

**ACCESS DISPUTE BETWEEN**  
**OPTUS NETWORKS PTY LIMITED (ACCESS SEEKER)**  
**AND TELSTRA CORPORATION LIMITED (ACCESS PROVIDER)**

**UNCONDITIONED LOCAL LOOP SERVICE (ULLS)**

Access Dispute Notified under subsection 152CM(1) of the *Trade Practices Act 1974* on 18 November 2005

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

**Background**

1. On 18 November 2005, the Australian Competition and Consumer Commission (the ACCC) received a written access dispute notification (the notification) from Optus Networks Pty Limited (Optus) that an access dispute existed in relation to the supply by Telstra Corporation Limited (Telstra) of the Unconditioned Local Loop Service (ULLS). Optus' notification was provided to the ACCC pursuant to subsection 152CM(1) of the *Trade Practices Act 1974* (the TPA).
2. The ULLS is an access service involving the use of unconditioned cable, primarily copper pairs, between end-users and a telephone exchange where the unconditioned cable terminates. The ULLS is used by access seekers in conjunction with their own infrastructure in the exchange to provide services, including traditional voice services and high speed internet and data services, to end-users.
3. After holding a public inquiry, the ACCC declared the ULLS, pursuant to section 152AL(3) of the TPA, in August 1999. A copy of the declaration was published in the *Commonwealth of Australia Gazette* GN32 on 11 August 1999. After holding a further public inquiry, the ACCC re-declared the ULLS, pursuant to section 152AL(3) of the TPA, to apply from 1 August 2006 to 31 July 2009. A copy of the declaration was published in the *Commonwealth of Australia Gazette* GN31 on 9 August 2006.
4. The ACCC has formed the view that, with respect to the notification, the requirements of subsection 152CM(1) of the Act are satisfied. That is:
  - Telstra is a carrier;
  - Telstra supplies the declared ULLS;
  - Telstra has an obligation under subsection 152AR(3) of the Act to supply the ULLS to Optus; and
  - Optus is unable to agree with Telstra about terms and conditions of access to the ULLS, including the charges and other terms and conditions that are the subject of this final determination.
5. On 14 August 2006, the ACCC made an interim determination on ULLS annual charges in this matter.
6. On 5 December 2006, the ACCC revoked the first interim determination and made a further interim determination on ULLS annual charges and connection charges.

7. On 13 August 2007, the ACCC extended the operation of the interim determination made on 5 December 2006 until 21 December 2007.
8. Pursuant to subsection 152CP(1) of the Act, this instrument is the final determination relating to the terms and conditions of access by Optus to the ULLS provided by Telstra.

### **Final Determination**

#### *Terms and conditions of access*

9. This Final Determination specifies:
  - ULLS annual charges, as per Schedule 1
  - ULLS 'single' connection charges, as per Schedule 2
  - ULLS MNM connection charges, as per Schedule 3
  - ULLS call diversion charges, as per Schedule 4
  - Indemnity for third parties, as per Schedule 5
  - Telstra's ability to amend operational documents unilaterally, as per Schedule 6
  - Confidentiality, as per Schedule 7
10. Subject to clause 11, other terms and conditions upon which Telstra and Optus have agreed for the supply of the ULLS are to continue to apply.
11. Except where the parties expressly agree otherwise, in the event of any inconsistency between the terms and conditions upon which Telstra and Optus have agreed for the supply of the ULLS and the intended operation of this determination, this determination is taken to apply to override any such pre-existing agreement to the extent of any inconsistency.
12. All charges expressed in this Final Determination are expressed on a GST exclusive basis.

#### *Settlement of over or under paid amounts and interest*

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

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

14. Interest is payable on the settlement amount, compounded daily at the applicable monthly rate specified in the Large Business Variable Indicator Rate published by the Reserve Bank of Australia, for the period commencing on the price calculation date, and ending on the date that this determination takes effect.

*Note: The Large Business Variable Indicator Rate series can be obtained from the Reserve Bank of Australia.*

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

*Commencement and expiry*

16. This determination has effect 21 days after the date it is made and ceases to have effect on 30 June 2008 (the expiry date).

