to arbitrate this dispute as notified.² However, after considering the parties submissions the Commission is satisfied that it has jurisdiction and the ability to arbitrate this dispute.

¹ Paragraph 6.1 of Optus’ notification of access dispute dated 21 September 2006, p.2

² Telstra submissions on preliminary issues dated 25 October 2006, Telstra further submissions on preliminary issues dated 30 October 2006 and Telstra submissions on the draft final determination dated 18 July 2007.

5. On 19 December 2006, the parties together with the Commission attended two site visits (the Site Visits).³ The purpose of these visits was to provide an opportunity for the parties to demonstrate to the Commission the processes involved in provisioning the ULLS at each chosen site location and to highlight the issues in dispute.
6. Following these site visits, the Commission wrote to the parties on 8 February 2007 with a proposed solution regarding the issues in dispute that were discussed at the site visits. After receiving submissions from both parties concerning the proposed solution, the Commission again wrote to the parties on 14 March 2007 seeking submissions in relation to whether the Commission had sufficient information on which to make an interim determination, and if so, whether, in all the circumstances, it was appropriate to make such an interim determination.
7. Submissions were received by both parties in response. Telstra made submissions against the making of an interim determination stating that such a determination would have no practical utility, while Optus was in favour of the making of an interim determination.⁴
8. The Commission chose not to proceed with making an interim determination in this dispute and advised the parties that it intended to proceed directly to a final determination. After taking into account submissions received by both parties, the Commission was satisfied that in accordance with paragraph 152DB(1)(b) of the Act there was utility in proceeding directly to the making of a final determination as this will provide the parties with a greater level of certainty. The Commission considered that in this instance it was unnecessary to make an interim determination as the specified ULLS provisioning processes it has determined in the final determination would be identical to those set out in an interim determination.
9. The Commission provided the parties with a draft final determination on 19 June 2007, and the accompanying reasons for the draft final determination. The draft final determination reflected the Commission's preliminary views pending consideration of the parties' submissions.
10. Submissions were received from both parties on the draft final determination on 18 July 2007 with submissions in reply lodged on 1 August 2007. Telstra and Optus made further submissions in relation to the draft final determination which were received by the Commission on 13 August 2007 and 21 August 2007 respectively.

The ULLS

11. On 4 August 1999, the ULLS was declared pursuant to subsection 152AL(3) of the Act. A copy of the declaration was published in the *Commonwealth of Australia Gazette* No. GN32, 11 August 1999. Following a further public inquiry, the Commission re-declared the ULLS with effect from 1 August 2006. A copy of that declaration was published in the *Commonwealth of Australia Gazette* No. GN31, 9 August 2006.

³ The Commission is permitted to inform itself of any matter relevant to the dispute in any way it thinks appropriate pursuant to paragraph 152DB(1)(c) of the Act.

⁴ Telstra submissions on the making of an interim determination, 21 March 2006 [sic], Optus submissions on the making of an interim determination, 21 March 2007.

12. Appendix 1 of the Declaration provides the service description of the ULLS, namely:

The unconditioned local loop service is the use of unconditioned communications wire between the boundary of a telecommunications network at an end-user's premises and a point on a telecommunications network that is a potential point of interconnection located at or associated with a customer access module and located on the end-user side of the customer access module.⁵

MATTERS AND INFORMATION THE COMMISSION HAS CONSIDERED

Legislative criteria

13. Subsection 152AQB(9) of the Act requires the Commission to have regard to a determination that sets out model terms and conditions relating to access to a core service if it is required to arbitrate an access dispute. For the purposes of this access dispute the Commission is required to have regard to the *Model Non-price Terms and Conditions Determination October 2003*.
14. Subsection 152CR(1) of the Act sets out the matters which the Commission is required to take into account in making a final determination.
15. Subsection 152CR(2) provides that the Commission may take into account any other matters that it thinks are relevant.
16. Subsection 152CP(1) of the Act provides that unless the Commission terminates the arbitration, it must make a written determination on access by the access seeker to the declared service.
17. Subsection 152CP(2) of the Act provides that the determination may deal with any matter relating to access by the access seeker to the declared service, including matters that were not the basis for notification of the dispute.
18. Section 152CQ of the Act restricts the Commission from making a determination in an access dispute where such a determination would have the effects prescribed by the section.
19. As required by subsection 152CP(4) of the Act, the Commission issued a draft determination to the parties on 18 June 2007.
20. Subsection 152CP(5) of the Act requires that when the Commission makes a determination it must give the parties to the arbitration its reasons for making the determination.

Submissions received from parties

21. The parties provided submissions in relation to a range of matters concerning the supply by Telstra of the ULLS in MDUs to Optus. The following substantive submissions were received:

⁵ Commonwealth of Australia Gazette No. GN31, 9 August 2006 p. 1983.

- 21 September 2006 — Optus notification of the access dispute
 - 25 October 2006 — Optus submissions on preliminary issues
 - 25 October 2006 — Telstra submissions on preliminary issues
 - 30 October 2006 — Telstra submissions in reply
 - 31 October 2006 — Optus submissions in reply
 - 15 February 2007 — Optus submissions on possible solution to the issues in dispute
 - 15 February 2007 — Telstra submissions on possible solution to the issues in dispute
 - 23 February 2007 — Optus submissions in reply
 - 7 March 2006 [sic] — Telstra submissions in reply
 - 21 March 2006 [sic] – Telstra submissions on whether Commission should make an interim determination
 - 21 March 2007 – Optus submissions on whether Commission should make an interim determination
 - 13 April 2007 – Telstra submissions in reply
 - 18 July 2007 – Optus submissions on draft final determination
 - 18 July 2007 – Telstra submissions on draft final determination
 - 1 August 2007 – Optus submissions in reply
 - 1 August 2007 – Telstra submissions in reply
 - 13 August 2007 – Telstra further submissions on draft final determination
 - 21 August 2007 – Optus further submissions on draft final determination.
22. The Commission has had regard to these submissions in preparing the final determination and refers to them as appropriate in this Statement of Reasons.

Additional material

23. The Commission has also had regard to the following material in preparing the final determination and refers to them as appropriate in this Statement of Reasons:
- 19 December 2006 — Conference meeting and site visits report, incorporating comments made by both parties
 - ACIF C569:2005 *Unconditioned Local Loop Service – Ordering, Provisioning and Customer Transfer* Industry Code (ACIF Code)
 - ACIF C559:2006 *Unconditioned Local Loop Service Network Deployment* Industry Code
 - ACIF G587:2002 *Unconditioned Local Loop Service IT Specification – Transaction Analysis* Industry Guideline (ACIF IT Guideline)

- Explanatory Memorandum to *Trade Practices Amendment (Telecommunications) Bill 1996*
- Explanatory Memorandum to *Telecommunications Competition Bill 2002*.

The Issues in Dispute

Optus' submissions on the issues in dispute

24. In its Notification, Optus alleges that “*Telstra provisions ULLS for itself in such a manner that it derives a substantial advantage over the provisioning times that its competitors are able to achieve*”⁶ and that this provisioning issue will impede the take-up of ULLS.
25. Optus advised that the ULLS provisioning issue arises when a customer moves into a recently vacated apartment, where the previous tenant has cancelled their telephone service.⁷
26. Optus claims⁸ that, when a customer accesses the Telstra copper line, two possible scenarios occur depending on whether the customer chooses to become a Telstra customer via a PSTN connection or an Optus customer via the ULLS. Optus submitted⁹ that the two scenarios are as follows:
 1. *Telstra PSTN connection:* In this scenario, Telstra is able to identify the cancelled telephony service, re-use the existing copper pair and connect the customer to the service within 1-2 business days. Telstra is able to use its provisioning systems to remotely configure this service to the customer. No truck-roll to the customer's premise is required.
 2. *ULLS:* When a customer chooses his/her telephone service via Optus, Optus is able to provision that service using ULLS. In such circumstances, Telstra will potentially allocate the service a different copper pair to the pair that currently serves the premises. Telstra's provisioning system for ULLS will simply search for a vacant copper pair to that address [at the MDF location], rather than identify the pair previously allocated to that particular service. Telstra will then send out a technician to the apartment building to examine the MDF to ensure that the copper pair selected display correct electrical characteristics, but only up to the side of the frame closest to the exchange ('A' side of the MDF).
27. Optus alleges that Telstra refuses to jumper the line to the 'B' side of the building MDF (the side closest to the end-user) and therefore the copper line cannot be used. By only provisioning the line to the 'A' side of the building MDF there is no copper wire path available to the end-user. Optus states that once Telstra has 'delivered' the copper line connection only to the 'A' side, Optus must then send out a second technician to the apartment block to provide a connection from the 'A' side to the 'B' side of the MDF to enable a customer to connect to the service. Optus further states that this process requires

⁶ Optus' notification of access dispute dated 21 September 2006, p.1.

⁷ *ibid*

⁸ *ibid*

⁹ *ibid*, p.2

two truck-rolls (one by Telstra and one by Optus) and a subsequent 7-10 business day activation period.¹⁰

Telstra's submissions on the issues in dispute

28. In relation to the issues in dispute, Telstra submits *inter alia* that Optus:
- fails to clearly describe the circumstances in which jumpering should supposedly be performed by Telstra
 - inaccurately assumes that Telstra provisions ULLS to itself, which it does not, and
 - is attempting to extend the scope of the ULLS declaration as the dispute is not a dispute in relation to the terms and conditions upon which Telstra complies with its standard access obligations in respect of the supply of ULLS.¹¹

Site Visits

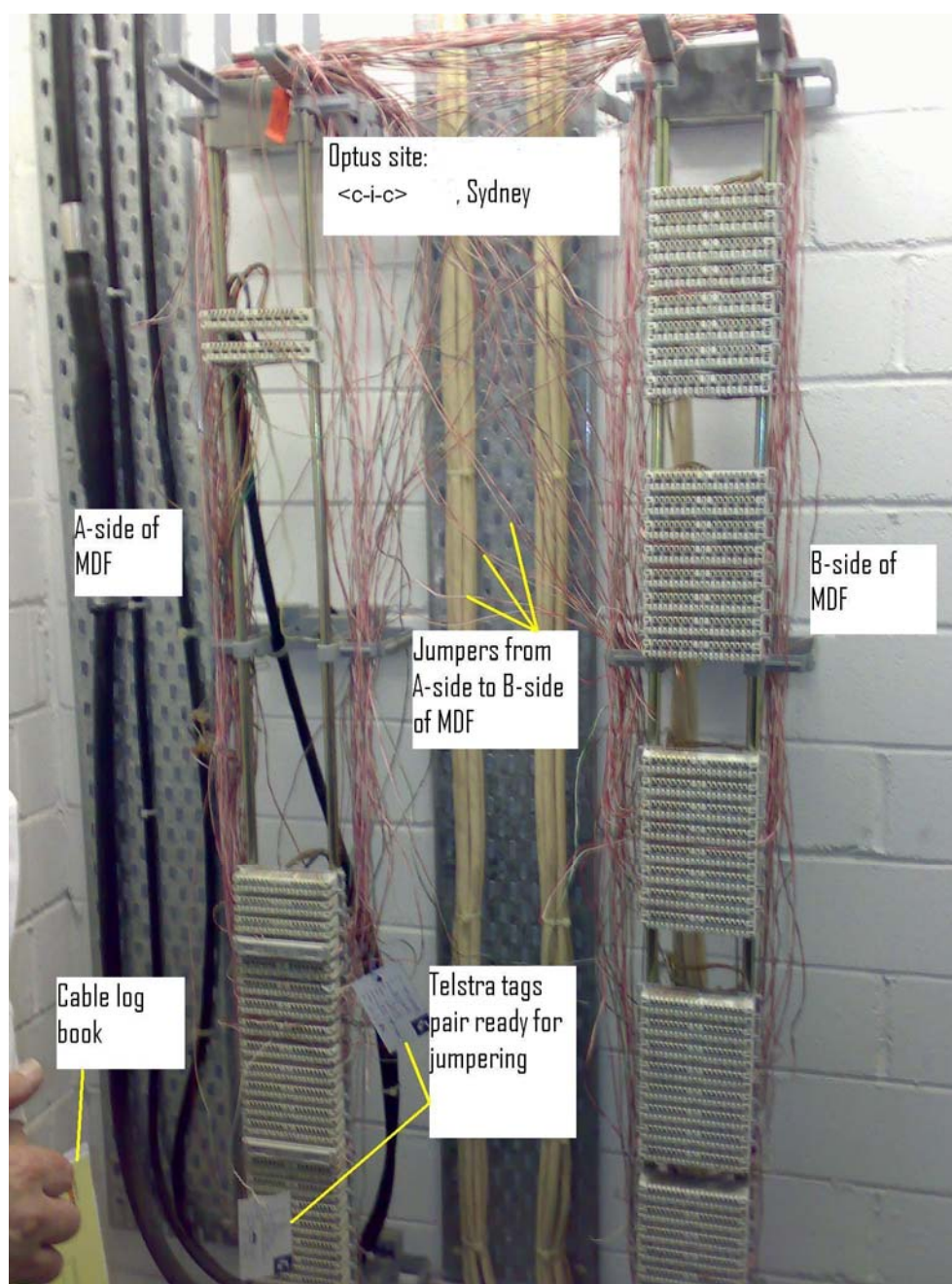
29. In order to progress the access dispute and clearly define the issues in dispute, the Commission directed parties to attend a conference meeting and site visits (of each party's choosing) with a member of the Commission (as constituted for the purposes of this arbitration) on 19 December 2006.¹² The purpose of the site visits was to provide the parties with an opportunity to demonstrate to the Commission the processes involved in provisioning the ULLS at each site location and to highlight what each party considered were the issues in dispute.
30. Optus' nominated site was a medium sized apartment block located at <c-i-c>, Sydney. The photograph in Figure 1 below shows the MDF located in the basement at this address.

