Submission in response to ACCC
Position Paper

Non-price terms and conditions and supplementary prices

Final Access Determination

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Contents

Section 1. Executive Summary

1.1 Optus agrees with an increased focus on non-prices terms and conditions of access, and the appropriate level at which ancillary access charges are set. In saying that, however, it is not clear that conducting an omnibus inquiry to look at all service-specific ancillary charges is preferable to an examination during specific Final Access Determination (FAD) inquiries.

1.2 While it is appropriate to outline the methodology to be used and broad obligations (such as cost orientation), specific terms should be set during the inquiry process for service-specific access determinations. Optus supports:

(a) Reliance upon model non-price terms and conditions.

(b) Drafting for specific clauses should be left to commercial negotiations, with fall-back position based on the model terms.

(c) The ACCC should make clear that it will intervene where ongoing breaches of the model non-price terms are identified.

(d) A general cost orientation obligation for ancillary charges should be placed on access providers.

(e) The ACCC should only intervene where ongoing competition concerns have been identified for specific ancillary charges. Such intervention, however, should occur during the Access Determinations (AD) inquiries for specific declared services.

(f) If the ACCC does intervene, it should adopt a consistent cost methodology across similar types of ancillary services.

Non-price terms and conditions

1.3 Optus sees merit in ensuring a level of consistency across key non-price terms that are common across all declared services. However, uniformity must not be the sole focus — a common approach should only be pursued where it is demonstrated it promotes the long term interest of end-users (LTIE) for *all* declared services.

1.4 In Optus' experience, access providers with significant market power have increasingly used non-price terms in a manner which may limit the growth of competition. However, it is neither practical nor desirable for the ACCC to set out every possible non-price term for the provision of declared services. Rather, the ACCC should require access to comply with the model non-price terms. This will provide a fall-back option for access seekers when negotiating with an access provider that is utilising its significant market power to impose non-price terms and conditions that would be detrimental to the LTIE. As such, Optus supports the inclusion of the model non-price terms within any non-price terms access determination.

1.5 Optus also sees merit in addressing non-price terms that have historically been problematic for access seekers. It is reasonable to expect that problems would continue where access providers have imposed unreasonable terms in past agreements. These terms could either be addressed during this omnibus inquiry (where sufficient evidence is presented) or service-specific AD inquiries.

Review of ancillary services for inclusion in the FAD

1.6 Ancillary charges have become more important as regulated access charges have decreased during previous regulatory periods. Over these periods ancillary charges have been largely left to market forces and as such reflect the exercise of Telstra's dominant bargaining position. In Optus' experience, ancillary charges change in a manner which compensates Telstra for lost revenue due to regulatory decisions.

1.7 Optus welcomes the increased scrutiny to be applied to ancillary charges through this omnibus non-price inquiry. However, the ACCC will not be able to set prices for all possible ancillary charges. Optus is concerned that foregone revenue as a result of regulated ancillary charges will be recovered through increased revenue from non-regulated ancillary charges. There are therefore significant benefits to be gained in imposing a broad cost orientation obligation for all ancillary charges.

1.8 An access obligation should be imposed in all ADs requiring access providers to set *all* ancillary charges at direct costs incurred. Optus believes that ancillary charges be charged at material plus time and labour. The onus should be placed upon access providers to justify the costs incurred. Where additional costs cannot be established, no ancillary charge should be permitted.

Facilities access services

1.9 Optus supports a three pronged approach to facilities access:

(a) First, continual reliance upon the general facilities access obligations under the *Telecommunications Act*. This places primacy on commercial negotiations and enables access seekers to raise complaints where commercial negotiations have failed. In Optus' experience, this process has worked well for setting general terms of access — i.e. renting space within, or access to, a facility.

(b) Second, ancillary charges associated with facilities access (i.e. installation charges, IIC, design study, etc.) should be charged on a strict cost incurred basis. The ACCC should impose a cost orientation obligation on access providers for all ancillary charges within all ADs. Where the access provider with significant market power cannot identify costs incurred that are not taken into account when setting access charges, no charge should be levied.

(c) Third, non-price terms and conditions that restrict the ability of access seekers to operate in a competitive manner should be removed. Further, Telstra should ensure that restrictions placed upon access seekers are consistent with equivalence obligations.

Access obligations apply only to providers with market power

1.10 Part XIC allows terms and conditions of an AD or SAOs to apply to specific access providers.[1] Optus strongly recommends that the ACCC utilise this power to ensure that SAOs and ADs apply only to access providers that have significant market power in the relevant markets. This will provide the maximum net benefits to consumers and will reduce compliance costs and red tape burden on providers that do not have market power.

1.11 The Act requires that ADs promote the LTIE. Optus submits that imposing regulatory obligations on parties that do not have market power will not do this, as it results in:

[1] Section 152BC(3)(a) and (i) and section 152BC(5).

(a) No benefits to consumers as these operators cannot operate without regard to the market; and

(b) Significant compliance costs and red-tape burden on these firms.

Section 2. Non-price terms and conditions

2.1 The ACCC proposes to review the non-price terms and conditions to be included in ADs for all Declared Services within this omnibus inquiry. This is not limited to the existing set of non-price terms and conditions already included in the existing FADs.

2.2 The current omnibus inquiry will help to ensure a level of consistency across key non-price terms that are common across all declared services. However, uniformity must not be the purpose of the Inquiry — a common approach should only be pursued where it is demonstrated that it promotes the LTIE for *all* declared services.

2.3 Optus supports the retention of the model non-price terms. Optus submits that the access determination requires access providers to comply with the model non-price terms. The purpose is to provide a fall-back option for access seekers when negotiating with an access provider that is utilising its market power to impose non-price terms and conditions that would be detrimental to the LTIE.