**Definitions**

17. For the purpose of this Final Determination, the following definitions apply:

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

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

*Note 2: The applicable Band is the Band in which the relevant service lies at the time the service is supplied.*

*Note 3: Brief descriptions of the four Bands are:*

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

*Note 4: Telstra provided a listing of the applicable current classification of ESAs into Bands on 31 August 2007.*



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Graeme Julian Samuel  
Chairman  
DATED: 21 April 2008

### Schedule 1 ULLS annual charges

1. Except where the parties subsequently agree otherwise, the ULLS Annual Charges payable by Optus to Telstra per month for the ULLS for the period from the price calculation date until the expiry date are as follows:

Band	2005-06	2006-07	2007-08
Band 1	\$ 5.60	\$ 6.00	\$ 6.20
Band 2	\$ 12.30	\$ 13.70	\$ 14.30
Band 3	\$ 25.00	\$ 27.30	\$ 28.50

2. This determination does not specify Annual Charges to apply in Band 4.

#### *Commencement*

3. For the purposes of this schedule the price calculation date is 18 November 2005.

## Schedule 2 ULLS 'single' connection charges

### *ULLS 'single' connections—IULLS and TULLS*

1. Except where the parties subsequently agree otherwise, and subject to clause 2, the charge payable per connection for the making of an IULLS or TULLS connection outside of a MNM is as follows:

	2005-06	2006-07	2007-08
Band 1	\$38.10	\$44	\$50.10
Band 2	\$43.10	\$47.80	\$52.80
Band 3	\$51.50	\$54.10	\$57.40

2. Except where the parties subsequently agree otherwise, where cutover testing is performed by Telstra at the request of the access seeker for a particular IULLS or TULLS connection, the following additional amount is payable for that connection:

	2005-06	2006-07	2007-08
Cutover testing additional charge	\$10	\$10.40	\$10.80

However, no additional amount for cutover testing is payable for connections made after 10 October 2007.

3. The charges specified in clauses 1 and 2 do not apply to connections made in Band 4.

### *ULLS 'single' connections—VULLS*

4. This schedule does not specify charges payable for VULLS connections.

### *Commencement*

5. For the purposes of this schedule the price calculation date is 18 November 2005.
6. This schedule does not apply to connections which were made before the price calculation date or which will be made after the expiry date.

### *Definitions*

7. For the purposes of this schedule:
  - (i) a reference to the connection of a ULLS outside a MNM refers to all instances of ULLS connections other than those that are made as part of a 'Managed Network Migration' (MNM)
  - (ii) a 'Managed Network Migration' (MNM) is the transfer or migration of services that is achieved by the project management by Telstra of a coordinated cancellation and connection of services
  - (iii) 'IULLS' connection refers to an 'in-use' ULLS connection where the ULLS is to be provided on a copper pair that was being used by Telstra, immediately prior to the request for access, to provide PSTN-based services on a wholesale or retail basis

- (iv) 'TULLS' connection refers to a 'transfer' ULLS connection where the ULLS is to be provided on a copper pair that was being used immediately prior to the request for access, to supply a ULLS to another carrier or carriage service provider (for the avoidance of doubt, this may include Telstra as the access provider)
- (v) 'VULLS' refers to a 'vacant' ULLS connection on a line that at the time of the order is not being used to supply any service.

### Schedule 3 Terms and conditions relating to Managed Network Migrations

*Connection charge for connections where the ULLS is being connected as part of an MNM involving the transfer of end user data services from a Telstra wholesale PSTN and/or ADSL service, or from a line that Telstra is using to supply a ULLS to another access seeker*

1. Except where the parties subsequently agree otherwise, the connection charges payable for the connection of ULLS as part of an MNM where the service is to be connected as part of an MNM involving the transfer of end user data services from a Telstra wholesale PSTN and/or ADSL service, or from a line that Telstra is using to supply a ULLS to another access seeker, are:

(a) for FY2005-06

Component	Charge
– Fixed amount	\$126.00 (per MNM)
– Variable amount	+ \$24.30 (per connection)

(b) for FY2006-07

Component	Charge
– Fixed amount	\$130.20 (per MNM)
– Variable amount	+ \$24.60 (per connection)

(c) for FY2007-08

Component	Charge
– Fixed amount	\$135.60 (per MNM)
– Variable amount	+ \$24.90 (per connection)

2. The charges specified in clause 1 do not apply to connections in Band 4.
3. Clauses 1 and 2 do not apply to connections that were made before the price calculation date or will be made after the expiry date.

*Minimum connection charge per MNM per exchange*

4. Except where the parties subsequently agree otherwise, the minimum connection charge per exchange for MNMs is as follows:

*Where the ULLS is being connected as part of an MNM involving the transfer of end user data services from a Telstra wholesale PSTN and/or ADSL service, or from a line that Telstra is using to supply a ULLS to another access seeker*

FY2005-06	\$612 (per MNM)
FY2006-07	\$622.20 (per MNM)
FY2007-08	\$633.60 (per MNM)

5. The charges specified in clause 4 are not to apply to MNMs in Band 4.

6. Clauses 4 and 5 do not apply to MNMs that were completed before the price calculation date or after the expiry date.

#### *Minimum number of services*

7. Except where the parties subsequently agree otherwise, it is at the discretion of the access seeker whether a particular service is to be connected as part of an MNM, or outside of an MNM.
8. The access seeker will notify Telstra at the time the order is made whether a particular service is to be connected as part of an MNM or outside of an MNM.
9. Except where the parties subsequently agree otherwise, there is no minimum number of connections pre-requisite for requesting an MNM.
10. Clauses 7 to 9 are not to apply in respect of MNMs that are ordered prior to the date this determination has effect, or MNMs that are ordered after the expiry date.

