



Submission by TPG Telecom Limited (July 2014)

to

*Australian Competition and Consumer Commission (ACCC)
Telecommunications Final Access Determination inquiries - non-price terms and
conditions and supplementary prices
Position paper (May 2014)*

1. TPG Telecom Limited (**TPG**) makes the following submissions regarding the ACCC position paper entitled “Telecommunications Final Access Determination inquiries - non-price terms and conditions and supplementary prices” (**Position Paper**).

Non-price terms and conditions

2. TPG agrees that a regulated set of non-price terms and conditions for access to declared services do:
 - provide a benchmark and safety net for access seekers who are unable to reach agreement; and
 - inform and discipline the parties and help to facilitate negotiations between access seekers and access providers,and will therefore be in the long term interest of end-users (**LTIE**)
3. However, in TPG’s experience, the efficacy of the current set of non-price terms is limited by the scope of issues that are covered by the current terms. TPG also considers that the access hierarchy has the potential to complicate the negotiation process and their application. These issues are discussed in further detail below.

Supplementary Prices

4. TPG supports the view that it is appropriate to set supplementary prices in the FADs for connections and disconnection charges, internal interconnect cables charges and special linkage charges and facilities access services (which include TEBA charges, External Interconnect Cable access service charges and duct access service charges).

Facilities access services

5. While the inclusion of supplementary prices in the FADs will go some way to addressing the inadequacies of the regulatory framework under the Telecommunications Act in terms of access to facilities, it is not enough.
6. Telstra remains the dominant owner of exchange buildings, underground facilities such as ducts, and external and internal interconnect facilities (together, **Telstra Facilities**). Access to Telstra Facilities is becoming an increasingly important requirement of competitive carriage, with the number of fibre optic competitors increasing and NBN POI’s being located in Telstra exchanges. The prices charged by

Telstra for access to Telstra Facilities are, in TPG's submission, significantly higher than Telstra's actual costs. Access seekers have very limited ability to negotiate reasonable price terms for access to Telstra Facilities.

7. For the most part, the establishment of upfront price and non-price terms of access to services has been effective in regulating Telstra's ability to extract monopoly rents for declared services. Unfortunately, none of the existing regimes provide for upfront pricing or access terms with respect to non-declared Telstra Facilities like TEBA and duct access.
8. As TPG understands the current regulations, setting upfront terms and conditions for access to Telstra Facilities in FADS will only be useful to the extent that Telstra Facilities can be said to be ancillary to the access seeker's access to declared services. It is not clear that access to the Telstra Facilities can in all cases be said to be ancillary to obtaining access to declared services.
9. Declaration of telecommunication facilities should be targeted and only be used in clear cases where the ACCC considers that it is necessary having regard to the state of competition. As explained above, TPG believes there is a clear case for access to TEBA and other Telstra Facilities to be declared.

Answers to ACCC questions

Non-price terms

1. *What approach to regulating non-price terms and conditions of access do you consider would best promote the LTIE?*

TPG considers that generally, the access determination model has been beneficial for the industry in terms of establishing certainty and consistency across all participants.

There are difficulties with the application of non-price terms. Typically, the acquisition of a service from Telstra involves many features, including IT systems interfacing and other operational matters. These matters are typically not covered by the non-price terms. As a result, the access seeker's capacity to rely on the access determinations (as opposed to contracting to acquire the Telstra version of the service), presents risks for the access seeker.

Access seekers have consequently been corralled into entering access agreements to acquire a Telstra version of the declared service even though, for some elements of those services, the pricing might be higher than might be available under the access determinations.

The resolution of this issue may not be simple but perhaps non-price terms should include an obligation on an access supplier that if they supply a service similar to the declared service all corresponding operational and IT systems shall be made available to an access seeker if the access seeker chooses to acquire the declared service on the regulated non-price terms.

The access hierarchy has the tendency to complicate the process of deciding on contracting and therefore the application of upfront non-price terms. In general, access agreements should take precedence but there may be situations where this is not appropriate (e.g., where the access seeker has no commercially acceptable option but to enter into the access agreement).

