

[Interim Determination]

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

LINE RENTAL SERVICE (WLR)

Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act*
1974
on 28 September 2006

Interim Determination under Section 152CPA

1. Except where the parties agree otherwise, the charge payable by Optus to Telstra for the WLR is to be \$23.12 per month for Home Line Part and \$25.84 per month for Business Line Part for the period 23 January 2007 to 31 December 2007.
2. Except where the parties agree otherwise, other terms and conditions on which Telstra currently supplies the WLR to Optus are to continue to apply.
3. This interim determination shall take effect as and from the 23 January 2007, and will remain in force until:
 - it expires on 31 December 2007;
 - the date a final determination comes into effect; or
 - this interim determination is revoked.



Graeme Samuel
Chairman

Ed Willett
Commissioner

DATED: 22 January 2007

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

LINE RENTAL SERVICE (WLR)

Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act
1974*
on 28 September 2006

Statement of Reasons for the Interim Determination

Background

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

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

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

After holding a public inquiry, the Australian Competition and Consumer Commission (the Commission) declared the WLR pursuant to section 152AL(3) of the *Trade Practices Act 1974* (the Act). A copy of the declaration was published in the Commonwealth of Australia Gazette No. GN 31, 9 August 2006.

The Commission set out its pricing principles, including price-related terms and conditions, (the WLR Pricing Principles and Indicative Prices Determination) in the document titled *Pricing principles and indicative prices, Local carriage service, wholesale line rental and PSTN originating and terminating access services - Final Determination and Explanatory Statement* dated 29 November 2006. The Commission is required to have regard to any pricing principles determination, including price-related terms and conditions, made under section 152AQA of the Act.

On 28 September 2006, 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 WLR. Optus' notification was provided to the Commission under section 152CM(1) of the Act.

The notification states that Telstra provides the WLR to Optus under Telstra's Standard Form of Agreement for Basic Telephone Service with Home Access

(SFOA). The notification states that the parties cannot agree on the price for the provision of the WLR from 1 August 2006.

The Commission has formed the view that the requirements of section 152CM (1) of the Act are satisfied. That is:

- Telstra is a carrier;
- Telstra supplies the declared WLR;
- Standard access obligations apply to Telstra in relation to the WLR; and
- Optus is unable to agree with Telstra about the terms and conditions on which Telstra is to comply with those obligations.

Discussion

In correspondence with the Commission, Optus has requested an immediate interim determination to be made in this dispute.

Telstra, however, submits that Optus has not suggested any reason why an interim determination is justified in this dispute. Telstra has submitted that it would be inappropriate for the Commission to make an interim determination at this stage because:

- the parties have been (and continue to be) in negotiation in relation to the price for a number of services including LCS and WLR. Those negotiations should be allowed to run their course. To consider making an interim determination at this time would be pre-emptory; and
- Optus has provided no compelling submissions in support of an interim determination.

In response to Telstra's submission Optus states that the parties remain in dispute about the price of WLR. According to Optus, whilst there have been some discussions about the merits of a commercial settlement, these are at a very preliminary stage and it is unclear whether they will progress further. Accordingly, Optus reiterates its request for the ACCC to expedite an interim determination.

Section 152CP of the Act provides that, unless the Commission terminates the arbitration under section 152CS, the Commission must make a written determination on access by the access seeker to the declared service. Section 152CP(4) provides that, before making a determination, the Commission must give a draft determination to the parties.

Section 152CP(5) provides that when the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.

Section 152CPA(1) provides that a determination may be expressed to be an interim determination.

Section 152CPA(3) of the Act provides that the Commission is not required to observe any requirements of procedural fairness in relation to the making of an interim determination if both:

- the declared service is covered by a determination in force under section 152AQA; and
- the price-related terms and conditions in the interim determination are consistent with the price-related terms and conditions in the section 152AQA determination.

In accordance with section 152CPA(1) and (3) the Commission has made an interim determination in the arbitration of this dispute.