¹⁰ *ibid*

¹¹ Telstra submissions on preliminary issues dated 25 October 2006, p.3, Telstra submissions in reply dated 30 October 2006, p.1

¹² ACCC letter to Telstra and Optus dated 23 November 2006

Figure 1: Optus site: <c-i-c>, Sydney



31. The photograph also shows the MDF blocks on the A-side and B-side of the building MDF and has been labelled to show examples of Telstra's tags on particular copper pairs. Each tag provides the required information to enable an access seeker's cabling technician to put the jumper between the tagged pair on the A-side of the building MDF to the destination pair on the B-side of the building MDF.
32. In regard to the site visits Optus made the following points¹³:

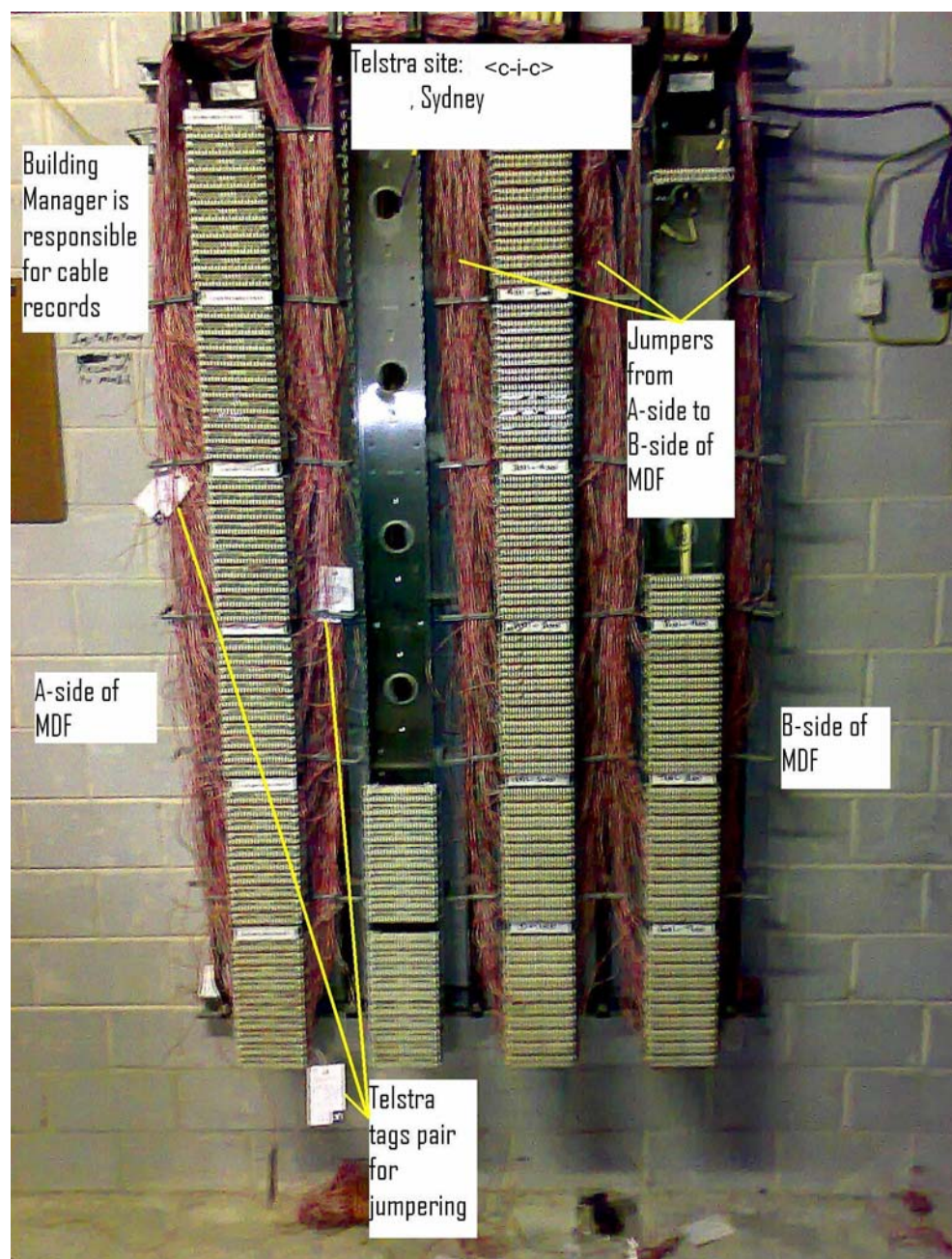
¹³ Conference meeting and site visits report incorporating comments made by both parties dated 19 December 2006, pp.4-5

- the current ULLS provisioning process requires a truck-roll by both Telstra and Optus. This meant additional cost to both parties as well as additional time required to provision services to non-Telstra end-users
- the end-user customer had to be present when the jumpering work from the 'A' side to the 'B' side of the MDF is being undertaken (i.e., an appointment is required) which meant further delays
- it was Optus' understanding that the customer did not need to be present when Telstra did work on the 'A' side of the MDF
- if the customer requested Telstra to provide a PSTN and/or broadband services, this could be done at the exchange without the need for a truck-roll, as Telstra can identify the copper pair at the exchange using information stored in its cable pair database. In Optus' view this meant that there is a difference between the processes used by Telstra Retail compared with those used by Telstra Wholesale
- end-users could dial a 1300 or 1800 number to obtain the previous telephone number at that address. In Optus' view this meant that the corresponding copper pair number could be obtained and hence the jumpering could be done at the exchange
- in Optus' experience approximately 90 per cent of ULLS could be provisioned by jumpering at the [Telstra] exchange MDF rather than at [the] MDF in the building
- a soft dial tone¹⁴ on the line indicates the existence of a copper path between the end-user's address and the Telstra exchange. Hence, there is no need to provision the ULLS using a vacant copper pair in preference to an existing connected copper pair
- Optus was willing to accept any downside risk associated with using existing copper pairs, for example, where there is a problem with the copper pair between the B-side of the MDF in the MDU and the end-users location
- Optus would allow Telstra technicians to contact end-user customers in circumstances where there was a fault.

Telstra's nominated site was a large apartment block with a tower located at <c-i-c>, Sydney. The photograph in Figure 2 below shows the MDF located in the basement at this address.

¹⁴ A soft dial tone is an audible telephone signal, except that there is no actual service on the line and normal calls cannot be made. A soft dial tone only allows emergency service calls to be made or calls to a carrier's test numbers (e.g., Own Number Check)

Figure 2: Telstra site: <c-i-c>, Sydney



33. The photograph also shows the A-side and B-side of the MDF together with tagged copper pairs, and the clipboard where cabling information is supposed to be stored.
34. In regard to the site visits Telstra made the following points¹⁵:
- to ensure that services are not incorrectly provisioned (i.e., a 'B' side tagged incorrectly and Optus' end customer left without service or another customer's service is inadvertently disconnected) Telstra adheres to the industry process specified in the ACIF Code

¹⁵ ibid, pp.4-7

- when Telstra receives a request for a VULL (i.e., a Vacant ULLS), the industry code stipulates that it locate a suitable copper pair that meets the requirements for both the ULLS and its specified deployment class on the A-side of the MDF, which it then tags so that the gaining service provider's technician can do the jumpering and other necessary work at the site
- Telstra cannot guarantee use of the same cable pair to the same premises in an MDU fed by an MDF whether it be for the purposes of providing a PSTN service to a Telstra end customer or providing a copper pair for a ULLS
- obtaining a previous telephone number for an address does not mean that particular number was the last service number used on a cable pair as the 'B' side of the MDF is accessible by any licensed cabler to carry out cabling work
- cabling to the 'B' side of the MDF does not guarantee a continuous path to customer premises. For example, the existing copper pair on the 'B' side of the MDF may not be capable of providing the requested service or pair gain equipment may have been used to provide previous services or other customer equipment may be present that prevents the service working
- it makes more operational sense for Optus to have a truck-roll after ULL cutover to ensure a continuous copper path to end customer premises and a working service for that end customer
- other Access Seekers use standard ULL process and truck-roll on or after ULL cutover to ensure minimal disruption to their end customer
- Telstra provides a basic infrastructure service to Optus; it is not appropriate for Telstra to contact Optus' customers should there be a fault or to ensure that the correct copper pair was used
- Telstra was not prepared to carry the significant risks of getting involved in:
 - provisioning a ULL jumper to an incorrectly tagged 'B' side of the MDF, leaving the Optus end customer with no service
 - testing and fault restoration beyond the 'A' side of MDF (noting the significant amount of non-Telstra Network related faults already lodged by Access Seekers)
- Telstra did not want to bear the potential risks of disconnecting or disrupting another existing end-customer's service that is fed from the same MDF or an intermediate distribution frame within an MDU.

Conclusion by Commission defining the Issues in Dispute

35. After considering each party's views at the Site Visits, the Commission defined the issues in dispute to be centred on Optus' preference that where the access seeker is willing to take the risk from using an existing copper pair with a soft dial tone the required jumpering should be done at the [Telstra] exchange MDF and not at the building MDF.
36. Telstra, on the other hand, maintained that it can only provision a ULLS using a suitable copper path that meets the requirements for both the ULLS and its specified deployment class (which requires Telstra to test and tag a copper pair at the building MDF on the 'A' side of the frame) and in this way it can at least assure the quality of the copper pair to the

‘A’ side of the MDF in the MDU and not take responsibility for other issues with ‘B’ side wiring, including customer equipment etc.

The Proposal

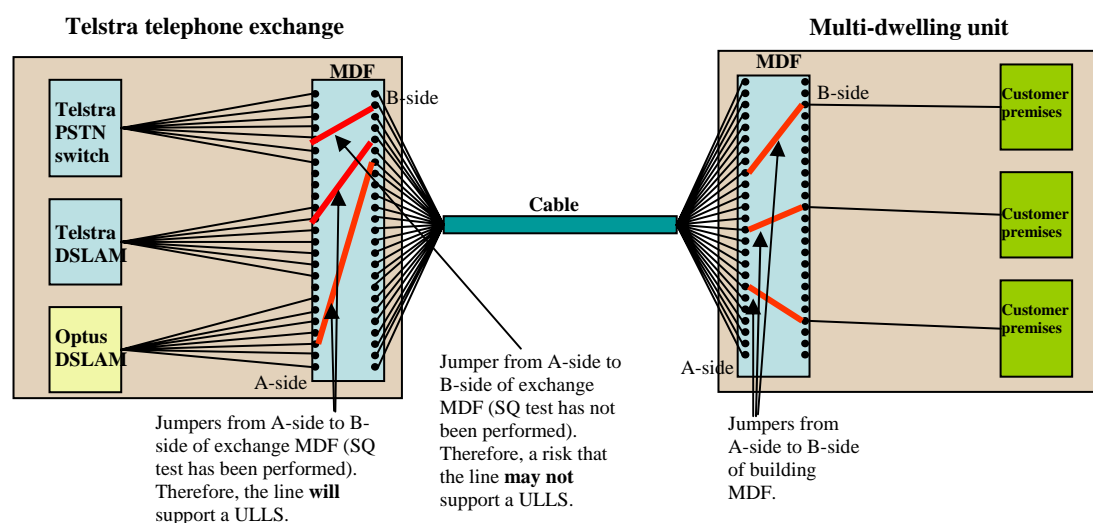
37. During the Site Visits the discussion turned away from jumpering at the building MDF in MDUs to circumstances where a continuous copper path exists (as there is a soft dial tone) between the customer premise and the Telstra exchange and therefore jumpering could be performed at the Telstra exchange to provide a ULLS.
38. In formulating the Proposal that was sent to the parties, the Commission understood from the discussions that took place at the Site Visits that where a customer vacates premises in a MDU, with a MDF in the building, the copper path between the customer premises and the Telstra exchange may still be intact and able to be identified by the presence of a soft dial tone. As such, it may be possible to provision a ULLS to an Access Seeker using that same copper pair. The Commission has since verified that the full national number (FNN) can be obtained where either a dial tone or a soft dial tone exists by dialling 1800 801 920 at the customer premises. This number is publicly available on the Internet.
39. On the basis of this understanding, it was the Commission’s view that in this situation, a ULLS could be provisioned with jumpering taking place only in the Telstra exchange. This would avoid two truck-rolls (one by the Access Provider and one by the Access Seeker) to the customer premises. The Commission also took the view that it was fair and reasonable for the Access Seeker to accept any risk that the copper pair may not be suitable for broadband services.
40. Further, the Commission also considered that in circumstances where a soft dial tone is not present, or the Access Seeker is not prepared to accept risk, the current Vacant ULLS provisioning process could be used.
41. Following the Site Visits and based on the information provided by the parties at those Site Visits, the ACCC wrote to the parties seeking their views on a proposal which aimed to resolve the issues in dispute (the Proposal).¹⁶
42. For convenience the Proposal is reproduced as follows:
 1. Where there is an existing line between the exchange and the end-user customer’s premise with a soft dial tone and Optus submits a ULLS Request to Telstra that identifies the full national number [FNN] associated with the line, Telstra must treat the request as if it was a ULLS Transfer Request and follow the ULLS Transfer process specified in the ACIF Code. For the purpose of the ULLS Transfer Request, Telstra is to be considered the losing Access Seeker.
 2. Where there is no line between the exchange and the end-user customer’s premise (i.e., there is no soft dial tone) and Optus requests a Vacant ULLS, Telstra must follow the Vacant ULLS process specified in the ACIF Code.

¹⁶ ACCC letter to Telstra and Optus dated 8 February 2007

3. If Optus submits a ULLS Request to Telstra that meets the requirements in paragraph 1 and is therefore required to be treated as if it were a ULLS Transfer Request, it must accept any risk to the quality of, connectivity of and suitability for providing voice and/or data services on the existing copper path between the Telstra exchange and the end-user premises.
43. The parties were also asked for submissions explaining why the Proposal would not resolve the issues in dispute.
44. The Commission notes that the Proposal is based, as far as possible, on provisions of the current ACIF Code.
45. The Commission acknowledges that the Proposal as outlined in paragraph 42 above slightly changed after considering all of the parties' submissions in this matter. In forming its view about the Proposal (outlined above) the Commission took into account the process set out in the ACIF Code. It appeared to the Commission that while the ACIF Code defined a *ULLS Transfer* to mean "a successful transfer of a ULLS between a Losing Access Seeker and a Gaining Access Seeker, there was no reason why Telstra would be excluded from this process given that the ACIF Code clearly contemplates that Telstra could be a Losing Access Seeker.¹⁷ For Telstra to be included in a ULLS Transfer Request process the request would specify that Telstra is the Losing Access Seeker. The Commission maintains this view.
46. From a process perspective, a ULLS Transfer (as envisaged in the Proposal) involves removing the jumper between the B-side of the MDF and the Telstra DSLAM in the Telstra exchange and provisioning a ULL jumper between the B-side of the MDF to the Optus DSLAM in the Telstra exchange. Essentially, the same process would be used irrespective of whether it is Telstra as the Losing Access Seeker or any other carrier as the Losing Access Seeker. This is illustrated in Figure 3 below.

