

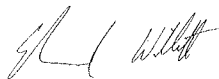
**ACCESS DISPUTE BETWEEN PRIMUS TELECOMMUNICATIONS PTY LTD
(ACCESS SEEKER) AND TELSTRA CORPORATION LIMITED (ACCESS
PROVIDER)**

LOCAL CARRIAGE SERVICE (LCS)

Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act 1974*
on 21 February 2007

Interim Determination under Section 152CPA

1. Except where the parties agree otherwise, the charge payable by Primus to Telstra for the LCS is to be 17.92 cents per call for the period 23 April 2007 to 31 December 2007.
2. Except where the parties agree otherwise, other terms and conditions on which Telstra currently supplies the LCS to Primus are to continue to apply.
3. This interim determination shall take effect as and from the **23 April 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: 20 April 2007

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Statement of Reasons for the Interim Determination

Background

The local carriage service is a service for the carriage of telephone calls from customer equipment at an end-user's premises to separately located customer equipment of an end-user in the same standard zone. However, the local carriage service does not include services where the supply of the local carriage service originates from an exchange located within a Central Business District Area of Sydney, Melbourne, Brisbane, Adelaide or Perth and terminates within the standard zone which encompasses the originating exchange.

After holding a public inquiry, the Australian Competition and Consumer Commission (the Commission) declared the LCS 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 LCS 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 when arbitrating an access dispute.

On 21 February 2007, the Commission received written notification (the notification) from Primus Telecommunications Pty Ltd (Primus) of an access dispute in relation to the supply by Telstra Corporation Limited (Telstra) of the LCS. Primus' notification was provided to the Commission under section 152CM(1) of the Act.

The notification states that Telstra provides the LCS to Primus under a Customer Relationship Agreement (CRA). The notification states that Telstra and Primus cannot agree on the monthly price for the provision of the LCS.

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 LCS;
- Standard access obligations apply to Telstra in relation to the LCS; and
- Primus 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 (copied to Telstra), Primus has requested an immediate interim determination to be made in this dispute.

Primus has submitted that:

- The Commission has sufficient information to make an interim determination
- Telstra's current pricing is anti-competitive and the making of an interim determination would be the quickest way to overcome this anti-competitive conduct
- Further negotiations are unlikely to lead to timely commercial resolution
- An immediate interim determination will move access prices closer to likely final determination rates
- The making of an interim determination promotes commercial certainty by contributing to the more timely resolution of the dispute
- Given the probable complexity associated with forming a view on an appropriate final determination an immediate interim determination will lead to timely and appropriate access terms that promote the LTIE.

Telstra submits that it is possible that alternative dispute resolution may resolve some issues in dispute and as a result Telstra proposes that a one month period commencing 16 April be permitted for commercial negotiation between the parties before the Commission proceeds with the arbitration of the dispute.

Further, Telstra submits that it would be inappropriate for the Commission to make an interim determination at this stage because Primus is currently being supplied with the service at a rate which is consistent with the Commission's immediate past pricing determination. As a result, in Telstra's view, it cannot be said that the rate is manifestly unreasonable in a way that would warrant an immediate interim determination.

In response to Telstra's submission Primus provided a further submission which argued that it has sought to reach commercial resolution with Telstra for over twelve months and considers it highly unlikely that commercial resolution will be reached.

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 sections 152CPA(1) and (3), the Commission has made an interim determination in the arbitration of this dispute.

As noted above, the LCS is covered by a determination in force under section 152AQA. The determination includes, *inter alia*, price-related terms and conditions for the LCS specified at 17.92 cents per call.

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

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.

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 LCS Pricing Principles and Indicative Prices Determination provides a reasonable basis for making an interim determination in this dispute. The Commission notes that the LCS Pricing Principles and Indicative Prices Determination was the outcome of a thorough review process based on input from a variety of stakeholders, including the parties to this dispute.

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

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

The Commission has made an interim determination of 17.92 cents per call in relation to the price of the LCS that Telstra charges Primus for the period from 23 April 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.

Further, the information available from Primus indicates that the parties continue to be in dispute in respect to the LCS. The Commission considers, therefore, that a decision to make an interim determination that is consistent with the LCS 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 LCS 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 LCS Pricing Principles and Indicative Prices Determination contributes to meeting the aims of the interim determination process.

The Commission also considers that the making of an interim determination in this dispute at the same time as the making of an interim determination in the WLR dispute (for the reasons set out in the statement of reasons relating to that dispute) will ensure that the linkages between the LCS and WLR pricing structures are recognised and that any possible arbitrage opportunities that take advantage of a lower WLR price are prevented. Given that the Commission is making an interim determination in the WLR dispute and there is an inter-relationship between WLR and LCS pricing, it is appropriate for the Commission to make an interim determination in this dispute also.

The Commission notes that the price-related terms and conditions contained in the LCS 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 for the purposes of the final determination. 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 LCS pricing for the purpose of the final determination.

² Ibid, p. 50.