Given the opportunity presented by the introduction of the new Telstra Wholesale Agreement (TWA), it would be in the LTIE for the ACCC to set an expectation that the substantive outcome of any terms that are "agreed" (but were effectively forced onto an access seeker) should predominantly be no less favourable than the upfront non-price

terms set by the ACCC in FADs.

2. *Do you consider the FADs should be made as:*

- *a comprehensive set of terms and conditions which can act as a fall back or complete substitute for commercial agreement; or*
- *a set of terms and conditions which deal only with a limited number of issues, which can be used when parties are unable to agree on a complete set of terms and conditions for access to a declared service or services; or*
- *an alternative option (please describe).*

Please provide reasons for your answers. In doing so, please describe any relevant experiences you have had in negotiating commercial agreements and how those experiences explain your preferred approach to addressing non-price terms and conditions in the FADs.

When TPG has considered the option of acquiring a declared service on the regulated price and non-price terms, it was clear to TPG that there were limits on the usability of the non-price terms. For example, there is no clear methodology by which TPG might be able to order, monitor provisioning, terminate and otherwise manage a service acquired on the non-price terms. In high volume services, such operational matters are essential to conduct efficient business. As a result, a regulated model was unattractive and a commercial agreement is generally the only realistic option, notwithstanding that certain services might have been cheaper using the regulated price. Once a commercial agreement is struck, there are limited options to enable an access seeker to have the price or non-price terms subsequently reviewed.

Whilst the notion of a comprehensive set of FAD non-price terms and conditions that can operate as a fall back is attractive, TPG considers that it is unrealistic to expect that the regulator would be able to maintain such terms in a manner that is useful on an ongoing basis.

The non-price terms that are set out in the current FADs however do not cover the operational matters that access seekers require.

A possible option is to include in the model terms a requirement that where an access seeker offers a commercial agreement for services that are (or substantially involve) declared services, the systems and operational aspects of that commercial agreement will apply in all respects for the declared service.

3. *What terms and conditions do you consider should be covered in the FAD? Please provide reasons and examples.*

TPG considers that the current heads of non-price terms are generally a reasonable starting point but that the operational clause described above should also be included.

4. *Are there any terms and conditions that the ACCC should consider as a matter of urgency? Please provide reasons.*

No

5. *What terms and conditions do you consider should be 'common' (that is, identical) across all the declared services? Please provide examples and reasons.*

- Billing and notifications
- Creditworthiness and security
- General dispute resolution procedures
- Confidentiality provisions
- Communications with end users
- Network modernisation and upgrade provisions
- Suspension and termination
- Liability and Indemnity

6. *Are there non-price issues for which a different approach should be adopted for individual regulated services? Please provide examples and reasons.*

No

7. *How frequently should the ACCC review the non-price terms and conditions included in the FADs?*

As frequently as the FADs are remade, and as required (e.g. when someone asks the ACCC for binding rule of conduct.

8. *Please provide your views on what steps the ACCC can take to facilitate active engagement and assistance from industry in the course of its consultation on non-price terms and conditions. For example, would there be benefit from holding an industry forum to discuss specific issues in relation to non-price terms and conditions (as proposed in chapter 2 of this paper)?*

Subject to stakeholders identifying a specific need for an industry forum as the FAD inquiries progress, TPG believes the present forms of industry consultation, are sufficient.

Supplementary prices

Connection and disconnection charges

9. *Please comment on whether the ACCC's previous approach to setting connection and disconnection charges for the fixed line services, Wholesale ADSL and the DTCS remains appropriate. If not, please propose an alternative approach and explain why it would be more appropriate and how it would be implemented.*

TPG considers that it is important to set connection and disconnection charges in the FADs for industry certainty.

The work involved in provisioning a ULL Service is likely to be limited to:

- Patching copper at the MDF in the exchange
- Attending the premises to test connectivity (but this will not be required in many instances).
- Some administrative work part of which will be internal and part done by a contractor (e.g. phone calls etc).

It is likely that contractor rates have substantially changed and that Telstra has conducted tenders and other processes to reduce its costs in connection with provisioning. It is also likely that contractors will be operating with efficiencies, particularly in Band 1 and 2 locations and that Telstra's actual costs are likely to be lower than the \$55.60 - \$58.58 currently being charged.