¹⁷ "Losing Access Seeker" as defined in the ACIF Code means the Carrier/Carriage Service Provider which will cease providing the customer with services over the ULLS immediately after the effective date of transfer (for the avoidance of doubt this may include the Access Provider)

Figure 3: Typical configuration in a Telstra exchange and a remote MDF site



47. In cases where there is no existing line between the end-user customer's premises and the Telstra exchange or there is no soft dial tone, Optus will need to request a Vacant ULLS from Telstra—Telstra would then follow the process for a Vacant ULLS as outlined in the ACIF Code. Such an approach concurs with current practice and does not require the parties to implement change. In these instances, Telstra is required to look for a suitable copper pair that meets the requirements for both the ULLS and its specified deployment class, which it then tests and tags (at the MDU MDF on the 'A' side of the MDF) so that the Gaining Access Seeker's technician can carry out the jumpering and other necessary work at the site and is in accordance with statements made by Telstra at the 19 December Site Visit¹⁸.

*Optus' submissions on the Proposal*¹⁹

48. Optus made the following submissions in regard to the Proposal:
- it fully supports the Commission's proposal to treat lines where a soft dial tone is present similar to an in-use ULLS connection, such that a ULLS will be activated at the exchange with no truck-rolls to the customer premises required
 - an acknowledgement that to implement this procedure will require some changes to the existing ULLS order process, but did not think these were likely to be significant
 - it accepts that if a solution is agreed under paragraph 1 of the Proposal, then for those lines where a dial tone is not present continued use of the VULL process and associated truck-roll is reasonable
 - it confirmed that it will accept the risk identified in paragraph 3 of the Proposal.

¹⁸ Conference meeting and site visits report incorporating comments made by both parties dated 19 December 2006, p.7; see also paragraph 35 of this Determination

¹⁹ Optus submissions on possible solution to the issues in dispute dated 15 February 2007

*Telstra's submissions on the Proposal*²⁰

49. Telstra, submitted that the Proposal would fail to resolve the issues in dispute for the following reasons:
- an obligation to provide an unconditioned local loop service cannot equate to an obligation to provide a service with a soft dial tone, as by its very nature, such a service is conditioned, at least partially
 - the Proposal incorrectly assumes that an inactive public switched telephone service (PSTS) [or soft dial tone] can be treated as if it were a live PSTS with a FNN for the purposes of in-use ULLS connections
 - an inactive service with soft dial tone will not always provide for an unconditioned and continuous copper path consistent with the requirements of the ULL declaration because where a ULL connection request is made, it is necessary to:
 - (a) find and assign an available vacant path to the network boundary point of the address supplied by the Access Seeker
 - (b) search for a path that passes Service Qualification for the Deployment Class supplied by the Access Seeker
 - (c) search for a path that is unconditioned (i.e., without a pair gain system)
 - (d) search for a path that continues to the Access Seeker POI (i.e., one that is not RIM fed)
 - (e) search for a path that is copper based (rather than fibre)
 - the ULLS Transfer process can only be used for the transfer of existing ULL services and that Telstra's systems have been designed and built in accordance with the agreed ACIF Code and the associated *ACIF G587 ULLS IT Specification – Transaction Analysis Industry Guideline* to carry out the transfer process
 - to develop a new process to transfer an inactive FNN to a ULLS (even assuming such a process would meet the requirements of the ULL declaration – which Telstra does not accept) would required significant systems change at substantial cost, both to Telstra and to the industry as a whole
 - the Proposal would clearly raise issues under paragraph 152CQ(1)(f) and paragraphs 152CR(1)(e)-(g) of the Act
 - the Proposal is misconceived as it implies that, if a soft dial tone is absent, then there is not a path between the exchange and the end-user customer's premises
 - the Proposal is misconceived because a dial tone on a handset at an end-user's premises is no guarantee of a suitable continuous unconditioned copper path to that premises as a pair gain system or alternative form of conditioned path may be in place
 - the Proposal cannot be implemented in a manner consistent with the declaration of the ULLS and the Commission's statutory obligations under Division 8 of Part XIC of the Act

²⁰ Telstra submissions on possible solution to the issues in dispute dated 15 February 2007

- the solution to the access dispute lay with Optus because it is simply a case of Optus co-ordinating timing with its end-user and performing a truck-roll where one is required, either on the day that Telstra completed its cutover or sometime thereafter and that such an approach would resolve the dispute in a manner consistent with that employed by other access seekers.

50. Both parties made further submissions in reply.

Optus' submissions in reply²¹

51. In response to Telstra's submissions regarding the Proposal, Optus made the following submissions in reply:

- Telstra's submission stating "*an obligation to provide an unconditioned local loop service cannot equate to an obligation to provide a service with a soft dial tone, as by its very nature, such a service is conditioned, at least partially*" is irrelevant and misleading
- the ACCC's Proposal would not require Telstra to provide a service with a soft dial tone, rather the presence of a soft dial tone is to be used to define an amended ULLS connection process and as is presently the case for in-use services which have full dial tone capability, conditioning will be removed as part of the ULLS activation process
- it accepted Telstra's submission that not all inactive services with a soft dial tone will be ULLS serviceable and submits that the ULLS service qualification process outlined by Telstra in its submission will identify whether this is the case for a particular line and reject the order
- it is unclear to Optus what point Telstra is making in regard to submissions made on the service qualification process as that process currently applies to both vacant and in-use services
- in practice the Proposal requires a change to step (a) of the service qualification process (as referenced in submissions made by Telstra)
- it is Optus' view that for those lines where a soft dial tone is present provision of the FNN to Telstra should enable Telstra to identify the in-place copper line and that there is no need to identify an "available vacant path" since the "in-place path" can be identified
- for an in-use ULL transaction Telstra only requires provision of the FNN details to enable it to identify the in-place path so it is not clear why Telstra cannot do so in the case of an inactive service where a soft dial tone is present
- the dispute notice is aimed squarely at changing the existing process because they are clearly inefficient as Telstra can provision its own retail services on a line without the need for a customer truck-roll but cannot do this when provisioning the ULLS

²¹ Optus submissions in reply dated 23 February 2007

- Telstra has declined to quantify the significant system changes it submits it will be required to implement under the Proposal and Optus rejects Telstra's submission that changes to Telstra's systems will be costly
- it accepted that some development will be required but considers that this could be kept to a minimum if the existing VULL transaction process is amended rather than the TULL transaction
- any costs that do arise will likely be offset by the benefits Telstra will derive from not having to undertake truck-rolls to customer premises as well as the benefits to consumers residing in MDUs from having access to equivalent provisioning processes from competing service providers
- it contested Telstra's submissions that the procedures outlined by the ACCC are in any way inconsistent with the ULLS declaration and contends that Telstra is in breach of its standard access obligations by insisting on unnecessary truck-rolls to provision ULLS services, as Telstra has clearly failed to provide ordering and provisioning processes that are of a technical and operational quality equivalent to that which it provides to itself.

*Telstra's submissions in reply*²²

52. In response to Optus' submissions in reply, Telstra made the following submissions in reply:

- it considered that there was a great deal of confusion about how the provisioning of the ULLS in MDUs can be undertaken in a manner which is both efficient and consistent with Telstra's standard access obligations ("SAOs")
- the Proposal went beyond Telstra's SAOs in respect of an ULLS
- the use of in-place records may be relevant to provisioning a *conditioned* service such as the standard PSTS but they have nothing to do with the presence of a soft dial tone and are not relevant to Telstra's obligation to provide an *unconditioned* communications wire
- the required changes to a number of core systems would involve substantial capital and operational resources (including financial resources) as it [the Proposal] involves separate validation steps and development of a new ULL request type to manage these requests in downstream systems compared to the standard VULL process
- the required changes would relate to only a small subset of ULL connections at MDUs, being VULL connections
- Telstra estimates that the number of Optus VULL connections at MDUs is as little as <c-i-c> percent of total ULL Requests that Telstra received from Optus in the last 6 months
- other access seekers manage with the current process

²² Telstra submissions in reply dated 7 March 2006 [sic].

- the cost of the changes would need to be recovered from Optus and other access seekers who would not even benefit from them and are disproportionate to any supposed benefits to be gained.

Interim Determination

53. After considering the submissions received to date, the ACCC again wrote to the parties seeking submissions in relation to whether the ACCC had sufficient information on which to make an interim determination, and if so, whether, in all the circumstances, it was appropriate to make such an interim determination.²³
54. Submissions were received by both parties with Telstra making further submissions in reply.

Optus' submissions on the making of an Interim Determination²⁴

55. Optus made submissions in favour of the making of an interim determination. Its submissions not already outlined in this Statement of Reasons are summarised as follows:
- the ACCC was in possession of sufficient information to make an interim determination and that there are no circumstances to suggest that it would not be appropriate to make such a determination
 - an interim determination will enhance competition and be in the long-term interests of end-users because the current contractual arrangements in place are highly inefficient
 - backdating a final determination is not a relevant consideration because of the operational nature of this dispute
 - the current process is significantly impeding the take-up of ULLS and from a consumer perspective is unacceptable because it involves significant delays and causes great inconvenience and frustration with the result being Optus has <c-i-c> which impacts adversely on Optus' ULLS growth plans
 - if the Commission made an interim determination, Optus anticipates that it would be able to reactivate sales of MDU new connect meaning consumers moving into MDUs will have a genuine choice of provider since Optus will be able to offer connectivity on terms comparable to those Telstra can offer.

Telstra's submissions on the making of an Interim Determination²⁵

56. Telstra made submissions against the making of an interim determination. Its submissions not already outlined in this Statement of Reasons are summarised as follows:
- if the Commission makes an interim determination or a final determination, it must be in accordance with the ACIF Code

²³ ACCC letter to Telstra and Optus dated 14 March 2007

²⁴ Optus submissions on whether the Commission should make an interim determination dated 21 March 2007

²⁵ Telstra submissions on whether the Commission should make an interim determination dated 21 March 2006 [sic]

- the Commission should not make an interim determination because it has not afforded the parties procedural fairness as there has been no exchange of submissions by the parties on the issues in dispute and the parties have not been properly heard on the substantive issues for the purposes of a decision being made
- an interim determination must have regard to Model Non-Price Terms and Conditions made pursuant to section 152AQB of the Act
- the Model Non-Price Terms and Conditions require that any [final] determination reflects the terms of the ACIF Code
- the Model Non-Price Terms and Conditions (e.g., those relating to non-discrimination and process such as service qualification) explicitly incorporate the terms of the ACIF C569:2001 *Unconditional Local Loop Service – Ordering, Provisioning and Customer Transfer* (2001 ACIF Code), which has since been replaced by the ACIF Code
- it has complied with the Model Non-Price Terms and Conditions by incorporating ACIF Code standards into its contractual arrangements including in respect to the processes for ordering and provisioning of ULLS
- any interim determination or final determination would need to conform with the requirements of the ACIF Code as expressly or implicitly incorporated into the Model Non-Price Terms and Conditions
- it does not object to the ACIF Code being used as the basis of an interim determination but realises that because the processes outlined in the ACIF Code are already reflected in the contractual arrangements between the parties there is no need to make an interim determination based on the ACIF Code
- it is inappropriate for the Commission to make an interim determination because:
 - (a) the Commission has not set any timeframe as to when a final determination is likely to be made
 - (b) the contractual arrangements between the parties reflect the ACIF Code as required by the Model Non-Price Terms and Conditions
 - (c) it would be unreasonable to require Telstra to change the current process for the purposes of an interim determination only
 - (d) any interim determination would be of no practical utility given the substantial period of time it would take to implement changes to the current process, and
 - (e) the interim determination would have little or no impact on end-users
- an interim determination should not be made because there would seem to be no obvious impediment to proceeding directly to the substantive phase of the access dispute
- if an interim determination on non-price terms and conditions which required significant system changes was made by the Commission, the level of certainty required is greater than that for an interim determination which merely deals with pricing because any regulatory error made in the interim determination on non-price terms and conditions is unable to be cured by backdating

- an interim determination would require Telstra to invest in substantial system changes and it would be impossible to reverse the changes as assets would be stranded
- the level of certainty for the purposes of making an interim determination would have to be the same as that required for the purposes of making a final determination and would require a consideration of each of the statutory criteria in section 152CR of the Act
- there would be no practical utility in making an interim determination as the changes proposed would take up to several years to implement and any such determination would be superseded by a final determination before it could take effect.

*Telstra's submissions in reply*²⁶

57. In response to Optus' submissions of 21 March 2007, Telstra made submissions in reply. Its submissions not already outlined in this Statement of Reasons are briefly summarised as follows:

- it rejected Optus' submission that "Telstra provisions ULLS for itself in such a manner that it derives a competitive advantage over the provisioning times that its competitors are able to achieve"
- it does not provision ULLS to itself and Optus is comparing the equivalency by which Telstra provides separate services even though the processes being compared are not equivalent
- Optus may acquire a PSTN service from Telstra and the process Telstra would use to provision the PSTN service to Optus is equivalent to the process Telstra would use to provision the PSTN service to itself
- Optus' submissions display a fundamental misunderstanding as to the differences between provisioning a PSTN service and ULLS.

Draft Final Determination

58. After taking into account the parties' submissions on whether an interim determination should be made the Commission accepted Telstra's submission that in order to provide certainty in the resolution of this 'non—price' access dispute, it was more appropriate to move to the making of a final determination.
59. In accordance with subsection 152CP(4) of the Act a draft final determination was prepared together with reasons for the draft final determination and sent to the parties on 19 June 2007. Parties were asked to provide submissions on the draft final determination.
60. Submissions made by both parties in relation to the ACIF Code, the Model Non-Price Terms and Conditions and the statutory criteria that the Commission must have regard to are addressed in the Commission's consideration of the dispute.