#### *MNM Migration Plans*

##### *Cancellation (standard and pre-wiring) charges*

11. Subject to clauses 12 and 13, and except where the parties subsequently agree otherwise, no charges are payable on cancellation of an order for a ULLS that was to be connected as part of an MNM.
12. Where the access seeker cancels an order for an MNM that is scheduled for an exchange, the access seeker must pay to Telstra:
  - a. a 'standard cancellation' charge of \$135.60 per cancelled MNM; and
  - b. if applicable, a further 'pre-jumpering' charge per relevant cancelled service, where the cancellation occurs after 'pre-jumpering' work has been performed by Telstra or its agents as part of the MNM process, of \$20 per relevant cancelled service.
13. Where an MNM was forecast to involve more than 20 services, and the access seeker revises down its forecast number of services to be connected as part of that MNM within 20 business days of the prospective date of the MNM, the access seeker must pay to Telstra:
  - (i) if applicable, a further 'pre-jumpering' charge per relevant cancelled service, where the cancellation occurs after 'pre-jumpering' work has been performed by Telstra or its agents as part of the MNM process, of \$20 per relevant cancelled service;in which case the number of relevant cancelled services is the difference between:
  - (a) the number of services that had been forecast for migration at the relevant exchange immediately prior to 20 business days from the prospective migration date; and
  - (b) the greater of: the revised number of services to be migrated, or 20.
14. Clauses 11 to 13 do not apply to cancellations that were made before the date this determination has effect or after the expiry date.

#### *Commencement*



15. For the purposes of this schedule the price calculation date is 18 November 2005.

*Definitions*

16. For the purposes of this determination:
  - (i) a reference to the connection of a ULLS as part of an MNM refers to a ULLS connection to be made in the context of a 'Managed Network Migration' (MNM)
  - (ii) a 'Managed Network Migration' (MNM) is the transfer or migration of services that is achieved by the project management by Telstra of a coordinated cancellation and connection of services
  - (iii) 'Pre-jumpering' work involves, inter alia, locating relevant copper pairs and making ready the jumpers that are needed to effect a ULLS connection prior to the actual connection or 'cutover'.

#### **Schedule 4 Charges for call diversion as part of a ULLS connection**

1. Except where the parties subsequently agree otherwise, and subject to clause 2, the charges that are to apply in respect of call diversion as part of a ULLS connection are as specified in Table 4(hd) of the Access Agreement 2006 Consolidation.
2. Except where the parties subsequently agree otherwise, the connection charge that is to apply in respect of call diversion as part of a ULLS connection (as specified in Table 1 in Part 2 of Table 4(hd) of the Access Agreement 2006 Consolidation) is as follows:

<b>Year</b>	<b>ULLS call diversion connection charge</b>
2005-06	\$8.50
2006-07	\$8.80
2007-08	\$9.20

3. Clauses 1 and 2 do not apply to call diversion as part of a ULLS connection requested before the price calculation date or after the expiry date.
4. The charges specified in clauses 1 and 2 do not apply to call diversion as part of a ULLS connection made in Band 4.
5. For the purposes of this schedule the price calculation date is 18 November 2005.
6. This determination ceases to have effect on 30 June 2008 (the expiry date).
7. In this determination,
  - (i) a reference to Table 4(hd) of the Access Agreement 2006 Consolidation is a reference to the agreement of that name between Telstra and Optus current as at the date that this determination is made.