2.4 Optus also sees merit in the ACCC addressing non-price terms that have historically been problematic for access seekers. It is reasonable to expect that problems would continue where access providers with significant market power have imposed unreasonable terms in past agreements. However, it is unlikely that the LTIE will be promoted by setting detailed non-price terms and conditions for *all* Declared Services through this omnibus inquiry. An assessment of the impacts upon the LTIE is best undertaken during FAD inquiries for specific Declared Services.

2.5 This section discusses the following issues:

(a) Structure of the non-price terms and conditions;

(b) Non-price terms and conditions to be included in the AD; and

(c) Frequency of review of non-price terms and conditions.

2.6 A further discussion on individual non-price terms and conditions is set out in subsequent sections of this submission.

Structure of non-price terms and conditions

2.7 Optus submits that the FAD instruments should continue to include a set of non-price terms and conditions. This is in line with the ACCC's view that:

> *…the inclusion of non-price terms and conditions in the FADs from the perspective of ensuring that there would be an effective fall-back set of terms and conditions of access to the parties.*[2]

2.8 Importantly, an effective fall-back position is required to ensure greater certainty to the industry and will provide parties with better guidance on what constitutes fair and reasonable conditions of access, especially in the case when an access agreement expires or when parties wish to vary an access agreement.

[2] ACCC, 2014, Telecommunications Final Access Determination inquiries – non-price terms and conditions and supplementary prices, Position Paper, May, p.9

Options for providing an effective fall-back position

2.9 The ACCC considers there is a range of options for how this could be established through the AD framework:

(a) At one end, an AD could focus only on those aspects of access where commercial agreement is less likely to result; and

(b) At the other end, an AD could provide a more comprehensive fall-back position by specifying terms and conditions for all aspects of access on which the parties could require certainty, in the absence of any form of commercial agreement.[3]

2.10 Optus considers a hybrid set of non-price terms may be reasonable, based on a combination of both the basic and a minimum set of the comprehensive non-price terms.

2.11 In general, the current construct of individual ADs for each of the declared services should be retained. These would in turn each contain a set of 'common' non-price terms and conditions, and where relevant 'service-specific' non-price terms and conditions.

Examples of current commercial constructs

2.12 There are currently a number of different commercial constructs adopted by access providers. While no single structure should take precedent over another, there is value in reviewing the frameworks considered by access providers. A few are discussed below.

New form of Telstra wholesale agreement

2.13 The ACCC has noted the recent introduction of the new form of Telstra Wholesale Agreement (TWA). The TWA is proposed to be an 'umbrella' agreement, which is intended to apply to all wholesale services — both regulated and unregulated — that Telstra supplies.

2.14 While the ACCC has noted that Telstra launched the new TWA on 31 March 2014, the TWA framework itself has not been widely diffused or accepted by industry. For example, Optus has yet to receive a draft copy of this TWA framework or briefing on how this framework would operate, therefore is unable to comment on the reasonableness of this framework.

2.15 However, Optus cautions the ACCC against using any one carrier's standard wholesale terms as the base document, as they will almost inevitably be drafted in a manner that too heavily favours that carrier (i.e. the access provider) and the terms are unlikely to be sufficiently balanced. Relying on terms and conditions proposed by an access provider with significant market power is unlikely to promote the LTIE.

NBN Co wholesale agreement

2.16 The NBN Co Wholesale Broadband Agreement (WBA) is the standard form of access agreement between NBN Co as the access provider and Retail Service Providers (RSPs) as the access seekers.

2.17 The non-price terms and conditions in the WBA include clauses dealing with the following (among other terms):

(a) Charges, invoices and payment;

[3] ACCC, 2014, Telecommunications Final Access Determination inquiries – non-price terms and conditions and supplementary prices, Position Paper, May, p.9

(b) Non-payment and billing disputes;

(c) Network compatibility, connections and upgrades;

(d) Outages and service faults;

(e) Intellectual Property;

(f) Confidentiality;

(g) Use of downstream customer information;

(h) Liability;

(i) Termination and suspension; and

(j) Dispute management.

2.18 Again, while broad guidance may be obtained by the NBN Co WBA, the specific wording of the relevant clauses must be revisited to assess its applicability to other core services, such as those services delivered over legacy networks.

Optus' wholesale and interconnect agreements

2.19 Generally speaking, the terms of Optus' wholesale and interconnect agreements with other carriers and service providers deal with the same issues as those listed above for the NBN Co WBA. While the specific wording of clauses may differ, at a high level they deal with the same issues.

2.20 The general approach in these wholesale and interconnect agreements is as follows:

(a) The general or 'core' legal terms and conditions — which apply to all services — are set out at the front of the agreement or in a set of 'General Terms'; and

(b) Particular terms that are specific to each service are set out in separate sections, schedules or service descriptions. These service-specific terms are often operational, technical or commercial in nature, but may also involve changes to the general legal terms referred to in paragraph (a), where the nature of the services requires a change to the general position. However, that would be the exception rather than the norm.

2.21 The above approach is also consistent with the NBN Co WBA. The WBA 'Head Terms' set out the core legal terms which apply to all NBN fixed and wireless services, while the WBA Product or Service Descriptions (and other parts of the WBA Product Catalogue) set out the service-specific details.

Non-price terms and conditions for inclusion in the AD

2.22 The ACCC last published a determination on model non-price terms and conditions in 2008. In that determination, the ACCC expressed a view on a list of non-price terms and conditions of access should be addressed in the model terms of access[4] — many of which, have since been incorporated within the existing AD instruments. Importantly, the ACCC retains the ability to vary the model terms should it consider it appropriate to do so.