²⁶ Telstra submissions in reply dated 13 April 2007

Optus' submissions on the draft final determination²⁷

61. Optus made submissions in favour of the proposed solution in the draft final determination. Those submissions not already outlined in this Statement of Reasons are briefly summarised as follows:
- the proposed determination will achieve a significantly more efficient provisioning process for the majority of ULLS 'new connects' at MDUs served by an MDF²⁸
 - the proposed determination would enable a ULLS to be provisioned at the [Telstra] exchange in those instances where Optus is able to identify the in-place line to the MDU with a soft dial tone, and Optus is able to provide Telstra with the FNN details associated with that line, thereby avoiding the need for truck-rolls to the customer's premises
 - it accepts that the proposed determination would not be available in those cases where a soft dial tone is not present on the customer's line - in which case, Optus considers that use of the present provisioning processes and associated truck-rolls is reasonable
 - it confirmed that it will accept those risks set out in paragraph 9(c) of the draft final determination
 - it considers the draft final determination to be consistent with the ACIF Code as the dispute deals with a specific issue that was clearly not contemplated when the ACIF Code was developed. In its view the draft final determination merely seeks to utilise one of the existing ULLS provisioning processes to address the issues raised in the dispute
 - the final determination should take effect within 3 months of the date it is issued unless otherwise agreed between the parties.

Telstra's submissions on the draft final determination²⁹

62. Telstra made submissions against the making of a final determination and reiterated its previous submissions. Those submissions not already outlined in this Statement of Reasons are briefly summarised as follows:
- Telstra's current provisioning processes, which comply with the ACIF Code, do not permit it to comply with the Commission's provisioning processes set out in the draft final determination. As such, the Commission should either terminate the arbitration on the basis that the provisioning processes should continue to be governed by the existing contract between the parties and refer the matter to the Australian Communications Industry Forum for consideration or make a final

²⁷ Optus submissions on the draft final determination dated 18 July 2007

²⁸ The Commission understands "new connects" to mean new customers wishing to acquire telephony services from Optus and therefore require a transfer from Telstra's PSTN and/or its ADSL service (i.e. an existing connection) to the Optus DSLAM (jumping at the Telstra exchange) and not "new connections" *per se*

²⁹ Telstra submissions on the draft final determination dated 18 July 2007

determination which requires the parties to follow the current contractual provisioning processes which reflect the ACIF Code and ACIF IT Guideline

- the draft final determination is contrary to the section 152CR statutory criteria because the procedure set out in the draft final determination:
 - (a) will not promote the long-term interests of end users (LTIE) given the negligible number of ULLS connections to be affected and the absence of interest in the Commission's proposal by other access seekers
 - (b) would likely require implementation at the industry level despite it not being required by all access seekers (and despite Telstra not being able to unilaterally implement it at the industry level)
 - (c) is contrary to Telstra's legitimate business interests as the benefits to be received from one access seeker, Optus, are disproportionate to the direct costs to be incurred by Telstra in implementing the amended process which will require significant and lengthy system changes
 - (d) is of minimal value to the majority of those parties (Telstra and other access seekers) that will have to bear the costs of the process changes
 - (e) is inefficient in that it will necessitate a two-step amended TULL-VULL process in a significant number of instances
- if the Commission makes a final determination that is inconsistent with the ACIF Code and the ACIF IT Guideline it will incur lengthy and costly system changes and therefore Optus should bear these costs as it is the only access seeker seeking the changes
- the only way in which either Telstra or Optus could accurately identify the inactive FNN associated with a line characterised by soft dial tone is to roll a truck to the end-user's premises and dial a Telstra Call Back number which would then identify the FNN for that cable path
- Paragraph 9(b) of the draft final determination has little or no practical application
- Paragraph 9(c) of the draft final determination fails to account for the outcome of a copper path that is not suitable
- the Commission's proposal is contrary to statutory criteria and that in order to ensure that ULLS participants such as Telstra and Optus are continuing to comply with the ACIF Code, should the Commission's Proposal be implemented, the ACIF Code and ACIF IT Guideline would require amendment, prior to the final determination being implemented. This would entail an industry-agreed amendment process
- Telstra estimates that the total time it would take to implement the changes necessitated by the draft final determination would be in excess of 2 years
- the Commission has inappropriately expanded the issues in dispute
- the Commission's criticism as to the lack of evidence when no substantive phase

provided

- Telstra estimates the cost of implementing the Commission's Proposal to be <c-i-c> and Optus, being the main beneficiary, should bear most of these costs.

63. Both parties made submissions in reply.

*Optus' submissions in reply*³⁰

64. In response to Telstra's submissions regarding the draft final determination, Optus made submissions in reply. Its submissions not already outlined in this Statement of Reasons are briefly summarised as follows:

- it considers Telstra's argument that the ACIF Codes "do not permit" Telstra to comply with the proposed final determination should be given no weight, as a determination will be legally enforceable regardless of any ACIF Code requirement
- it noted that the ACIF Code is not a registered code, so it is not enforceable under the Telecommunications Act, and Telstra is not even a signatory
- it submitted that the practical issues raised by Telstra lack merit – these issues concerned the FNN and paragraph 9(b) of the draft final determination
- it rejected Telstra's assertion that the only way of identifying an FNN is by a truck-roll to a customers' premises and dialling a "secret Telstra Call Back number" – it asserts that there would be a number of means of identifying the FNN, for example, in many instances new tenants would be able to confirm these details with the ex-tenants or the landlord, or the FNN may be written on the handset in the apartment
- the identification of the FNN is an issue for the access seeker to be concerned about and not the access provider
- it considers that there are some system changes associated with the IT implementation of the Proposal but these changes are neither complex nor excessively costly – it estimates that the total cost will be <c-i-c> and will require 3 months of IT development
- the IT system changes required for the TULL transaction set will simply replicate those that exist for other transactions and therefore Telstra's claim that significant IT development work will be required is unfounded
- it rejected Telstra's assertion that the small number of Optus ULLS MDU new connects <c-i-c> is evidence that the draft final determination is not in the LTIE and instead proves that the current processes are a barrier to competition and that the draft final determination is in the LTIE
- it expects that ULLS MDU new connects would make-up around <c-i-c> per cent of total ULLS connections.

³⁰ Optus submissions in reply dated 1 August 2007

*Telstra's submissions in reply*³¹

65. In response to Optus' submissions regarding the final draft determination, Telstra made submissions in reply. Its submissions not already outlined in this Statement of Reasons are briefly summarised as follows:
- it will be impossible in the majority of cases for Optus to identify the FNN associated with the line serving that unit without physically attending at the unit and calling Telstra's private Call Back number
 - delays experienced by Optus' MDU customers in the connection of ULLS-based services are largely due to Optus' own actions rather than any deficiencies in Telstra's ULLS provisioning process – Optus fails to ask customers at the time of taking a customer's initial order whether the service they require is for an MDU and therefore doesn't bother to coordinate a truck roll on the same day as the Telstra truck roll to complete the provisioning process
 - Optus' claim that it will lose <c-i-c> ULLS connections per month is wholly unsubstantiated.
66. Both parties made further submissions in reply.

*Optus' further submissions in reply*³²

67. Optus made the following submissions in response to Telstra's submissions of 1 August 2007. These submissions can be briefly summarised as follows:
- it did not accept Telstra's submission that the poor customer experience associated with the ULLS provisioning process for ULLS MDU new connects is due to inadequacies within Optus' processes – it derives from the need to run two truck rolls to the customer premises and the delays and inconvenience this necessitates
 - it rejects Telstra's submission that it has not substantiated the costs that will be incurred in implementing the draft final determination and has provided evidence that the changes are relatively simple and can be delivered in 12 weeks at a cost of approximately <c-i-c >
 - it stands by its claim that some <c-i-c > ULLS sales per month are at risk because of the lack of a suitable provisioning process for MDU new connects and that Telstra's subsequent calculations regarding this figure are made on incorrect assumptions.

³¹ Telstra submissions in reply dated 1 August 2007

³² Optus further submissions in reply dated 21 August 2007

*Telstra's further submissions in reply*³³

68. Telstra made the following submissions in response to Optus' submissions of 1 August 2007. These submissions can be briefly summarised as follows:

- it rejected Optus' claim that a new occupant of premises could confirm the FNN associated with those premises through the former tenant – it is Telstra's view that this would be highly unusual
- it would be rare for the FNN to be written on a rental handset that has been left behind.

CONSIDERATION & ANALYSIS OF STATUTORY CRITERIA SUPPORTING A FINAL DETERMINATION

Model Non-price Terms and Conditions Determination October 2003

69. Subsection 152AQB(9) of the Act requires the Commission to have regard to a determination that sets out model terms and conditions relating to access to a core service if it is required to arbitrate an access dispute. The relevant determination in this instance is the *Model Non-Price Terms and Conditions Determination October 2003* (the Model Terms and Conditions).

Telstra's submissions regarding Model Terms and Conditions

70. In regard to the Model Terms and Conditions Telstra made a number of submissions. Its submissions not already outlined in this Statement of Reasons are as follows:

- the existence of a statutory duty to “have regard to” model terms and conditions does limit the Commission's decision-making ability in relation to access arbitrations and therefore the Commission must consider the Model Terms as a focal point in its decision-making in the access dispute³⁴
- the Model Terms make explicit (and thereby give rise to a legitimate expectation) that the Commission intends to respect the terms of industry agreed ACIF codes and standards relating to the ULLS³⁵
- the Commission had stated that its proposed approach to developing the Model Terms and Conditions was that where an ACIF code covers a particular matter that has been raised by an industry participant, the Commission will treat that particular aspect of the ACIF code as representing the standard for the model term and condition³⁶
- the Model Terms cover the ordering and provisioning of ULLS³⁷

³³ Telstra further submissions in reply dated 13 August 2007

³⁴ Telstra submissions on draft final determination, p.3

³⁵ *ibid*

³⁶ *ibid*, pp.3-4

³⁷ *ibid*, p.4

- the Commission is incorrect in its reasons for the draft final determination that the Model Terms are silent on the ordering and provisioning issue before the Commission³⁸
- the Model Terms incorporate, or at a minimum endorse the ACIF Code as evidenced by the Commission noting that [a] change in process should be developed through the ACIF and the relevant code and therefore this means that the Commission expects that provisioning processes will be developed and amended through the ACIF – even though the Commission uses service qualification as an example its views are obviously relevant to all provisioning processes³⁹
- access agreements that fail to incorporate ACIF codes standards will fail to meet the Commission’s model non-price terms and conditions – Telstra’s access agreements reflect the ACIF Code and ACIF IT Guideline in this regard⁴⁰

Optus’ submissions regarding Model Terms and Conditions

71. Optus made the following submissions in regard to the Model Terms and Conditions:

- it rejected Telstra’s submission that the Commission is bound by the Model Terms and that, in respect of provisioning processes for ULLS, these require the Commission to adopt the provisions of the ACIF Code⁴¹
- in its opinion the Commission has had regard to the Model Terms as required by subsection 152AQB(9) of the Act⁴²
- the Commission was correct to conclude that the “Model Terms and Conditions do not assist in resolving the ordering and provisioning matters in this access dispute beyond adopting a generic non-discrimination standard”⁴³
- a requirement to have regard to a particular matter does not mean or require that the particular matter must be determinative of the conclusion reached – it is merely a requirement that the matter be given weight in the decision-making process.⁴⁴

Commission’s conclusion regarding Model Terms and Conditions

72. The Model Terms and Conditions are designed to assist parties to reach commercial agreement on terms and conditions for access, or to submit access undertakings, thus providing more timely access for access seekers to “core” fixed line network services.⁴⁵ While these Model Terms and Conditions are not binding, they are intended to provide clear guidance about the Commission’s views as to what constitutes fair terms and

³⁸ *ibid*

³⁹ *ibid*

⁴⁰ *ibid*

⁴¹ Optus submissions in reply dated 1 August 2007, p.1

⁴² *ibid*

⁴³ *ibid*

⁴⁴ *ibid*, p.2

⁴⁵ Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005*, p.39

conditions for access to services.⁴⁶ The Model Terms and Conditions while indicative are not designed to limit the Commission's decision-making ability in relation to arbitrations and any arbitral determination depends upon the particular circumstances of the dispute. As such, there will remain the potential for an arbitral determination to depart from the model terms and conditions.⁴⁷

73. In developing the Model Terms and Conditions the Commission expressed the view (and also submitted by Telstra in this dispute) that where an ACIF code covered a particular matter, the Commission would treat that particular aspect of the ACIF code as representing the standard for the model term and condition and adopted particular provisions of an ACIF code where the Commission considered the provisions adequately dealt with the matter under examination.⁴⁸ The Commission also expressed the view that it had chosen to deal with only the key contentious terms and conditions as raised by industry participants⁴⁹ as there was no requirement for the model terms and conditions to be comprehensive.⁵⁰
74. The Commission has had regard to the Model Terms and Conditions and is not satisfied the ordering and provisioning issues in this access dispute are adequately dealt with in the determination. While it is evident that in formulating the Model Terms and Conditions the Commission has adopted clause 8.1 of the 2001 ACIF Code dealing with non-discrimination as well as the **respective legislative provisions** of the Act that deal with non-discrimination, namely paragraph 152AR(3)(b), subsection 152AR(4A) and subparagraph 152AR(5)(d)(i) of the Act, the determination is silent on the ordering and provisioning issue currently before the Commission.⁵¹ This is because as the Commission notes at page 46 of the Model Terms and Conditions:

...the Commission has attempted to address the issue of service level standards by the adoption and application of a non-discrimination standard that provides a broad principle approach to the issue of ordering and provisioning...The Commission still maintains the view that it is too problematic, as well as potentially undesirable, to apply an approach beyond a generic level standard. The generic standard adopted (of non-discrimination), however, should make it clear that the Commission would be expecting that an access provider will provide a level of service comparable to that which it provides to itself.

75. Therefore, the Commission is of the view that the Model Terms and Conditions do not assist in resolving the ordering and provisioning matters in this access dispute beyond adopting a generic non-discrimination standard for model terms and conditions. The Commission acknowledges that Telstra is correct in its assertion that where an ACIF code covers a particular matter the Commission will treat that particular aspect of the ACIF code as representing the standard for the model term and condition and does have a legitimate expectation that the Commission will respect the terms of industry agreed ACIF codes. However, the Commission is satisfied that this is not the case here. The Model Terms and Conditions do not adopt any clause from an ACIF code dealing specifically with the provisioning of the ULLS in MDUs.