## Schedule 5 Indemnity for third parties

1. Except where the parties subsequently agree otherwise, the term that is to apply between the parties in respect of an indemnity for third parties is clause 16.3DD of the Telstra and Optus Networks and Optus Mobile, Access Agreement variation no. 163 (Telstra unconditioned local loop service and managed network migration service), 12 September 2005, p. 6 amended to include the underlined text as set out below:
  - ‘(a) Subject to subclause (b), Optus indemnifies Telstra against all liability and loss arising from, and any reasonable cost, charge or expenses incurred in connection with, any claim brought against Telstra in relation to the Migration of a service to Telstra ULLS, the transfer of a Telstra ULLS to Optus, or the provision to Optus of a Telstra ULLS carried out by Telstra in accordance with a request received from Optus under this agreement, including:*
    - (i) any Migration, transfer or provision of a Telstra ULLS which is not authorised by the relevant ULLS Customer; and*
    - (ii) any unsuccessful Managed Network Migration of a service under paragraph 4.5 of Schedule 42C and the Telstra Ordering and Provisioning Manual Part 16: Telstra Unconditioned Local Loop Service Operations Manual, a Restoral as envisaged under paragraph 4.6 of Schedule 42C and the Telstra Ordering and Provisioning Manual Part 16: Telstra Unconditioned Local Loop Service Operations Manual, or a Reversal as envisaged under paragraph 4.7 of Schedule 42C and the Telstra Ordering and Provisioning Manual Part 16: Telstra Unconditioned Local Loop Service Operations Manual where Telstra is unable to reconnect the DSL-IG Service or Basic Telephone Service due to the unavailability of infrastructure required to supply the DSL-IG Service or Basic Telephone Service.*
  - (b) The indemnity in subclause (a) does not apply to a claim brought against Telstra by a third party (and to which subclause (a) applies) to the extent that:*
    - (i) the claim relates to a negligent act or omission by Telstra in relation to the Migration of a service to Telstra ULLS, the transfer of a Telstra ULLS to Optus, or the provision to Optus of a Telstra ULLS carried out by Telstra in accordance with a request received from Optus under this agreement; and*
    - (ii) the liability under such a claim (as described in clause 16.3DD(b)(i)) could not have been excluded or reduced at law (regardless of whether such liability, loss, cost, charge or expense was excluded or reduced) by Optus in its contractual relationship (including a standard form of agreement) (if any) with that third party.’*
2. This Schedule has effect 21 days after the date the determination is made.
3. This Schedule ceases to have effect on 30 June 2008.

## Schedule 6 Telstra's ability to amend operational documents unilaterally

1. Except where the parties subsequently agree otherwise, the term that is to apply between the parties in respect of Telstra's ability to amend operational documents unilaterally is set out in the definitions of 'OMM or Operations and Maintenance Manual' and 'OPM or Ordering and Provisioning Manual' in the Telstra and Optus Networks and Optus Mobile, Access Agreement variation no. 163 (Telstra unconditioned local loop service and managed network migration service), 12 September 2005, Attachment E – new schedule 42A, p. 2 amended to include the underlined text as set out below:

*'OMM or Operations and Maintenance Manual means the Telstra Operations and Maintenance Manual Part 16 Fault Management Procedures for Telstra Unconditioned Local Loop Service as amended:*

- (a) *by Telstra from time to time to implement or reflect a change to Telstra's standard processes, subject to:*
  - (i) *Telstra giving 20 Business Days prior notice to Optus; and*
  - (ii) *Telstra allowing Optus to provide comments during the notice period on the proposed amendment, and giving reasonable consideration to any comments which Optus has made on the proposed amendment; and*
- (b) *otherwise, by agreement of the parties.*

*OPM or Ordering and Provisioning Manual means the Telstra Ordering and Provisioning Manual Part 16 Telstra Unconditioned Local Loop Service Operations Manual as amended:*

- (a) *by Telstra from time to time to implement or reflect a change to Telstra's standard processes, subject to:*
  - (i) *Telstra giving 20 Business Days prior notice to Optus; and*
  - (ii) *Telstra allowing Optus to provide comments during the notice period on the proposed amendment, and giving reasonable consideration to any comments which Optus has made on the proposed amendment; and*
- (b) *otherwise, by agreement of the parties.'*

2. This Schedule has effect 21 days after the date the determination is made.
3. This Schedule ceases to have effect on 30 June 2008.

## Schedule 7 Confidentiality

1. Except where the parties subsequently agree otherwise, clause E.3 of the model non-price terms in ACCC's Final determination – model non-price terms and conditions, October 2003, as set out below applies between the parties:

“E.3 Subject to clause 15.3, Confidential Information of the access seeker:

- (a) referred to in paragraph E.2(a); or
- (b) relating to or concerning the access seeker's end-users, may be:
- (c) used by the access provider only for the purpose of undertaking planning, maintenance, provisioning operations or reconfigurations of its Network, for the purposes of this agreement or for the purpose of billing; and
- (d) disclosed only to personnel directly involved in the purposes referred to in paragraph (c) above.”

where

“clause 15.3” is a reference to clause 15.3 of “Access Agreement 2006 Consolidation” between Telstra Corporation Limited and Optus Networks Pty Ltd/Optus Mobile Pty Ltd, 14 August 1992 (incorporating variations No 1, dated 29 March 1993 to No 165, dated 1 February 2006); and

“paragraph E.2(a)” provides:

For the sake of clarification, information generated within the access provider's Network as a result of or in connection with the supply of the relevant Service to the access seeker or the interconnection of the access provider's Network with the access seeker's Network (other than the aggregate Network information of the access provider and all access seekers to whom the relevant service is supplied) is the Confidential Information of the access seeker.

2. This Schedule has effect 21 days after the date the determination is made.
3. This Schedule ceases to have effect on 30 June 2008.