[4] ACCC, 2008, Final Determination – Model Non-price Terms and Conditions, November, p.5

2.23 While the obligation for the ACCC to set model non-price terms and conditions relating to a core service have since been repealed,[5] the conclusions the ACCC made during its last determination remain relevant. Optus recommends that the ACCC continue to apply the model non-price terms and conditions in future ADs.

2.24 Figure 1 sets out a table of the existing non-price terms included within the existing FAD instruments. As can be highlighted below, there are a number of key non-price terms[6] that are common across each of the FADs. These terms provide a starting basis for 'common' non-price term across the FAD instruments.

Figure 1 Existing non-price terms and conditions in the FAD instruments

NON-PRICE TERMS	FIXED LINE (ULLS, LSS, PSTN OTA, WLR, LCS)	WADSL	DTCS	MTAS
Billing and notifications	8	2	2	2
Creditworthiness and security	9	3	3	3
General dispute resolution procedures	10	4	4	4
Confidentiality provisions	11	5	5	5
Communications with end users	12	8	-	-
Network modernisation and upgrade provisions	13	9	8	-
Suspension and termination	14	6	6	6
Changes to operating manuals	15 (ULLS only)	10	-	-
Ordering and provisioning	16 (ULLS, LSS only)	-	-	-
Liability and indemnity	-	7	7	-
Resale services	-	11	-	-

Source: ACCC FAD instruments

2.25 Optus considers that at a minimum, these key non-price terms should be retained. There may also be scope for the ACCC to better align the terms across the various FADs, and to include a consistent number of non-price terms across the ADs. However, further consultation should occur on the specific drafting of each clause prior to the finalisation of any proposal to do so. Optus welcomes further consultation on the drafting of specific terms, including the identification of how the application of the drafting promotes the LTIE for each of the ADs for which the terms are proposed to apply.

Model non-price terms and conditions

2.26 Optus supports the principles applied in the development of the model non-price terms and conditions[7] and believes that the principles should continue to apply in the consideration of non-price terms and conditions. These principles are set out at Figure 2. These principles should apply irrespective of whether the non-price terms and conditions are considered to be 'common' or 'service-specific'.

[5] Section 152AQB [Repealed]
[6] The numbers set out in the table refer to the corresponding Schedule number of the non-price terms in the relevant FAD.
[7] ACCC, 2008, Final Determination – Model Non-price Terms and Conditions, November, p.9

Figure 2 Principles applied in development of the model non-price terms and conditions

As expressed by the ACCC in its 2008 Determination, these Model Terms:

- should be 'fair';
- should reflect legislative provisions that require consideration of the access provider's or certain other service providers' reasonably anticipated requirements;
- should reflect current market conditions;
- should provide for efficient access;
- should not seek to establish a 'minimum or maximum' standard of access;
- need not be exhaustive;
- should be expressed in a clear and objective manner; and
- need not be developed to the level that they could be inserted directly into a service provider's contracts.

Source: ACCC

2.27 Optus does not believe it is practical for this omnibus inquiry to set out details for all non-price terms and conditions for every Declared Service. Moreover, any attempt to do so is unlikely to promote the LTIE and is likely to give rise to unintended consequences. However, there is merit in the provision of broad principles that can be used by access providers with significant market power to guide the development of, and to aid the assessment by access seekers of the reasonableness of, non-price terms and conditions.

2.28 In addition to investigating the extent to which a common set of non-price terms and conditions can be developed for all Declared Services, the ACCC should also consider adopting the principles applied in the development of the model non-price terms and conditions. These terms could then be used by access providers and seekers when developing non-price terms not specifically drafted in any AD.

Frequency of review of non-price terms and conditions

2.29 Optus considers that the frequency of review of non-price terms should continue to typically align with the FAD process.

2.30 This is also notwithstanding the ACCC's ability to set BROCs or further Access Determinations that address non-price terms that have not been included in the FAD instruments should sufficient need for its inclusion be addressed.

Section 3. Connection and disconnection charges

3.1 The suite of connection and disconnection charges traditionally included within the existing ADs should continue to be included in future ADs. These include:

(a) Connection and disconnection charges for ULLS and LSS;

(b) Connection and supplementary charges for wholesale ADSL; and

(c) Connection charges for DTCS.

3.2 Connection services are non-avoidable costs that are required to provision a new retail service. These are generally one-off charges when a new service is activated. Connection charges may vary depending on the number of processes required to connect the service.

3.3 These charges are incurred in relation to the provision of retails services using the ULLS, LSS and/or DTCS services. There are also similar charges levied in respect of wholesale ADSL (WADSL).

3.4 The ACCC has utilised a variety of methodologies to set connection/disconnection charges over the various declared services. A cost-based method has only been used in historic arbitration or pricing principle decisions. Since then, the ACCC has indexed prices. The WADSL FAD used a retail-minus approach and the DTCS FAD merely averages charges between providers.

3.5 Optus sees merits in adopting a consistent methodology for all declared services — unless there is clear evidence that another approach better promotes the LTIE. Optus notes that the ACCC has often claimed a lack of data for use of more rigorous methods. Optus submits that such reasoning is not valid; the ACCC has extensive powers to collect any information it deems relevant.

3.6 Optus submits that for access seeker certainty, these charges should continue to be set out in relevant FAD instruments. However, the charges must be set at levels that promote competition and the LTIE, and not at levels that reward game playing and non-cooperation from access providers that can exercise market power.

3.7 While specific charges should be determined during the FAD inquiry for each Declared Service, Optus recommends that this omnibus inquiry should include:

(a) A clear statement on cost methodology to be applied to specific classes of ancillary charges; and

(b) An overarching cost orientation obligation to be imposed on access providers with significant market power.