⁴⁶ *ibid*

⁴⁷ Final Determination – Model Non-Price Terms and Conditions, October 2003, p.8

⁴⁸ *ibid*, p.11

⁴⁹ *ibid*, p.10

⁵⁰ Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Issues) Act 2005*, p.41

⁵¹ Final Determination – Model Non-Price Terms and Conditions, October 2003, p.46

76. Further it is the Commission's view that the Model Terms and Conditions do not require a final determination of an access dispute to reflect the terms of an ACIF code, nor does that final determination have to accord with an ACIF code. An ACIF code does not determine the scope of the Commission's decision-making ability in an arbitration. At most the Commission is obliged to take this material into account and is satisfied that it has done so in this access dispute.
77. The Commission does not consider that any change to be made to any provisioning process is expected to be developed and amended through the ACIF. After considering all of the circumstances of this particular dispute it is the Commission's view that this final determination utilises the existing ACIF Code, as far as possible, and is within the realm of the Commission's decision-making ability. As the Commission notes on page 12 of the Model Terms and Conditions:
- ... Where, however, an ACIF Code only partly deals with a particular issue, the Commission may be minded to establish an express model term that complements the ACIF code provisions.*
78. The Commission in this instance has not established an express model term; instead it is the intention of the Commission to make a determination which is designed to complement existing ACIF code provisions.

Statutory Criteria – subsection 152CR(1)

79. The Commission has considered the final determination against the relevant statutory criteria prescribed in subsection 152CR(1). The Commission's assessment of each criterion is set out below.
- (a) Promoting the long-term interests of end-users of carriage services or of services supplied by means of carriage services*
80. Subsection 152CR(1)(a) of the Act requires the Commission to have regard to whether the final determination will promote the LTIE of carriage services or of services supplied by means of carriage services.
81. In considering whether the final determination will promote the LTIE, the Commission must have regard to the extent to which the determination is likely to result in:
- promoting competition in markets for carriage services or services supplied by means of carriage services
 - achieving any-to-any connectivity in relation to carriage services that involve communication between end-users
 - encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which carriage services or services supplied by means of carriage services are supplied.⁵²

⁵² Subsection 152AB(2)

82. In deciding the extent to which the final determination is likely to result in the objective of promoting competition, regard must be had to the extent to which the determination will remove obstacles to end-users of gaining access to the ULLS in MDUs serviced by a MDF.⁵³ In addition, in deciding the extent to which the final determination is likely to result in the achievement of the objective of encouraging the economically efficient use of, and economically efficient investment in, the infrastructure by which carriage services or services supplied by means of carriage services are supplied, regard must be had to technical feasibility, the legitimate commercial interests of the supplier and the incentives for investment.⁵⁴
83. The Commission has published a guideline explaining what it understands is meant by the LTIE in the context of its declaration responsibilities.⁵⁵ The Commission considers that a similar interpretation is appropriate in making a final determination in this arbitration.

Telstra's submissions regarding subsection 152CR(1)(a)

84. Telstra considers that the proposal set out in the draft final determination will not promote the LTIE because it imposes a significant cost impost on Telstra and only applies to an extremely small number of VULL requests in respect of MDFs at MDUs.⁵⁶
85. Telstra also submitted that the Commission's reasoning (in regard to the draft final determination) is flawed because:
- it ignores the ratio of Vacant to In-use ULLS Requests which is not a function of the procedure available for provisioning ULLS on receipt of a VULL Request⁵⁷
 - the Commission cannot require Telstra to implement changes across the board for all access seekers in this arbitration which results in a significant amount of uncertainty, inefficiencies and unnecessary costs⁵⁸
 - it cannot be said that other access seekers desire the change and the consequential acceptance of risk it entails⁵⁹
 - it would require Telstra to implement one process for Optus while maintaining its existing Code-compliant process for other access seekers unless and until they also requested it (which is by no means guaranteed or even existed)⁶⁰
 - it involves the Commission overriding existing industry self-regulatory processes contrary to the intention of the Telecommunications Act and, in Telstra's view, the objects of Part XIC of the TPA.⁶¹

⁵³ Subsection 152AB(4)

⁵⁴ Subsection 152AB(6)

⁵⁵ ACCC, *Telecommunications Services – declaration provisions: a guide to the declaration provisions of Part XIC of the Trade Practices Act*, July 1999

⁵⁶ Telstra submissions on draft final determination dated 18 July 2007, p.11

⁵⁷ *ibid*, p. 12

⁵⁸ *ibid*

⁵⁹ *ibid*

⁶⁰ *ibid*

⁶¹ *ibid*

Optus' submissions regarding subsection 152CR(1)(a)

86. Optus submitted that the Commission's proposal will promote the LTIE as it will promote competition through removing obstacles to end-users in MDUs gaining access to ULLS and in the long term is likely to result in lower prices, increased quality of service and increased diversity and scope in product offerings.⁶²
87. Optus also submitted that the Commission's proposal will promote the LTIE as it implements a more efficient connection process thereby enabling access seekers to increase the take-up of ULLS in MDUs. Optus estimates that <c-i-c> ULLS connections per month are at risk of being lost due to its inability to access a more efficient provisioning process for MDU "new connects".⁶³
88. Both parties made submissions in reply, with Optus making further submissions in reply.

Telstra's submissions in reply

89. Telstra made the following submissions in response to Optus' submissions of 18 July 2007. These submissions can be briefly summarised as follows:
- Optus has provided no evidence to substantiate its claim that the Commission's proposal will promote the LTIE by enabling access seekers to increase the take-up of ULLS services in MDUs⁶⁴
 - Telstra understands that other access seekers are happy with the current provisioning process and have not requested any change. As such, Telstra considers that it is significant that no other access seeker has sought to join the arbitration⁶⁵
 - any delays experienced by Optus' MDU customers are largely due to Optus' own actions and not Telstra's ULLS provisioning process⁶⁶
 - there appears to be no evidence to support Optus' assertion that it has suspended pro-active marketing of ULLS to customers moving into an MDU as Optus' recent "Optus Fusion" (combined phone and broadband cap) marketing campaign does not exclude the provision of offering this "fused" service in MDUs⁶⁷
 - it doubts the validity of Optus' claim that it will lose <c-i-c> ULLS connections per month, based on historical data.⁶⁸

Optus' submissions in reply

90. Optus made the following submissions in response to Telstra's submissions of 18 July 2007. These submissions can be briefly summarised as follows:

⁶² Optus submissions on draft final determination dated 18 July 2007, p. 3

⁶³ *ibid*, pp.3 and 4

⁶⁴ Telstra submissions in reply dated 1 August 2007, p.2

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ *ibid*, pp.2 and 3

⁶⁸ *ibid*. p.3

- Optus refutes Telstra's claim that the small number of Optus connections for the period 1 September 2006 to 28 February 2007 is evidence that the draft final determination is not in the LTIE and contrary to Telstra's view, these statistics prove that the current processes are a barrier to competition and that the draft final determination is in the LTIE.⁶⁹

Optus' further submissions in reply

91. Optus made the following further submissions in response to Telstra's submissions of 1 August 2007. These submissions can be briefly summarised as follows:
- it rejects Telstra's submission that any delays experienced by Optus' MDU customers is due to inadequacies within Optus' processes and reasserts that it is the provisioning process which is inadequate⁷⁰
 - Optus stands by its claim that <c-i-c> ULLS sales per month are at risk because of the lack of a suitable provisioning process for MDU new connects⁷¹
 - Telstra has made an incorrect assumption that only a small proportion (<c-i-c> %) of the <c-i-c> sales will be new connects and therefore its subsequent calculations are meaningless and without merit.⁷²

Commission's conclusion regarding subsection 152CR(1)(a)

92. The Commission is satisfied that implementation of the final determination will promote the LTIE as it will allow Optus, and indeed, other access seekers (if they wish) to increase take-up of the ULLS by reducing an existing obstacle to end-users gaining access to the ULLS in MDUs. Currently, access seekers are required to use the VULL process for every order that is received in respect of the provisioning of ULLS in MDUs, where the previous occupant had a Telstra service(s). In the Commission's opinion this is inefficient and leads to access seekers incurring higher costs because of the nature of the VULL process. The Commission seeks to remedy this situation through the use and modification of the current TULL process.
93. It is the Commission's view that the final determination will in certain circumstances:
- reduce the time taken for an end-user to gain access to the ULLS
 - encourage efficiencies in the use of infrastructure by reducing the requirement for two truck-rolls to the same premises
 - encourage access seekers to invest in infrastructure
 - increase competition between service providers.
94. Taking into account the Site Visits, the Commission is also satisfied that the implementation of the final determination is technically feasible by using current provisions of the ACIF Code and that Telstra's legitimate commercial interests are not

⁶⁹ Optus submissions in reply dated 1 August 2007, p.5

⁷⁰ Optus further submissions in reply dated 21 August 2007, p.1

⁷¹ *ibid*

⁷² *ibid*

affected because the final determination adopts a process currently in use. Regardless of this final determination, Telstra's legitimate commercial interest in earning a commercial return is protected through the Commission's pricing principles for the ULLS.

95. The Commission does not consider that the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users is relevant in this instance.

(b) Legitimate business interests of the carrier or provider, and the carrier's or provider's investment in facilities used to supply the declared service

96. Subsection 152CR(1)(b) of the Act requires the Commission to have regard to the legitimate business interests of the access provider, and the carrier's or provider's investment in facilities used to supply the declared service.
97. The Commission is of the view⁷³ that the concept of legitimate business interests should be interpreted in a manner consistent with the phrase 'legitimate commercial interests' used in section 152AB of the Act. Accordingly, it would cover, in this arbitration, Telstra's interest in earning a normal commercial return on its investment. This does not, however, extend to receiving compensation for loss of any 'monopoly profit' that occurs as a result of increased competition.

Telstra's submissions regarding subsection 152CR(1)(b)

98. Telstra submitted that the system changes will involve significant costs and these costs will be incurred in circumstances where the benefit of the change will only be relevant to one access seeker, Optus. Further, the ACIF Code explanatory statement stipulates that there is an expectation that the costs of establishing and maintaining the operational and support systems would be outweighed by the benefits derived from the implementation of a standard industry process.⁷⁴
99. Telstra considers that it would not be in its legitimate business interests to make the system changes required by the Commission's proposal particularly where no other access seeker has indicated interest in the amended process or where some would not desire it.⁷⁵

Optus' submissions regarding subsection 152CR(1)(b)

100. Optus submitted that Telstra's legitimate business interests would be enhanced by the proposed determination as it would enable Telstra to avoid the deployment of technicians to undertake unnecessary truck-rolls to the customer premises to tag and test a line.⁷⁶
101. Optus also submitted that while Telstra has argued that there will be substantial costs involved in the implementation of the Commission's proposal, it has submitted no evidence in support of this claim. Optus indicated that it will also need to make changes

⁷³ ACCC, Resolution of telecommunications access disputes – a guide, March 2004 (Revised), p.56

⁷⁴ Telstra submissions on draft final determination dated 18 July 2007, p. 13

⁷⁵ *ibid*

⁷⁶ Optus submissions on draft final determination dated 18 July 2007, p. 4

to its systems and processes. However, it considers that such changes will be minimal and would be outweighed by the benefits of eliminating unnecessary truck-rolls.⁷⁷

102. Optus also noted that the ULLS Pricing Principles enable Telstra to recoup its costs of provisioning ULLS.⁷⁸

103. Telstra made submissions in reply.

Telstra's submissions in reply

104. Telstra made the following submissions in response to Optus' submissions of 18 July 2007. These submissions can be briefly summarised as follows:

- in its 18 July submission, Telstra set out the significant costs involved in making the system changes, together with an independent assessment of those costs
- Optus has provided no evidence to support its claim that the costs would be minimal and outweighed by the apparent benefit of the new process
- if Telstra was required to pass on the costs of the Commission's proposal to access seekers, this would be contrary to other access seekers' interests (as they would be paying for a new provisioning process which was never requested nor desired)
- the ability of Telstra to recoup costs would need to be considered in the ULLS access disputes currently before the Commission.⁷⁹

Commission's conclusion regarding subsection 152CR(1)(b)

105. While the Commission accepts that Telstra will incur some cost in implementing the Commission's proposal, the Commission is satisfied that those costs will not be significant. It is the Commission's view that implementation of the final determination involves some change to the existing TULL procedures which should not prevent Telstra from earning a normal commercial return.

106. As referred to in paragraph 94 of this Statement of Reasons it is the Commission's view that Telstra's legitimate business interests are protected through the Commission's pricing principles for the ULLS. By adopting current processes of the ACIF Code, it is the view of the Commission that there would be little discernable impact on Telstra's business operations.

107. In regard to Telstra's submission concerning the ACIF Code (and outlined above at paragraph 98), the ACIF Code imposes minimum operational requirements on carriers and carriage service providers in the ordering and provisioning of a ULLS and ULLS Transfers.⁸⁰ The Commission is satisfied that it is therefore reasonable for it to build upon those minimum operational requirements outlined in the ACIF Code, in order to resolve this access dispute.

⁷⁷ *ibid*

⁷⁸ *ibid*

⁷⁹ Telstra submissions in reply dated 1 August 2007, pp. 3 and 4

⁸⁰ ACIF Code, clause 1

108. While change may initially benefit one access seeker, in the Commission's opinion implementation of the final determination will benefit all access seekers who use the process in the future by providing them with an efficient approach to the provisioning of the ULLS in MDUs.

(c) Interests of all persons who have rights to use the declared service

109. Subsection 152CR(1)(c) of the Act requires the Commission to have regard to the interests of all persons who have rights to use the declared service. Persons who have rights to use a declared service will, in general, use that service as an input to supply carriage services, or a service supplied by means of carriage services, to end-users. In this instance Optus is such a person and has an interest in being able to compete for the custom of end-users on the basis of its relative merits.