TPG believes that the ACCC should conduct an investigation of current rates of the contractors who perform that work and should review the overall Telstra costs of the provisioning teams.

Disconnection charges are difficult to justify. At the same time as a ULL service is being disconnected, it will be patched back to Telstra's systems, in respect of which Telstra will receive a connection charge that will not require attending the exchange.

TPG considers that the majority of the work done in relation to provisioning these services is software driven and managed through B2B systems such as LOLO and the costs are likely to be minimal.

Early Termination Fees for WADSL are also difficult to understand since it is unclear what cost Telstra would be amortising over a 6 month term requiring recovery. The ACCC should conduct an enquiry to understand the reasoning behind the ETF.

10. *If you agree with maintaining the ACCC's previous approach to setting connection and disconnection charges, please provide any comments on the ACCC's proposal to update the contractor rates and other costs used in calculating these charges.*

No additional comments.

11. *Please comment on the non-price terms and conditions associated with connection and disconnection charges, such as whether disconnections should still be made pursuant to the Telstra churn process or whether the terms around Telstra Managed Network Migrations policy are still appropriate?*

TPG considers that the terms around Managed Network Migrations may still remain important for business mergers within the industry and are appropriate. The churn process continues to be important.

Internal interconnect cable

12. *Is the ACCC's proposed approach in pricing these services still appropriate? Please provide reasons.*

TPG believes that the that IIC price terms should be included in the ULLS and LSS FADs and that they should be same as those determined in the final arbitral determinations until the ACCC makes new FADs for these services.

TPG does not agree with the Telstra submission that the cost allocations for the ULLS and WLR do not allow it to recover MDF and MDF housing costs for the equipment side of the MDF. TPG agrees with the ACCC's view that allowing Telstra to recover the MDF housing costs via the IIC charge would be likely to result in over-recovery or double-recovery of costs.

13. *Is there an alternative approach to pricing these services that would be more appropriate? Please provide reasons.*

Special linkage charges

14. *Should the DTCS FAD address the issue of special linkage charges in relation to non-price terms and conditions? If so, what specific issues should be addressed?*

Yes. As the incumbent and only ubiquitous transmission provider, Telstra continues to have the ability to apply exorbitant charges to extend its network to allow an access seeker to deliver services to the access seeker's customer's premises (Special Linkage Charges).

More transparency around the basis of charges is required to ensure they are linked to underlying costs and are not arbitrarily imposed. Perhaps a non-price term should be included requiring that such charges be calculated on an open book direct cost recovery basis.

Facilities access services

15. *Which facilities access services are ancillary to currently declared services and should be regulated through the FADs for those services? Please provide:*

- a) *a detailed description of each facilities access service that is ancillary to a declared service*
- b) *an explanation of the nexus between the declared service and each facilities access service that make these facilities access services ancillary to declared services*
- c) *how regulating these facilities access services in the FADs would be likely to promote the long term interests of end-users (LTIE).*

At the very least, the following Telstra Facilities (as the ACCC has described them in the Position Paper) should be should be regulated through the FADs:

- Telstra Equipment Building Access service (TEBA). Without rackspace in TEBA, access seekers' ability to make use of ULLS and LSS is very difficult.
- External Interconnect Cable access service (EIC access service). Whilst TPG has not made significant use of EIC, the only reason to install an EIC would be to obtain access to ULLS. There is a clear nexus.
- Internal interconnect cable (IIC access service). Again, without this service, access seekers are not able to make use of ULLS.

16. *Are there any other facilities access services (that are not acquired as ancillary to a declared service) that should be the subject of a declaration inquiry into facilities access services? Please provide:*

- a) *a detailed service description of the each facilities access service sufficient to precisely identify the service*
- b) *an explanation of how declaring these facilities access services would be likely to promote the LTIE.*

Underground facilities and duct access services should be declared services. More and more providers are installing competitive fibre optic infrastructure. Reasonable pricing for access to ducts has been difficult to secure and it is likely that Telstra is obtaining returns significantly higher than its actual costs. A declaration of access to ducts will promote infrastructure based competition which will be in the LTIE.