Connection and disconnection charges for ULLS and LSS

3.8 The 2011 FAD indexed connection and disconnection on top of the historical indexation applied during the 2010 fixed line service pricing principles Draft Decision,[8] which in turn was an indexed rate based on cost-based charges estimated in 2008.[9] The connection and

[8] ACCC, 2010, Review of the 1997 telecommunications access pricing principles for fixed line services, Draft Report, September. See section A11 in Appendix A.
[9] ACCC, 2008, Unconditioned Local Loop Service Pricing Principles and Indicative Prices, June

disconnection charges set in 2008 relate to the costs of technicians performing jumpering work inside Telstra exchanges, travel and vehicle costs for the technicians, costs of back-of-house management or assistance for technicians, material costs and indirect costs.

3.9 The existing fixed line services ADs regulate connections charges in relation to in-use ULLS connections (IULL) and transfer ULLS connections (TULL). While these may have been the connection processes in 2008 when the original decision was made, Telstra has introduced additional connection processes using the Vacant ULLS (VULL) and Enhanced Vacant (eVULL) processes. The latter two connection types remain subject to commercial terms. **[CiC]**

3.10 That said, Telstra also publishes a reference rate card setting out the ULLS connection charges for each of the ULLS connection types.[10] Optus notes that with the exception of VULL connections, the eVULL rates are currently in line with the declared rates for the other ULLS connection types.

3.11 A summary of the different ULLS connection types is set out in the table below.[11]

Figure 3 ULLS Connection Types

ULLS CONNECTION TYPE	
In use ULLS (iULL)	IULL consists of provisioning of ULLS using an in-use communications wire. Field activity involves an exchange jumper being cutover from an in-use PSTN service, which currently provides a Telstra PSTN service to a customer. No end user premise visit is required.
Transfer ULLS (TULL)	TULL consists of provisioning of ULLS which is effectively a transfer of an in-use ULLS from one access seeker to another access seeker. Field activity required involves an exchange jumper being cutover from an in-use ULLS, which currently provides a ULLS to the initial access seeker. No end user premise visit is required.
Diversion ULLS (DULL)	DULL consists of provisioning of ULLS using an in-use communications wire, together with a request that Telstra provide a Call Diversion service for 30 calendar days. Field activity involved is the same as for IULL *except* for the requirement of a diversion. No end user premise visit is required.
Vacant ULLS (VULL)	VULL consists of provisioning of ULLS using a vacant communications wire. Field activity involves connecting a CAN path from the POI pair in the exchange to the network boundary point (NBP) at the end-user premise. Jumpering at the exchange is required but it is also often necessary to undertake work at the end user premise or along the copper line between the exchange and the premises.
Enhanced Vacant ULLS (eVULL)	eVULL consists of the provisioning of ULLS using a vacant and intact metallic path. Unlike VULL, field activity will only require jumpering at the exchange as the remainder of the service path is intact. No end user premise visit is required.

Source: Telstra

3.12 The charges for IULL and TULL (and similarly, for DULL) include the following activities:

(a) Jumpering, travel, vehicle, tool and materials (copper pair) costs and indirect costs; and

(b) Back-of-house costs.

3.13 Back-of-house costs include costs associated with Telstra's Data Activation Centre (DAC) and the Integrated Deployment Solution Centre (IDS). The main issues with setting this cost related to:

(a) The time needed for DAC activity;

[10] Telstra Wholesale Rate Card for Reference Services, Version 5.0, 30-06-2014
[11] Telstra, 2012, Report on the common "ticket of work" tasks under the Structural Separation Undertaking, September, pp.5-6

(b) Salary costs; and

(c) Cutover testing.

3.14 The ACCC determined that on average, an eight minute allowance for DAC activity should be allowed. Optus notes that this decision was criticised by all access seekers.[12] The ACCC set the wage rate at $60 to $64 per hour; or around $117,000 to $124,800 per annum. Optus notes that all access seekers highlighted that the assumed wage rate was significantly above actual rates paid to comparable staff levels.[13] Instead, the ACCC dismissed concerns as *it* believed the access seeker wage rates were not reflective of efficient costs. Since the original analysis in 2008, the rates have been rolled over using annual adjustments. As a result, the effective wage rate as it applies in 2014 is around $70 per hour.

3.15 Optus submits there is merit in revisiting the assumptions underlying the 2008 Pricing Principles. It is likely that over the period since these issues were last examined that there has been some efficiencies achieved by Telstra in the tasks required. Relevant questions include:

(a) Is the implied 2014 wage rate still regarded as efficient?

(b) Is the time required to undertake the back-of-house activities the same as six years ago, or has there been increased automation?

(c) Has there been no improvement in the performance of jumpering activities over the last six years?

ULLS call diversion charges

3.16 The ACCC recognises that setting up a ULLS call diversion requires work conducted entirely at the DAC and is an additional cost component of a ULLS connection (namely, a DULL connection). As such, it is supposedly based on the hourly salary for Telstra back of house activities multiplied by the time taken for ULLS call diversion activities.[14]

3.17 In addition to the ULLS call diversion charges, access seekers are also required to incur the related costs for local number portability and the usage charges related to calls made during the call diversion period.

3.18 As per the comments above, Optus submits there may be merit in revisiting the assumptions underlying the 2008 Pricing Principles. It would seem logical that over the period since these issues were last examined that there has been some efficiencies achieved by Telstra in the tasks required. For example, is the time required to undertake the ULLS call diversion activities the same as six years ago?