Telstra's submissions regarding subsection 152CR(1)(c)

110. Telstra submitted that the interests of all persons who have the right to use the ULLS should be considered and that the changes [i.e., implementing the Commission's proposal] will not be in the interests of access seekers, because:

- it is unknown whether any other access seeker (besides Optus) is interested in the amended process and, if there was an interested access seeker, an assessment of the benefits of the amended process should take account of the number of ULLS connections affected for that access seeker⁸¹
- some access seekers will not be interested in the amended process⁸²
- a number of access seekers primarily service business customers in MDUs who require equipment to be installed at the premises after cutover and this will require tagging at the MDF regardless of whether there is a soft dial-tone or not⁸³
- the extensive costs of implementing the proposal (whether at a bilateral or industry level) will need to be passed on to Optus or all access seekers (to ensure that Telstra recoups the direct costs of provisioning ULLS) and, in the latter case, this would mean that those access seekers that are not willing to accept the risks associated with adopting the Commission's proposal will still be subject to higher ULLS costs.⁸⁴

Optus' submissions regarding subsection 152CR(1)(c)

111. Optus submitted that it supported the Commission's conclusion that the current processes act as an impediment to competition between Telstra and Optus (and other access seekers), for customers in MDUs.⁸⁵

112. Optus also submitted that the Commission's proposal will allow access seekers to compete on a more equivalent basis with Telstra Retail for the provision of services to customers moving into an MDU.⁸⁶

⁸¹ Telstra submissions on draft final determination dated 18 July 2007, p.12

⁸² *ibid*

⁸³ *ibid*

⁸⁴ *ibid*, p 13

⁸⁵ Optus submissions on draft final determination dated 18 July 2007, p. 4

113. Telstra made submissions in reply.

Telstra's submissions in reply

114. Telstra made the following submissions in response to Optus' submissions of 18 July 2007. Its submissions can be briefly summarised as follows:

- Optus' suggestion that the proposed determination will provide access seekers with an opportunity to compete with Telstra Retail on a more equivalent basis is misconceived because it ignores that fact that any obligation of equivalency in section 152AR(3) of the TPA would extend at most to the equivalent aspects of provisioning (i.e., solely to the provisioning of the unconditioned copper wire by Telstra to itself).⁸⁷

Commission's conclusion regarding subsection 152CR(1)(c)

115. It is the view of the Commission that Optus under current conditions for the provisioning of the ULLS in MDUs with a MDF in the building is impeded in competing for the custom of end-users. The Commission is also of the view that this impediment is not restricted to Optus, but also other service providers who may wish to provide similar ULLS services in MDUs.

116. While acknowledging Telstra's submission that other access seekers (service providers) manage with the current process, the Commission considers that the final determination will allow all service providers to compete for end-users more effectively.

117. The Commission notes and reiterates that the final determination is confined to a specific set of circumstances and does not displace the existing ordering and provisioning processes outlined in the ACIF Code. There is no impediment in the Commission's determination to those access seekers who wish to use current ACIF Code procedures.

(d) Direct costs of providing access to the declared service

118. Subsection 152CR(1)(d) of the Act requires the Commission to take into account the direct costs of providing access to the declared service; in this instance the ULLS. The direct costs of providing access to a declared service are those incurred (or caused) by the provision of access.

Telstra's submissions regarding subsection 152CR(1)(d)

119. In its response to the draft final determination, Telstra submitted that should the changes outlined in the Commission's determination be required at an industry level this would take approximately 16 months. It estimates that it will take a further 7.5 months to alter its IT systems and once implemented a further 4 to 6 weeks would be required to test the new processes. It therefore estimates that the total time required to implement the changes necessitated by the draft final determination would be in excess of 2 years.⁸⁸

⁸⁶ *ibid*

⁸⁷ Telstra submissions in reply dated 1 August 2007, p. 4

⁸⁸ Telstra submissions on draft final determination dated 18 July 2007, p.10

120. Telstra also submitted that the costs of implementing this proposal will be c-i-c which includes redesigning and rebuilding its system; designing and building a new interface to its existing system, additional costs for incorporating a management reserve and project and operational deployment costs.⁸⁹
121. It is Telstra's view that these costs are significant when compared to the small subset of ULL connections at MDUs at issue in this access dispute.⁹⁰
122. Telstra also submitted that a bilaterally agreed process would take less time to implement between Optus and Telstra alone, as the ACIF stage would be omitted. However, should the bilateral process need to be repeated in respect of other access seekers, the overall time for agreement and implementation would be much greater than 2 years.⁹¹

Optus' submissions regarding subsection 152CR(1)(d)

123. Optus submitted that the Commission's proposal set out in the draft final determination seeks to minimise any systems or process changes by utilising the existing processes for ULLS Transfer Request pursuant to the ACIF Code. Accordingly, the changes to systems and costs incurred would be minimal.⁹²
124. Optus also rejected Telstra's claims that other access seekers will not benefit from the changes to the provisioning processes set out in the draft final determination, since it offers a more efficient process than exists at present for MDU new connects and there is no reason to believe that other access seekers will not require Telstra to use this process once the final determination is made publicly available.⁹³
125. Optus repeated in its submissions that Telstra will benefit by eliminating unnecessary truck rolls to customer premise.⁹⁴
126. Both parties made submissions in reply with Optus making further submissions in reply.

Telstra's submissions in reply

127. Telstra made the following submissions in response to Optus' submissions of 18 July 2007. These submissions can be briefly summarised as follows:
- if the Commission were to make the final determination in the form proposed it will take at least 2 years to implement, as set out in its 18 July 2007 submissions⁹⁵
 - Optus' 3 month timeframe for implementation is "mere hyperbole and clearly unworkable".⁹⁶

⁸⁹ *ibid*, p.11

⁹⁰ *ibid*

⁹¹ *ibid*

⁹² Optus submissions on draft final determination dated 18 July 2007, p. 4

⁹³ *ibid*

⁹⁴ *ibid*

⁹⁵ Telstra submissions in reply dated 1 August 2007, p. 4

⁹⁶ *ibid*

Optus' submissions in reply

128. Optus made the following submissions in response to Telstra's submissions of 18 July 2007. These submissions can be briefly summarised as follows:

- there are some system changes associated with the IT implementation of the Commission's proposal but these changes are neither complex nor excessively costly⁹⁷
- in order to minimise costs, Optus will supply the inactive FNN details within one of the 'optional fields' in the TULL request and therefore no change to the ACIF ULLS IT Specifications will be required⁹⁸
- Optus will perform a number of validations with the end customer therefore address validation and matching of the address to the inactive FNN will not be necessary by Telstra – using one field as the primary validation field is consistent with all TULL transactions
- a number of the sub-processes described in the McAinsh Statement that are required to provision the ULLS associated with the inactive FNN are duplicates of existing processes that exist for an active FNN and should therefore not represent a major IT build⁹⁹
- Optus estimates the total cost of building and testing the transaction set for TULL under the Commission's proposal as well as building the provisioning processes through its back end systems to be c-i-c and will require 3 months of IT development¹⁰⁰
- Telstra has previously put forward various cost estimates for systems development work on its ULLS systems in separate regulatory proceedings. Some of these estimates relate to upgrades associated with various connection activities and processes, such as those that enable the migration of SSS to ULLS.¹⁰¹
- if the Commission used this information to benchmark Telstra's claimed costs for the MDU upgrade, it would conclude that Telstra's claimed costs are not credible.¹⁰²

Optus' further submissions in reply

129. In further submissions in response to Telstra's submissions of 1 August 2007, Optus submitted that it rejected Telstra's assertion that Optus had not substantiated the costs of implementing the Commission's proposal. In Optus' view the changes are relatively simple and can be accommodated at a modest cost and within a short timeframe.¹⁰³

⁹⁷ Optus submissions in reply dated 1 August 2007, p. 4

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ *ibid*

¹⁰¹ *ibid*; SSS means Telstra Wholesale's Spectrum Sharing Service

¹⁰² *ibid*

¹⁰³ Optus further submissions in reply dated 21 August 2007

Commission's conclusion regarding subsection 152CR(1)(d)

130. The Commission acknowledges that Telstra incurs costs in supplying the ULLS. However, it is the Commission's view that the costs in implementing the final determination will be minimised as the determination requires Telstra to utilise the existing provisioning processes for ULLS Transfer Requests pursuant to the ACIF Code and that any benefits to end-users will outweigh the costs of any necessary changes to Telstra's current systems.
131. On this point the Commission notes that the regulatory regime permits Telstra to recover the efficient costs of supplying and charging for the ULLS.
132. In regard to Telstra's submission that a bilaterally agreed process would take less time to implement between Optus and Telstra alone, the Commission notes that in its Notification of the access dispute, Optus provided details of negotiations between the parties which did not result in an acceptable outcome to either party. It is not obvious to the Commission as to why a bilateral agreement between the parties could take less time.
- (e) Value to a party of extensions, or enhancement of capability, whose cost is borne by someone else***
133. Subsection 152CR(1)(e) of the Act requires the Commission to take into account the value to a party of extensions, or enhancement of capability, whose cost is borne by someone else when making a final determination.

Telstra's submissions regarding subsection 152CR(1)(e)

134. Telstra submitted that the Commission's proposal requires IT systems changes to be made which purportedly enhance its capability used to provision the ULLS (at least with regard to ULLS ordered by Optus in MDUs) and therefore the value of these purported enhancements to Optus need to be considered when the costs are borne by Telstra.¹⁰⁴
135. Telstra also submitted that it will bear substantial costs in circumstances where the value to Optus will be minimal, given the negligible number of services to be affected by the proposal.¹⁰⁵
136. Should the Commission make a final determination in the form proposed, Telstra submitted that the costs of agreeing and implementing the required system changes will need to be borne by the person benefiting from the changes which in this instance is Optus.¹⁰⁶

¹⁰⁴ Telstra submissions on draft final determination dated 18 July 2007, p. 13

¹⁰⁵ *ibid*

¹⁰⁶ *ibid*

Optus' submissions regarding the subsection 152CR(1)(e)

137. Optus submitted that the Commission's proposal is more likely to benefit Telstra than act as a significant cost burden, for the reasons outlined in paragraphs 100 and 101 of this Statement of Reasons.¹⁰⁷

Commission's conclusion regarding subsection 152CR(1)(e)

138. For the reasons outlined under "Other Relevant Matters", the Commission is satisfied that the specified ULLS provisioning processes it has determined will not be burdensome on Telstra. By using the current provisions of the ACIF Code, the cost of implementation should be negligible but will ultimately enhance the capability of access seekers in the take-up of the ULLS.
139. The Commission considers that the final determination will allow all service providers to compete for end-users more effectively through the enhancement of the ULLS.

(f) Operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility

140. Subsection 152CR(1)(f) of the Act requires the Commission to have regard to the operational and technical requirements necessary for the safe and reliable operation of a carriage service, a telecommunications network or a facility when making a final determination.

Telstra's submissions regarding subsection 152CR(1)(f)

141. Telstra submitted that the Proposal that had been suggested by the Commission would clearly raise issues under paragraph 152CR(1)(f) of the Act. It has also submitted that it was not prepared to carry the significant risks in provisioning an ULL jumper to an incorrectly tagged 'B' side of the MDF, leaving the Optus end customer with no service nor did it want to bear the potential risks of disconnecting or disrupting another existing end-customer's service that is fed from the same MDF within an MDU.¹⁰⁸
142. Telstra also submitted at the Site Visit that it made more operational sense for Optus to have a truck-roll after the ULL cutover to ensure a continuous copper path to end customer premises and a working service for that end customer.¹⁰⁹

Optus' submissions regarding subsection 152CR(1)(f)

143. Optus submitted that it accepted any risk that may occur as a result of the provisioning process outlined in paragraph 1 of the Proposal¹¹⁰ and stated at the Site Visit that it was willing to accept any downside risk associated with using existing copper pairs, for

¹⁰⁷ Optus submission on draft final determination dated 18 July 2007, p. 5

¹⁰⁸ Conference meeting and site visits report incorporating comments made by both parties dated 19 December 2006, p.7

¹⁰⁹ *ibid*

¹¹⁰ Optus submissions on possible solution to the issues in dispute, 15 February 2007, p.2

example, where there is a problem with the copper pair between the 'B' side of the MDF in the MDU and the end-users location.¹¹¹

144. Optus also submitted (in response to Telstra's submission in paragraph 141 above) that it will accept any risk to the quality of, connectivity to, or suitability for providing voice and/or data services on the existing copper path between the Telstra exchange and the customer premises as reflected in paragraph 9(a) of the draft final determination.¹¹²
145. In Optus' view there will be minimal impact on existing operational and technical requirements as the draft final determination proposes the implementation of processes based on existing procedures in the ACIF Code and will be facilitated by existing systems.

Commission's conclusion regarding subsection 152CR(1)(f)

146. The Commission has considered the submissions and comments made by both parties during the conference meeting and associated Site Visits. Consideration has also been given to existing industry practices and certain provisions of the ACIF Code and the Commission is satisfied that the final determination will have limited (if any) impact on this criterion. The final determination is based on the existing Transfer Request procedures of the ACIF Code and is to be accommodated via existing systems. The Commission does not accept that it makes more operational sense for there to be two truck-rolls to the same premises when an existing provisioning process can be used, albeit with some modification.
147. The Commission recognises that if the incorrect FNN details are included in a ULL Transfer Request, it could result in incorrect jumpering at the Telstra exchange. To mitigate this risk, the Commission considers Telstra would need to verify that the FNN corresponds with the address details included in the Transfer Request. Where this information is incorrect, Telstra would reject the Transfer Request and advise Optus why it had been rejected (i.e., provide the appropriate Rejection Code). This validation step has been included in the final determination

(g) Economically efficient operation of a carriage service, a telecommunications network or a facility

148. Subsection 152CR(1)(g) of the Act requires the Commission to have regard to the economically efficient operation of a carriage service, a telecommunications network or a facility when making a final determination.
149. In the Commission's view, the phrase 'economically efficient operation' embodies the concept of economic efficiency as used in subsection 152CR(1)(a). It would not appear to be limited to the operation of carriage services, networks and facilities by a carrier or carriage service provider supplying the declared service, but would seem to include those operated by others (e.g., service providers using the declared service).