As noted above, the WLR is covered by a determination in force under section 152AQA. The determination includes, *inter alia*, price-related terms and conditions for the WLR specified at \$23.12 per month for Home Line Part and \$25.84 per month for Business Line Part.

Under section 152AQA(6) of the Act, the Commission must have regard to the WLR Pricing Principles and Indicative Prices Determination if it is required to arbitrate an access dispute in relation to the WLR.

Section 152CR(1) of the Act sets out matters that the Commission must take into account in making a final determination. Section 152CR(4) specifies that, in making an interim determination, the Commission does not have a duty to consider whether to take into account a matter referred to in a paragraph of subsection (1). Under section 152CR(3), in making an interim determination, the Commission may take into account a matter referred to in a paragraph of subsection (1) or any other matters that it thinks are relevant.

In making the interim determination, the Commission has had regard to the WLR Pricing Principles and Indicative Prices Determination which sets out the supporting reasons in relation to the WLR pricing principles and indicative prices.

The Commission has made an interim determination of \$23.12 per month for Home Line Part and \$25.84 per month for Business Line Part in relation to the price of the WLR that Telstra charges Optus for the period from 23 January 2007 to 31 December 2007. Accordingly, the price-related terms and conditions in the interim determination are consistent with the Pricing Principles and Indicative Prices Determination.

As outlined in the Commission's *Resolution of telecommunications access disputes – a guide, March 2004 (revised)*, (the Access Dispute Guidelines), the Commission considers that, for the purposes of making an interim determination, it does not need to have all the information necessary for making the final determination, nor to have reached a view on all outstanding issues between the parties. Rather, the Commission considers that the information should provide a reasonable basis for the terms and conditions set out in the interim determination.¹

The Commission is of the view that the WLR Pricing Principles and Indicative Prices Determination provides a reasonable basis for making an interim determination in this dispute. The Commission notes that the WLR Pricing Principles and Indicative Prices

¹ *Resolution of telecommunications access disputes – a guide, March 2004 (revised)*, p. 51.

Determination was the outcome of a thorough review process based on input from a variety of stakeholders, including the parties to this dispute.

Further, the information available from Optus indicates that the parties continue to be in dispute in respect to the WLR. The Commission considers, therefore, that a decision to make an interim determination that is consistent with the WLR Pricing Principles and Indicative Prices Determination provides a degree of regulatory certainty to the parties. The Commission is also of the view that an interim determination that is consistent with the WLR Pricing Principles and Indicative Prices Determination also promotes commercial certainty by contributing to a more timely resolution of disputes.

A more timely resolution of disputes meets the aims of the interim determination process. That is, as discussed in the Access Dispute Guidelines, the Commission sees interim determinations as being important for the smooth operation of the access regime, as they help ensure access seekers get timely access to declared services.² Accordingly, an interim determination that is consistent with the WLR Pricing Principles and Indicative Prices Determination contributes to meeting the aims of the interim determination process.

Further, the Commission notes that a number of complaints have been made to it in respect to the WLR service and that a Competition Notice was issued against Telstra relating to the supply of WLR in April 2006. Specifically, the Commission notes that Optus has commenced its own Federal Court litigation with Telstra based on the Competition Notice and section 46 of the Act. The Commission considers that making an interim determination in this dispute will serve as a means of overcoming the anti-competitive conduct the Commission has reason to believe Telstra has been/is engaging in, in relation to the WLR service – at least in respect of Optus access to the service. Accordingly, the Commission considers there is a clear need for an urgent interim determination in this dispute pursuant to section 152CPA(3) of the Act.

The Commission notes that the price-related terms and conditions contained in the WLR Pricing Principles and Indicative Prices Determination are indicative only, and that the Commission has stated that in the event of arbitration it would look at specific issues, raised by the parties on their individual merits. Further, the Commission may, if appropriate, decide to backdate the final determination in this arbitration. The Commission will have regard to information submitted by the parties regarding WLR pricing for the purpose of the final determination.

² Ibid, p. 50.