Indexation of connection charges

3.19 The ACCC has applied an inflator to ULLS connection charges since its last analysis in 2008. Connection and disconnection charges have been indexed on the following basis:

(a) For 2011–12, charges are indexed by 1.75 per cent (i.e. half of the forecast CPI for the 12 months to June 2011)— this indexation is applied to update charges for the six months from the commencement of the IADs on 1 January 2011 to the commencement of the ADs on 1 July 2011;

[12] ACCC, 2008, Unconditioned Local Loop Service Pricing Principles and Indicative Prices, June, p.24
[13] ACCC, 2008, Unconditioned Local Loop Service Pricing Principles and Indicative Prices, June, p.25
[14] ACCC, 2008, Unconditioned Local Loop Service Pricing Principles and Indicative Prices, June, p.44

(b) For 2012–13, charges are indexed by 2.5 per cent (i.e. the RBA's CPI forecast for the 12 months to June 2012); and

(c) For 2013–14, charges are indexed by 3 per cent (i.e. the RBA's CPI forecast for the 12 months to June 2013).

3.20 However, since the FADs were determined the actual CPI inflation has been lower than forecasted. This is summarised in Figure 4 below.

Figure 4 Inflation indices

FAD Charges	CPI Inflation (12 months to)	Inflator applied	Actual CPI Inflation
July 2011 – June 2012	June 2011	1.75 %	1.2 %
July 2012 – June 2013	June 2012	2.5 %	2.4 %
July 2013 – June 2014	June 2013	3.0 %	

Source: ACCC, ADs for fixed line service, Final Report, table 14.1; ABS, 6401.0 Consumer Price Index, Australia

3.21 While the use of the ACCC's indexation method is transparent, the table above highlights the potential that the indexation method may also overstate the actual CPI inflator for the period of the FAD. It follows that a continuation of the trend where indexation is overstated, may lead to the over-recovery of the efficient costs of connection and disconnection activities – a continuation of this approach also potentially fails to acknowledge any efficiency that may have evolved in conducting the relevant activities (e.g. jumpering).

3.22 The difference in the ULLS connection charges is set out in the table below. This shows that if actual CPI was applied, the price terms in the final period would be on average 1.8 per cent lower than the levels set out in the FAD.

Figure 5 ULLS connection charges as set out in 2011 fixed line services AD

	AD (July 2011 to June 2012)	AD (July 2012 to June 2013)	AD (July 2013 to June 2014)	AD extension
Band 1	$52.67	$53.98	$55.60	$55.60
Band 2	$55.49	$56.88	$58.58	$58.58
Band 3	$60.29	$61.80	$63.66	$63.66

Source: ACCC, FADs for fixed line service, Final Report, table 14.1

Figure 6 ULLS connection charges, if CPI revised to reflect actual not forecast CPI

	AD (July 2011 to June 2012)	(July 2012 to June 2013)	(July 2013 to June 2014)	AD extension
Band 1	$52.67	$53.30	$54.58	$54.58
Band 2	$55.49	$56.15	$57.50	$57.50
Band 3	$60.29	$61.02	$62.48	$62.48

Source: ACCC, FADs for fixed line service, Final Report, table 14.1; ABS, 6401.0 Consumer Price Index, Australia

3.23 Notwithstanding the difference in price terms, this highlights that Telstra has been able to over recover from access seekers the cost of ULLS connections from those ULL connection types with price terms set out in the FAD. Put simply, this means that as a starting point under this approach, the FAD price term for July 2013 to June 2014 will already have been overstated by approximately 1.8 per cent, when compared to the FAD price term for July 2011 to June 2012.

Connection and disconnection charges for WADSL

3.24 The WADSL AD included connection charges for the following categories:

(a) Transfer from another WADSL service is $22.50;

(b) Transfer from a LSS is $80; and

(c) All other types of completed installation or transfer requests at $80.

3.25 The ACCC also allowed an early termination charge (ETC). It was set at $50 where a service is connected for less than six months. Where the connection was longer than six months no ETC is applicable.[15] It was noted that Telstra waives this fee for services that migrate to a Telstra fibre access broadband product. The ACCC noted that there may be competition implications arising from the ETC, and that this would be addressed in the 2014 FAD process (i.e. the current inquiry).[16]

3.26 Nonetheless, the costs set in the WADSL FAD have not been based on costs. The prices were set during the IAD process using a retail-minus approach, based on Telstra's retail connection fees.[17] The ACCC claimed not to have sufficient information on the costs for connections and disconnections. However, the ACCC did commit to analysing the costs incurred during the next FAD process (i.e. this inquiry).[18]

3.27 Optus recommends that the ACCC undertake a comprehensive analysis of the costs incurred to undertake the connection and disconnection processes, as agreed upon in the original WADSL FAD.

Connection and disconnection charges for DTCS

3.28 The ACCC set connections charges based on industry averages for different capacity services to metropolitan and regional areas. In addition, the ACCC noted that there was wide variation in the level of connection charges between providers. Further, it is common practice to discount or completely waive connection charges.[19]

3.29 The rates were set at $3,100 for 2Mbps SDH links, increasing to $40,000 for the 622Mbps service. Ethernet links were priced at $2,500 for 2Mbps increasing to $5,000 for 1Gbps services.[20]

3.30 The ACCC considered such an approach allowed providers to recovers initial costs of connection. Thus, promoting investment certainty, efficient investment in assets and promotes competition.[21] Optus, however, notes that it is not clear how an average price reflects efficient costs or promotes efficient investment decisions. The use of average pricing

[15] ACCC, 2013, Public inquiry to make a final access determination for the Wholesale ADSL service, Final Report, p.54
[16] ACCC, 2013, Public inquiry to make a final access determination for the Wholesale ADSL service, Final Report, p.55
[17] ACCC, 2012, Interim access determination for the wholesale ADSL service, Statement of Reasons, February, p.11
[18] ACCC, 2013, Public inquiry to make a final access determination for the Wholesale ADSL service, Final Report, p.69
[19] ACCC, 2011, An ACCC Discussion Paper for a public inquiry into a final access determination for the DTCS, June, p.18
[20] ACCC, 2012, Final Access Determination No.1 of 2012 (DTCS), June, p.5
[21] ACCC, 2011, Draft final access determination for the DTCS, Explanatory Statement, December, p.28

is likely to favour access providers with market power as a result of its scale and cost advantages.