¹¹¹ Conference meeting and site visits report incorporating comments made by both parties dated 19 December 2006, p.5

¹¹² Optus submissions on draft final determination date 18 July 2007, p. 5

Telstra's submissions regarding subsection 152CR(1)(g)

150. Telstra stated at the Site Visit that it would be inefficient for it as an access provider to the industry as a whole to tailor a process specifically to suit the preferences of an individual access seeker.¹¹³
151. It submitted that the draft final determination is inefficient in that it will necessitate a two-step amended TULL then VULL process in a significant number of instances.¹¹⁴
152. Telstra also submitted that to implement the Commission's proposal each of the steps set out in section 1 of the McAinsh Statement would need to be agreed and implemented bilaterally between Telstra and Optus or at an industry level between ACIF participants. Telstra asserts that proceeding on a bilateral basis would be costly, time consuming and highly inefficient.¹¹⁵
153. Telstra further submitted that the Commission's proposal is inefficient because the proposed variant TULL Request may be rejected because:
- (a) a cable part is in part fibre to a RIM
 - (b) a cable path is part of a pair gain system
 - (c) a cable path is provided by tie cable, or
 - (d) line conditioning equipment is found
- such that the line is not suitable for a ULLS.
154. Neither Telstra nor any other access seeker's systems are currently configured to process these reject types for a TULL. Therefore, a significant proportion of the proposed variant TULL Requests will be rejected and the access seeker will need to treat the request as a VULL Request and start the provisioning process afresh. As such, Telstra submitted that given the small numbers of connections which are to be affected by a final determination, it makes little sense from an efficiency perspective to implement a process where a significant proportion of the cases Telstra will need to apply the current VULL process.¹¹⁶

Optus' submissions regarding subsection 152CR(1)(g)

155. In this access dispute, Optus has submitted that the current provisioning process is unacceptable because it involves significant delays and causes great inconvenience and frustration with the result being that Optus has <c-i-c> which has impacted adversely on Optus. It further submitted that until the current connection processes are improved, Optus' ULLS growth plans will continue to be adversely impacted as a high proportion of

¹¹³ Conference meeting and site visits report incorporating comments made by both parties dated 19 December 2006, p.7

¹¹⁴ Telstra submissions on draft final determination date 18 July 2007, p. 9

¹¹⁵ *ibid*

¹¹⁶ *ibid*, p.14

Optus' new connect ULLS sales are expected to come from customers moving into MDUs which are currently forecast to be over <c-i-c> sales per month.¹¹⁷

156. Optus also submitted that the Commission's process in the draft final determination would enable a ULLS to be provisioned at the exchange in those instances where Optus is able to identify the in-place line to the MDU and soft dial tone is present on that line, and Optus is able to provide Telstra with the FNN details associated with that line. The ULLS connection could then be activated at the exchange with no truck roll to the customer premises required, creating a more efficient and streamlined connection process.¹¹⁸
157. Optus also submitted that the proposed process set out in the draft final determination will lead to a more efficient ULLS provisioning process that will benefit Telstra and Optus as well as other users of the ULLS.¹¹⁹

Commission's conclusion regarding subsection 152CR(1)(g)

158. After considering the views of both parties, the Commission is satisfied that the final determination will contribute to the economically efficient operation of a carriage service, a telecommunications network or a facility. It is the Commission's view that presently the process currently undertaken in the provisioning of the ULLS in MDUs serviced with an MDF is operating inefficiently. Two truck-rolls are required, causing considerable delay and inconvenience as well as increasing the costs for service providers using the ULLS in these circumstances. As the Commission has stated previously, the provisioning of ULLS in MDUs is not restricted to Optus.
159. The Commission considers that by adopting the final determination, both parties will ultimately benefit as costs will decrease and the ULLS provisioning process streamlined.

Other relevant matters – subsection 152CR(2)

160. Subsection 152CR(2) of the Act provides that the Commission may take into account any other matters that it thinks are relevant in making a final determination.

The ACIF Code

161. The ACIF Code was fundamental in the Commission's making of the final determination in this access dispute and therefore is a relevant consideration. Following the Site Visits and information provided by the parties at those Site Visits, the ACCC formulated a Proposal, the aim of which was to resolve the issues in dispute. This Proposal is based as far as possible on provisions of the ACIF Code and it is the Commission's view that it is the most effective way of achieving resolution of the issues in dispute.
162. Both parties made submissions in relation to the Proposal and its use of the provisions of the ACIF Code.

Telstra's submissions regarding the use of the ACIF Code

¹¹⁷ Optus submissions on whether the Commission should make an interim determination dated 21 March 2007, p.3

¹¹⁸ Optus submissions on the draft final determination dated 18 July 2007, p. 1

¹¹⁹ *ibid*, p. 5

163. Telstra made the following submissions:

- the ACIF Code provides an industry agreed approach to ensuring non-discriminatory provisioning of ULLS. It ensures minimum standards are met by access providers and [that] access seekers would be treated in a non-discriminatory manner¹²⁰
- when undertaking a comparison between the manner in which Telstra provisions ULLS to an access seeker and hypothetically to itself, the most realistic way in which the Commission can approach the issue of equivalent provisioning of the services is to look to the industry agreed steps in the ACIF Code¹²¹
- the ACIF Code should be strictly complied with to ensure that the industry-agreed approach to non-discrimination is respected¹²²
- the draft final determination is inconsistent with the ACIF Code and that the Commission's obligation under subsection 152AQB(9) must take precedence over anything the Commission considers relevant pursuant to subsection 152CR(2)¹²³
- the Commission's purported application of the ACIF Transfer ULLS process to the provisioning of ULLS at MDFs in MDUs is inherently flawed. It involves a misconstruction of the relevant provisions because it is based on a misunderstanding of the nature of soft dial tone¹²⁴
- a soft dial tone indicates that no carriage services are being provided over the cable path. Where a soft dial tone exists neither Telstra nor any other provider is providing any service over the line (whether that is ULLS to another access seeker or PSTN to itself) and therefore there can be no transfer as between access seekers because there is no service to transfer. There is no Losing Access Seeker supplying a service over the ULLS immediately prior to the "transfer" for the purposes of the ACIF Code. Hence, the ULLS Transfer process **cannot** apply because there is no service to transfer¹²⁵
- where there is a cable path with a soft dial tone, an access seeker will need to place a Vacant ULLS request for the purposes of the ACIF Code – where a soft dial tone is present it is the provisioning processes for a VULL which should be adopted¹²⁶
- a request relating to the use of a cable path [with soft dial tone] will not fall within the scope of clause 11.1.1(b) or (c) of the ACIF Code – therefore if Optus makes a request relating to a customer premises to which an inactive cable path runs, Optus must submit a Vacant ULLS request under the ACIF Code and follow the

¹²⁰ Telstra submissions on draft final determination dated 18 July 2007, p.5

¹²¹ *ibid*

¹²² *ibid*

¹²³ *ibid*

¹²⁴ *ibid*, p.6

¹²⁵ *ibid*

¹²⁶ *ibid*

appropriate procedures of the ACIF Code¹²⁷

- the current process is consistent with the ACIF Code, the Commission's proposal would override the agreed industry process which has worked efficiently and provided certainty since 2001 and would place Telstra in the position that it was non-compliant with the Code¹²⁸
- if the Commission and Optus continue to believe that the current ACIF process are not the optimal manner in which to provision the ULLS then, these organisations should raise their concerns with the Communications Alliance¹²⁹
- Telstra's current interface and front-end systems have been designed and built to accord with the ACIF IT Guideline¹³⁰
- a soft dial tone is only present where a previous Telstra PSTN service has been disconnected. It is not present where a previous ULLS has been disconnected¹³¹
- the Commission's proposal is not consistent with either a VULL, IULL or TULL process as set out in the ACIF Code¹³²

Optus' submissions regarding the use of the ACIF Code

164. Optus made the following submissions:

- it considers the draft final determination to be consistent with the ACIF Code and that this dispute deals with a specific issue that was clearly not contemplated when the ACIF Code was developed¹³³
- the draft final determination merely seeks to utilise one of the existing ULLS provisioning processes to address the issues raised in the dispute and to address a barrier to competition in the current provisioning process¹³⁴
- Telstra's argument that the ACIF Codes "do not permit" Telstra to comply with the proposed final determination should be given no weight, as a determination of the ACCC will be legally enforceable regardless of any ACIF Code requirement.¹³⁵

¹²⁷ *ibid*, pp. 6-7

¹²⁸ *ibid*, p.7

¹²⁹ *ibid*

¹³⁰ *ibid*, p.8

¹³¹ Telstra submissions on draft final determination dated 18 July 2007, Annexure A, part H, paragraph 30

¹³² Telstra submissions in reply dated 1 August 2007, p.2

¹³³ Optus submissions on draft final determination dated 18 July 2007, p.2

¹³⁴ *ibid*, Optus submissions in reply dated 1 August 2007, p.2

¹³⁵ Optus submissions in reply dated 1 August 2007, p.3

Commission's conclusion regarding the ACIF Code

165. After taking into account the written and oral views of the parties, including submissions made in regard to the draft final determination, the Commission maintains its view that the most effective way of achieving resolution is by adopting the Proposal founded on (as far as possible) provisions of the ACIF Code as the basis for the Commission's final determination in this matter.
166. Below is an explanation of the relevant provisions of the ACIF Code which will have some application to this final determination.
167. The ACIF Code imposes minimum operational requirements on carriers/carriage service providers (C/CSPs) in the ordering and provisioning of a ULLS and ULLS Transfers and is intended not to necessarily limit industry's ability to improve on the minimum level.¹³⁶ Clause 11 of the ACIF Code deals with the ULLS Ordering Procedure. It relevantly provides that the ULLS ordering procedure is the process by which the Access Seeker makes a request to the Access Provider for a ULLS copper pair. As such, the Access Seeker must specify the type of ULLS request required. The types of requests (relevant to this final determination) are:
- (a) Vacant ULLS
 - (b) In-Use ULLS
 - (c) ULLS Transfer Request.¹³⁷
168. The ACIF Code defines these requests as follows:

Vacant ULLS

This process covers the provision of a ULLS on a Communications Wire [copper pair] that is currently not being used for any other purpose.¹³⁸

In-Use ULLS

This process covers the provision of a ULLS on an existing Communications Wire currently being utilised by the [end-user] Customer. There are two specific types with the ULLS Request detailing whether the Service Number associated with the In-Use ULLS is cancelled by the Access Provider or ULLS Call Diversion is provided as well as the ULLS Transfer Request.¹³⁹

For the purposes of this final determination the applicable type of ULLS request is restricted to the first type of In-Use ULLS, that is, one where the Service Number associated with the In-Use ULLS is cancelled by the Access Provider.

¹³⁶ ACIF Code, clauses 1.4 and 7.1

¹³⁷ *ibid*, subclause 11.1.1

¹³⁸ *ibid*, subparagraph 11.1.1(a)

¹³⁹ *ibid*, subparagraph 11.1.1(b)

ULLS Transfer Request

This process covers the transfer of ULLS between two Access Seekers when the Customer transfers from one Access Seeker to another Access Seeker. The Gaining Access Seeker may have a different use for the ULLS.¹⁴⁰

As outlined in paragraph 45 of these reasons the ACIF Code clearly contemplates that Telstra could be a Losing Access Seeker.

169. Definitions applicable to these types of requests can be found at clause 6.2 of the ACIF Code. The definitions relevant to the process set out in the final determination and as defined in the ACIF Code are as follows:

“C/CSP” means Carrier/Carriage Service Provider.

“Communications Wire” is a copper or aluminium based wire, forming part of a Public Switched Telephone Network. For the avoidance of doubt, Communications Wire generally means a copper or aluminium cable pair.

This definition is consistent with that used in the ULLS Declaration.

“ULLS Request” means a specific request from the Gaining Access Seeker to the Access Provider for a Vacant or In-Use ULLS or ULLS Transfer Request.

“Service Number” means the Customer’s fixed network billing service number which is identifiable by a full national number...For the avoidance of doubt, Service Numbers may be associated with voice and data services.

“ULLS Transfer” means the successful transfer of a ULLS between the Losing Access Seeker and the Gaining Access Seeker.

“Gaining Access Seeker” means the C/CSPs identified on a CA [Customer Authorisation] that will provide the Customer with services over the ULLS immediately after the Effective Date of Transfer. For the avoidance of doubt, the Gaining Access Seeker may also be the Access Provider.

“Losing Access Seeker” means the C/CSPs which will cease providing the Customer with services over the ULLS immediately after the Effective Date of Transfer (for the avoidance of doubt, this may include the Access Provider).

170. Throughout this process Telstra has maintained that it cannot comply with what the Commission is proposing because it would place Telstra in the position that it was non-compliant with the ACIF Code. However, the Commission does not accept this submission because:

- (i) the Proposal adopted in the final determination is utilising (in the Commission’s view) existing ULLS provisioning processes contained in the ACIF Code to resolve this access dispute; and

¹⁴⁰ *ibid*, subparagraph 11.1.1(c)

- (ii) in any event, clause 16 of the ACIF Code provides that *if there is an inconsistency between a requirement of this Code and a requirement imposed on a Party by statute [in this instance section 152CP of the Act], the Party will not be in breach of the requirement of the Code in relation to any conduct that is necessary to ensure compliance with that statute.*
171. The Commission notes the current ACIF Code is unregistered. Therefore any determination made by the Commission will not be inconsistent with section 117 of the *Telecommunications Act 1997*.
172. Telstra submitted that the ULLS Transfer process can only be used for the transfer of existing ULL services; that Telstra's systems have been designed and built in accordance with the agreed ACIF Code to carry out the transfer process and that the Commission's purported application of the ACIF Transfer ULLS process is inherently flawed.¹⁴¹
173. The Commission has considered these submissions carefully and repeats its reasons at subparagraph 170(i) above. The Commission is utilising the existing ULLS provisioning process to resolve the current issues in dispute. The Commission has determined a specific process that is to apply in a limited set of circumstances and has concluded that the most efficient way to proceed is through the use of the existing provisions of the ACIF Code and has adopted as far as possible the ACIF Code process. The Commission has taken this approach in order to minimise the impact of an arbitration-determined process.
174. The Commission reiterates that when that limited set of circumstances arise, namely, the supply by Telstra to Optus of the ULLS in MDU's serviced by a MDF and there is an existing communications wire between the Telstra exchange and the end-user customer's premises which has a soft dial tone a ULLS Transfer Request may be submitted by Optus and the ULLS Transfer process pursuant to clause 11.4 of the ACIF Code would then apply. Optus must supply the Service Number (which includes the full national number) to Telstra. If there is no existing communications wire or soft dial tone or Optus does not supply the Service Number to Telstra this process cannot apply. Instead Optus would have to make a Vacant ULLS request and the Vacant ULLS process as outlined in the ACIF Code would apply. The process dealing with Vacant ULLS requests currently applies and therefore in the Commission's view does not require the parties to implement change
175. The Commission acknowledges Telstra's concerns regarding the Proposal which has been incorporated into the final determination with some modification. Telstra has submitted that the Proposal is misconceived in regard to the presence or absence of a soft dial tone.¹⁴²

¹⁴¹ Telstra submissions on possible solution to the issues in dispute, 15 February 2007, p.2, Telstra submissions on draft final determination, 18 July 2007, p.6

¹⁴² Telstra submissions on possible solution to the issues in dispute, 15 February 2007, p.2, Telstra submissions on draft final determination, 18 July 2007, p.6

176. The Commission is satisfied that the soft dial tone is an identification tone¹⁴³ which assists in identifying the Service Number associated with an inactive Telstra PSTN service. The presence of a soft dial tone together with the provision of a full national number (supplied by the Gaining Access Seeker) will enable Telstra to identify the Communications Wire at the Telstra exchange and carry out any subsequent Transfer ULLS Request process. If there is no such identifier the request would need to be treated as a Vacant ULLS Request. The onus will be on the Gaining Access Seeker to deal with the consequences of both processes and not Telstra.
177. The Commission notes the concerns that have been raised that not all inactive services with a soft dial tone will be ULLS serviceable but is satisfied that Telstra's service qualification testing processes could be used to identify whether this is the case.
178. Telstra has elicited numerous points as to why the Commission has fallen into error by not adhering strictly to the ACIF Code. The Commission notes that contrary to these submissions it is not the role of ACIF codes to limit the scope of the Commission's decision-making ability in arbitrating this access dispute. It is within the realm of the Commission's decision-making ability that if it is concerned that a term or condition of access is unreasonable the Commission may deal with that concern regardless of the terms of any existing ACIF code.
179. The Commission has taken into account the ACIF Code and has determined that the most effective and efficient resolution of this dispute is to adopt the Proposal which is based (as far as possible) on provisions of the ACIF Code.

Subsection 152CP(2)

180. Subsection 152CP(2) of the Act provides that a determination may deal with any matter relating to access by the access seeker to the declared service including matters that were not the basis for notification of the dispute.
181. Optus in its Notification, indicated the basis for the dispute to be that Telstra was in breach of its standard access obligations (SAOs) pursuant to paragraph 152AR(3)(b) of the Act because it did not provide ordering and provisioning processes that are of a technical and operational quality equivalent to that which it provides itself.
182. Telstra has maintained throughout this dispute that:
- the dispute is not a dispute in relation to the terms and conditions upon which Telstra complies with its SAOs in respect of the supply of ULLS¹⁴⁴
 - the Proposal went beyond Telstra's SAOs in respect of the ULLS¹⁴⁵
 - it does not provision the ULLS to itself but provisions separate services, namely the PSTN.¹⁴⁶

¹⁴³ Note: subparagraph 12.2.1(c) requires an access seeker to provide an identification tone to the access provider for the purposes of ULLS Provisioning

¹⁴⁴ Telstra submissions in reply on preliminary issues, 30 October 2006, p.1

¹⁴⁵ Telstra submissions in reply on possible solution to the issues in dispute, 7 March 2006 [sic], p.1

183. It is the Commission's view that this access dispute is a dispute that relates to the terms and conditions in respect of the supply of the ULLS. In this dispute, the Commission is able to make a determination that specifies the terms and conditions on which the carrier or provider is to comply with any or all of the SAOs applicable to the carrier or provider.¹⁴⁷ It can also make a determination which specifies any other terms and conditions of the access seeker's access to the ULLS.¹⁴⁸
184. The Commission does not accept that the Proposal as adopted in the final determination goes beyond Telstra's SAOs in respect of the ULLS. Nor does the Commission accept Telstra's submission that because it does not provision the ULLS to itself, the SAO pursuant to paragraph 152AR(3)(b) is not applicable.
185. Subsection 152AR(3) provides:
- (3) *An access provider must, if requested to do so by a service provider:*
- (a) *supply an active declared service to the service provider in order that the service provider can provide carriage services and/or content services; and*
- (b) *take all reasonable steps to ensure that the technical and operational quality of the active declared service supplied to the service provider is equivalent to that which the access provider provides to itself; and*
- (c) *take all reasonable steps to ensure that the service provider receives, in relation to the active declared service supplied to the service provider, fault detection, handling and rectification of a technical and operational quality and timing that is equivalent to that which the access provider provides to itself.*
- ...
- (4A) *To avoid doubt, ordering and provisioning are taken to be aspects of technical and operational quality referred to in paragraph (3)(b).*
186. It is the Commission's view that paragraphs 152(3)(b) and (c) do not simply impose an obligation. The obligation for an access provider is to supply an active declared service pursuant to paragraph 152AR(3)(a). Paragraphs 152(3)(b) and (c) impose the standard by which the supply of the declared services is to comply. Therefore, the obligation upon Telstra is to supply the ULLS to Optus. The standard of that supply must be equivalent to that which the access provider provides to itself.
187. While Telstra states that it does not supply the ULLS to itself, but instead supplies the PSTN, it is the Commission's view that what Telstra supplies to itself is technically and operationally the same service as that supplied to Optus, albeit called something different and perhaps without service qualification tests having been performed. In other words, the communications wire that is used to provide a ULLS is a required input to the PSTN. As such, the ULLS as described in the ULLS Declaration is a service that forms part of the PSTN. For these reasons, the Commission considers that Telstra does supply the relevant active declared service, albeit in a "value-added" manner under a different name.

¹⁴⁶ Telstra submissions in reply on whether the Commission should make an interim determination, 13 April 2007, p.1

¹⁴⁷ paragraph 152CP(2)(c) of the Act

¹⁴⁸ paragraph 152CP(2)(d) of the Act

Therefore, Telstra is under an obligation to supply the ULLS to Optus at a standard equivalent to that which it provides itself in relation to that aspect of its PSTN service which falls within the declared service definition. This includes the ordering and provisioning of the ULLS. The Commission is satisfied that the Proposal as adopted in the final determination can be implemented in a manner consistent with the ULLS Declaration.

188. In regard to the issue of the obligation on Telstra to provide ordering and provisioning to the same service level as that which it provides to itself the Commission notes in regard to subsection 152AR(3) that the Model Terms and Conditions provide that the Commission is of the view that:

...there is an express legislative and ACIF Code obligation upon access providers to provide ordering and provisioning to the same service level as that which it provides itself...The spirit and intent of the legislation is concerned with achieving non-discriminatory outcomes as between an access provider and an access seeker, as opposed to the provision of non-discriminatory levels of service by an access provider between different access seekers...The Commission adopts as model clauses, the statutory ordering and provisioning requirements, in addition to ACIF Code clause 8.1...The generic standard adopted (of non-discrimination), however, should make it clear that the Commission would be expecting that an access provider will provide a level of service comparable to that which it provides to itself.¹⁴⁹

189. The Commission confirms its view as expressed in the Model Terms and Conditions and also confirms its view that the generic standard of non-discrimination should be applied to this final determination.
190. In its latest submissions Telstra has contended that the Commission has expanded the issues in dispute and that the real issue in dispute was the fact that Telstra does not jumper the ULLS from the A-side to the B-side of the MDF in an MDU.¹⁵⁰ Telstra still maintains that the Commission does not have jurisdiction to arbitrate in respect of jumpering on the B-side of the MDF in the MDU as requested by Optus and that it is inappropriate for the Commission in its arbitral jurisdiction to decide not to address the question asked of it but rather propose an alternative solution.¹⁵¹
191. Telstra is incorrect in its submissions concerning the scope of the Commission's decision-making ability in arbitrations. As paragraph 180 above provides, the Commission may deal **with any matter** relating to access by the access seeker to the declared service including matters that were not the basis for notification of the dispute. As discussed previously it is within the realm of the Commission's decision-making ability that if it is concerned that a term or condition of access is unreasonable the Commission may deal with that concern.
192. In any event the Commission is satisfied that the final determination reflects the issues that were notified by Optus.

¹⁴⁹ *Final Determination – Model Non-price Terms and Conditions*, October 2003, p46; subclause 8.1 of the ACIF Code provides that “the ordering and provision of ULLS will be treated in a non-discriminatory manner in accordance with Section 152AR of the *Trade Practices Act 1974*

¹⁵⁰ Telstra submissions on the draft final determination, 18 July 2007, pp.15-16

¹⁵¹ *ibid*

193. In respect of the issue of jurisdiction, the Commission provides an extract contained in a letter dated 23 November 2006 which was sent to both parties as follows:

...Although as submitted by Telstra, the service description for ULLS does not extend beyond the network boundary point, for the purposes of the ULLS, the boundary of the telecommunications network is to be ascertained in accordance with section 22 of the Telecommunications Act 1997.

Section 22 of the Telecommunications Act 1997 provides that the boundary of a telecommunications network is to be ascertained in accordance with any regulations that are in force for the purposes of section 22. If no regulations are in force, in the case where a telecommunications network is used to supply a carriage service to an end-user in a building by means of a line that enters the building, the boundary of a telecommunications network is:

- (i) the point agreed between the customer and the carrier or carriage service provider who operates the telecommunications network, or failing agreement;*
- (ii) if there is a main distribution frame (MDF) in the building and the line is connected to the frame – the side of the frame nearest to the end-user.*

As there are no regulations in force under section 22, the boundary of the network for the purposes of the ULLS would appear to be the “B” side of the MDF unless otherwise agreed by the customer, and therefore jumpering to the “B” side would form a part of the declared service over which the Commission has jurisdiction to arbitrate.

As outlined by Telstra, the industry-agreed ACIF code (C559:2005) appears to suggest that the access provider is only obliged to jumper to the A side of the MDF, and that all activities on the B side of the MDF (i.e. the customer side) remain the responsibility of the access seeker. However, where there is a discrepancy between the legislation and an industry-agreed code, the legislation will prevail...

194. It is the Commission’s view that such a discrepancy exists in the ACIF Code and the legislation. Unless there is an express agreement between Telstra and Optus, the boundary of the network for the purposes of the ULLS is the B-side of the MDF and as such falls within the service description of the ULLS. Therefore, the Commission is entitled to make a determination which deals with the issue of jumpering to the B-side of the MDF.

Restrictions on access determinations – section 152CQ

195. The Commission notes that section 152CQ of the Act restricts the Commission from making a determination in an access dispute, where such a determination would have certain effects.
196. Telstra in its submissions regarding the Proposal stated that it will be required to develop and implement a new process *which would require significant system change at substantial cost, both to Telstra and to the industry as a whole* and that the Proposal *would clearly raise issues under paragraph 152CQ(1)(f) of the TPA.*¹⁵²
197. In its submissions on the draft final determination, Telstra provided a statement by Craig McAinsh (Business Processes and Systems Manager, Telstra Wholesale) detailing the current ULLS provisioning processes, the processes set out in the draft final determination and the costs that will be incurred by Telstra in designing and

¹⁵² Telstra submissions on possible solution to the issues in dispute, 15 February 2007, p.2

implementing the necessary changes required by the draft final determination. Telstra estimates these costs to be <c-i-c>.

198. Optus in its response submission to the draft final determination stated that the sub-processes described in Craig McAinsh's statement that are required to provision the ULL associated with the inactive FNN will be duplicates of processes that exist for an active FNN and therefore should not represent a major IT build. It estimated that the cost of implementing the Commission's final determination would be approximately <c-i-c>.
199. While the Commission recognises that there will be a need to change processes and IT systems to comply with the final determination, it is satisfied that the specified ULLS provisioning processes it has determined will not be burdensome on Telstra and that by using the current provisions of the ACIF Code, the cost of implementation should be negligible but will enhance the capability of access seekers in the take-up of the ULLS.
200. The Commission has concluded that this final determination will not have any of the prescribed effects specified in section 152CQ of the Act.

CONCLUSION – FINAL DETERMINATION

201. The focus of the final determination is to specify the ULLS provisioning processes applicable in a specific set of circumstances regarding the supply by Telstra to Optus of the ULLS in MDUs serviced by a MDF in a building.
202. In making its final determination in this dispute, the Commission has taken into account the statutory criteria in subsection 152CR(1) of the Act and has considered *inter alia*, the:
 - parties' submissions
 - Model Terms and Conditions
 - conference meeting and site visits report, incorporating comments made by both parties, dated 19 December 2006
 - demonstration by each party of the ULLS provisioning process at Site Visits
 - ACIF C569:2005 *Unconditioned Local Loop Service – Ordering, Provisioning and Customer Transfer* Industry Code (ACIF Code)
 - ACIF C559:2006 *Unconditioned Local Loop Service Network Deployment* Industry Code
 - ACIF G587:2002 *Unconditioned Local Loop Service IT Specification – Transaction Analysis* Industry Guideline (ACIF IT Guideline).
203. The Commission notes that Telstra in its submissions on the draft final determination requested an oral hearing. However, having regard to the time allowed for the provision of written submissions (including submissions in reply) on numerous issues, and the manner in which the Commission sought and obtained information relating to its decision (including the site visit), the Commission was satisfied that an oral hearing was not required on any matters.

204. The Commission considers that, after having regard to the statutory criteria and other material as outlined above, it is satisfied with its final determination as annexed at Attachment A.
205. In the Commission's view the final determination is the most appropriate course of action as it is evident to the Commission that changes to the terms and conditions of access to the ULLS in this specific set of circumstances is necessary in order to promote competition.
206. The changes are necessary because currently whenever Telstra is the Losing Access Seeker the process that is used by Optus (as Gaining Access Seeker) is always the VULL process whereas, if a soft dial tone is present, Telstra as the Gaining Access Seeker¹⁵³ the process may be different. As such, Telstra may be able to re-use the existing Communications Wire (assuming it passes its service qualification tests) enabling it to gain efficiencies in provisioning the service(s) that are not available to other Access Seekers. In staff's opinion this situation does not seem to be within the spirit or intent of the legislation in its attempt to achieve non-discriminatory outcomes
207. The Commission views its final determination as a fair and reasonable solution to the issues in dispute in this arbitration and has adopted the provisions of the ACIF Code as far as it possibly can in order to minimise the impact of this final determination on the parties.
208. In the Commission's opinion, the final determination enables a ULLS to be provisioned at the [Telstra] exchange in those instances where Optus is able to identify the in-place line to the MDU by way of a soft dial tone, and is able to provide Telstra with the FNN details associated with that line, thereby avoiding the need for truck-rolls to the customer's premises. If Optus is unable to identify an in-place line or a soft dial tone is not present on the customer's line, current ULLS provisioning processes apply.
209. Except where the parties agree otherwise, other terms and conditions on which Telstra currently supplies the ULLS to Optus will continue to apply.
210. The Commission is satisfied that the final determination should take effect 180 days from the date it is made, unless otherwise agreed between the parties.

30 November 2007

¹⁵³ Under the definition of "Gaining Access Seeker" in the ACIF Code, Telstra may also be the Gaining Access Seeker and the Access Provider