3.31 As per views expressed above, the ACCC should undertake a proper analysis of the costs incurred to undertake the connection and disconnection processes. Failure to do so is likely to result in cost over-recovery and higher prices for end-users.

Section 4. Special linkage charges

4.1 Special linkage charges (SLC) are ancillary charges that are often associated with the supply of new transmission services. They are generally one-off charges incurred by an access seeker to help recover the cost of the installation of a new transmission link by an access provider. The capital equipment installed through the SLC then forms part of the access provider's network and asset base — i.e. the access seekers that pays for the equipment and its installation foregoes ownership.

4.2 These SLCs form one of the key categories of DTCS ancillary services, the majority of which have not been addressed by the ACCC. Specifically,

> *In addition to connection charges, the ACCC understands that there are other forms of non-recurring charge levied on access seekers to access to the DTCS, including feasibility studies, special linkage charges and early cancellation charges.* [22]

4.3 In addition to SLCs, other non-recurring charges are levied where:

(a) A feasibility study has occurred (in order to determine whether an SLC is required) and the access seeker has decided not to proceed with the order within a certain time frame. While these studies are generally not required as the access provider is obliged to advise of any SLCs before proceeding with an installation, there are often instances in which a feasibility study (generally resulting in an unnecessary increased lead time and charge) would be required; and

(b) An early cancellation charge is levied if the access seeker decides to terminate the services any time after the order is accepted by the access provider *and* before the minimum lease terms has expired. This fee applies even if the order is cancelled after the order has been accepted but before the lease service is delivered.

4.4 A key issue highlighted by the ACCC is that: *"The nature of these charges varies considerably with circumstances and cannot be predicted in advance."*[23] These views were similarly noted by the ACCC in its recent decision to declare the DTCS – recognising that *"unlike a connection charge, the SLC is not readily quantifiable at the time of purchasing a DTCS service."* [24] These observations, in turn, highlight the lack of transparency in the charges levied for these services.

4.5 Optus submits that, as a minimum, the ACCC impose a cost orientation obligation on SLCs and other non-recurring charges; and also require that access providers make available transparent and upfront cost quotes, without cancellation penalties where the final cost is higher than the quoted cost.

Previous regulatory consideration of SLCs

4.6 The ACCC has considered SLCs in a number of regulatory decisions. However, it has not employed any regulatory mechanism to set price terms, indicative prices or even pricing principles. As such, SLCs continue to be subject to commercial terms. This is problematic where an access provider has significant market power.

[22] ACCC, 2012, Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement, June, p.40
[23] ACCC, 2012, Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement, June, p.40
[24] ACCC, 2014, Domestic Transmission Capacity Service, Final Report, March, p.54

DTCS declaration and Final Access Determination

4.7 Respondents to the ACCC's DTCS declaration and FAD inquiries have long raised concerns in relation to transparency and consistency issues as to how costs are calculated and apportioned for Telstra's SLCs.

4.8 These transparency and equivalence issues relating to Telstra's SLC pricing constructs still exist and it remains to be seen how they will be addressed over time. Put simply,

> *… the issue of SLCs is important and the ACCC recognises that improving transparency and consistency for access seekers will likely encourage the efficient use of and investment in infrastructure.*[25]

4.9 Despite this, and while it notes access seeker concerns about the lack of transparency and processes with the provisioning of SLCs, the ACCC took the view that it is *"not necessary to specify SLCs within the DTCS service description in order to consider the issue in the DTCS FAD inquiry."*[26]

4.10 The 2012 DTCS FAD did not set prices terms for feasibility studies, SLCs and early termination charges since:

> *These charges are not predictable for DTCS products and their nature and quantum vary considerably depending on each individual connection. The ACCC considers that any regulatory problems associated with these charges should be addressed on a case-by-case basis, potentially through issuing a BROC.*[27]

Preferred approach to SLCs

4.11 Optus recommends that the ACCC imposes:

(a) A cost orientation obligation on SLCs and other non-recurring charges; and

(b) Transparency obligation requiring upfront cost quotes without cancellation penalties where the final cost is higher than the quoted cost.

4.12 Optus supports a broad cost orientation obligation on all non-recurring charges. These charges recover the costs incurred to perform specific activities. There is no requirement for access providers to make an efficient return on the installation of capital equipment. Once the capital equipment under a SLC is installed, the access provider makes an efficient commercial return on the use of the capital through the recurring charges. Optus reiterates that the access provider retains ownership of the capital installed under the SLC.

4.13 Further, both the ACCC and Telstra have noted in previous discussions and submissions that SLCs merely recover the costs of the capital works associated with installing the required equipment. If this is correct, a cost orientation obligation should therefore not impact upon the SLCs levied.

4.14 A recurring observation from access seekers in relation to the SLC is the lack of transparency over the charges levied and the variation of charges after the initial quote. Transparency of SLC quotes should include a breakdown of costs, particularly in instances where there is a significant discrepancy between the estimated cost and the cost determined following completion of a feasibility study.

[25] ACCC, 2014, Domestic Transmission Capacity Service, Final Report, March, p.88
[26] ACCC, 2014, Domestic Transmission Capacity Service, Final Report, March, p.53
[27] ACCC, 2012, Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement, June, p.46

4.15 The ACCC has acknowledged that it *"welcomes Telstra's initiative to simplify and introduce better pricing tools to assist access seekers in understanding the SLC better."*[28] This proposed measure was again reiterated in the ACCC's position paper for this inquiry as a new measure being trialled which involves *"simplifying the SLCs by introducing better quote tools that also improve price certainty."*[29] However, Optus has not yet been able to access nor has Optus been briefed on the existence of any such pricing tool for SLC quotes. Optus is therefore unable to comment on the reasonableness of any such measure being proposed by Telstra.

4.16 Optus reiterates that it would better promote the LTIE for the ACCC to require such transparency. If Telstra is developing better pricing tools, then any cost obligation should not prove problematic for Telstra to implement.

[28] ACCC, 2014, Domestic Transmission Capacity Service, Final Report, March, p.54
[29] ACCC, 2014, Telecommunications Final Access Determination inquiries – non-price terms and conditions and supplementary prices, Position Paper, May, p.17

Section 5. Facilities access services

5.1 Facilities access services have the potential to be enduring bottlenecks for the supply of services to downstream customers. In particular, it can inhibit the ability of access seekers to install their own infrastructure in order to deliver downstream services using a network access service (e.g. ULLS) and restricts the type of interconnection that is allowed within an exchange. Facilities access terms and conditions are therefore very relevant to the ULLS, LSS and to a lesser extent, PSTN OTA services. Facilities access also impacts on related mobile market and future interconnection arrangements with NBN Co.

5.2 The ACCC has acknowledged that *"access to facilities is an area of general concern for access seekers. The ACCC also considers that more issues may emerge as RSPs seek connection to NBN POIs, the vast majority of which are located in Telstra exchanges."*[30]

5.3 Telstra currently provides these services pursuant to contractual arrangements. Examples of the types of facilities access services which access seekers currently purchase in conjunction with a declared service (i.e. an ancillary service) include:

(a) Telstra Equipment Building Access service (TEBA service);

(b) External Interconnect Cable service (EIC service); and

(c) Duct access service.

5.4 Additionally, concerns with the Internal Interconnect Cable (IIC) service, which are currently encompassed within the suite of TEBA services, have also been raised. The IIC service was previously subject to an access dispute between Telstra and other Access Seekers; Optus was not a party to that dispute. This IIC service was recently declared as part of the ACCC's Fixed Line Services Declaration in April 2014.

5.5 Optus supports the following:

(a) Continued reliance upon the facilities access provisions contained within the *Telecommunications Act*. This includes relying upon the arbitration powers to settle any commercial disputes on the terms of access.

(b) Regulating the fee for service/usage charges under Part XIC as ancillary charges to declared services. Impose a broad cost orientation obligation on all fees for service. Directly regulate where there are examples of problematic charges.

(c) Regulating non-price terms that impose restrictions on the ability of access seekers to utilise exchange space which have the effect of favouring the downstream retail divisions of Telstra.

Previous regulatory consideration of facilities access services

5.6 Access seekers have a right to access telecommunications facilities through the *Telecommunications Act*. While this access framework remains imperfect, this process has worked relatively well and has helped to facilitate effective commercial facilities access agreements, and generally lead to commercial resolution of disputes.

[30] ACCC, 2014, Domestic Transmission Capacity Service, Final Report, March, p.51

5.7 The ACCC has considered the issue of access to facilities, including access to TEBA, in a number of previous consultations. The ACCC's views in those decisions are discussed below.

Facilities Access Code

5.8 The ACCC last published a final determination on the Facilities Access Code in 2013. This review entailed revisiting the original framework for access to a number of 'eligible facilities' introduced in 1999. In that determination, the ACCC has decided to vary the Code to update it so that *"on balance, the Code remains relevant and continues to serve as a useful tool in facilitating access to eligible facilities."*[31]

5.9 The Code was developed under Part 5 of Schedule 1 to the *Telecommunications Act* 1997 (Telco Act) and applies to the following 'eligible facilities': telecommunication transmission towers; sites of telecommunication transmission towers; and underground facilities designed to hold lines.

5.10 The ACCC similarly cautions that:

> *… a key purpose of the Code is to establish a set of default or minimum administrative standards and processes to facilitate timely access to eligible facilities. The ACCC further considers that overly prescriptive provisions may limit or delay the facilities access arrangements which reflect individual inter-carrier relationships.*[32]

5.11 The final decision also highlighted the two available, but limited, regulatory mechanisms available to the ACCC to address any issues of access to facilities. [33]

5.12 First, absent separate declaration, any issues of access to facilities can already be addressed via the access determinations for the fixed line services and/or the DTCS. A key advantage of this approach is that it will impose no requirement on the ACCC to set price terms for access to facilities, e.g. access to TEBA.

5.13 Second, the ACCC could make a decision in relation to pricing equivalence under the Telstra Structural Separation Undertaking (SSU) framework for TEBA. For example, the SSU provides 'step in' rights for the ACCC with respect to TEBA pricing by providing that should the ACCC choose to set price terms for TEBA through its existing regulation of the ULLS and LSS services, Telstra must, within a set timeframe, publish reference prices equal to the price specified by the ACCC; and include any such ACCC decision within its Telstra Economic Model (TEM) reporting requirement.

Access Determinations

5.14 The ACCC has acknowledged on several occasions the existence of a wide variety of non-recurring charges related to the provision of declared services. Furthermore that:

> *The nature of these charges varies considerably with circumstances and cannot be predicted in advance. The ACCC considers it is therefore not practical to set AD prices for the range of services that may arise at this time. If the ACCC considers that particular*

[31] ACCC, 2013, Facilities Access Code Final Decision, An ACCC Final Decision to vary "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)", September, p.5
[32] ACCC, 2013, Facilities Access Code Final Decision, An ACCC Final Decision to vary "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)", September, p.12
[33] ACCC, 2013, Facilities Access Code Final Decision, An ACCC Final Decision to vary "A Code of Access to Telecommunications Transmission Towers, Sites of Towers and Underground Facilities (October 1999)", September, p.23

ancillary charges are unjustifiable and deter or deny access to the DTCS, the ACCC has regulatory options available to it including issuing a BROC or varying the AD.[34]

5.15 The ACCC has not included facilities access provisions for any declared services FADs to date, but acknowledges that reliance on facilities access is required for the supply of the service.

> *The ACCC understands that the DTCS uses the same exchange facilities, such as TEBA space, as other communications services, such as DSL. Access seekers are therefore likely to have facilities access arrangements in place in order to provide those other services. As the DTCS uses the same facilities, additional facilities access arrangements are unlikely to be required for the DTCS.* [35]

5.16 Additionally, under the section 152ER(3) of the CCA, the ACCC must not make an AD that would prevent Telstra from complying with the SSU. The ACCC also notes that access to facilities is also subject to regulation under Schedule 1 to the Telco Act.[36]

Record Keeping and Reporting requirement

5.17 In 2008, the ACCC established a Record Keeping and Reporting Requirement (RKR) requiring Telstra to keep and retain records and give reports to the ACCC relating to access to Telstra exchange facilities.

5.18 The Telstra Exchange Facilities (TEF) RKR requires Telstra to give monthly reports to the ACCC that contain information which includes details of Telstra decisions to cap and uncap exchanges and the amount of space in an exchange reserved by Telstra for its own anticipated future requirements. The RKR also requires Telstra to report on the details of queued access seekers, their position in the queue, and any progress in the queue.

5.19 A summary of this RKR information provided to the ACCC also remains the only source of transparency on TEBA queues that is available to access seekers.

The NBN Co facilities access product

5.20 The ACCC recognises the role of the NBN and its likely impact on access to declared services. For example, in its recent decision to declared the DTCS it noted that:

> *In terms of the impact of the NBN, the ACCC agrees with submitters that it is too early to determine the impact of the NBN but that it is likely to have an impact on the structure of the DTCS markets and levels of DTCS competition in the future.* [37]

5.21 One of the prerequisites of access to the NBN requires RSPs to procure access to the NBN Aggregation Nodes (ie. NBN POIs). Of the 121 NBN POI sites, 111 will be in facilities licensed by NBN Co from a third party (the Underlying Facility Provider, or in this case the Telstra exchange) while the remaining 10 will be owned and operated by NBN Co. Access to these facilities is currently enabled via the NBN Co Facilities Access Service product construct.

5.22 NBN Co describes facilities access service as a *"service that enables a customer to install, operate and maintain its telecommunications equipment at or near a point of interconnect for the purpose of interconnecting its network with the NBN Co network."* [38]

[34] ACCC, 2012, Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement, June, p.40
[35] ACCC, 2012, Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement, June, p.61
[36] ACCC, 2012, Final Access Determination for the Domestic Transmission Capacity Service, Explanatory Statement, June, p.62
[37] ACCC, 2014, Domestic Transmission Capacity Service, Final Report, March, p.54
[38] ACCC, 2013, NBN Co Special Access Undertaking, Final Decision, December, p.5

5.23 In its 2012 product construct paper, NBN Co explicitly noted several key limitations in relation to access to NBN POIs:[39]

(a) Access to the building is subject to the conditions, limitations and requirements of the Underlying Facility Provider – this means that the majority of NBN POI sites will also be subject to the general TEBA rules.

(b) Access seekers who wish to connect transmission links from an existing facility at a TEBA site to their NBN POI facility co-located within the same Telstra exchange is responsible and must make their own separate arrangements with Telstra to undertake the required cross connect service. These arrangements are therefore subject to general TEBA rules.

(c) In addition to meeting the conditions, limitations and requirements of the Underlying Facility Provider, access seekers will also be required to comply with the technical specifications, operational manuals and occupational health and safety requirements notified by NBN Co.

5.24 That said, it has also been acknowledged that: *"In any case, Telstra also notes that NBN Co has provisioned an area in every Telstra exchange where a NBN POI is located and those areas are managed by NBN Co independently from TEBA."*[40] However, it is unclear whether this same flexibility is afforded to access seekers within their rented TEBA Space — i.e. can access seekers manage their areas within the exchange independently from TEBA?

5.25 Access seekers incur a number of ancillary charges for both placing orders and completing the required feasibility studies to conduct works within TEBA, including making amendments to their own rented space within TEBA. **[CiC]** The volumes of orders and studies placed vary, and the price for each activity subject to commercial terms.

Limitations imposed upon the use of exchange space

5.26 Optus remains concerned over the effect of the non-price terms and conditions imposed by Telstra upon access seekers in the use of TEBA.

5.27 **[CiC]**

5.28 **[CiC]**

5.29 These restrictions impact many related communications markets as exchanges, typically, contain points of presence for access seekers which could also be used as points of handover and interconnection between non-declared services and/or multiple providers. The effect of Telstra's non-price terms is that one exchange may have most, if not all, main communications carriers within it, but carriers are limited in the interaction that can occur. It imposes unnecessary costs, and unnecessary duplication of assets outside of the exchange space. The current rules do not encourage the efficient use of, or investment in, infrastructure, and neither does it promote competition in downstream related markets.

5.30 The non-price terms and conditions directly impact upon the provision of services in several downstream related markets. Telstra provides TEBA as well as competes against access seekers in the related downstream markets. It is this level of vertical and horizontal integration that results in Telstra having both the ability and incentive to use TEBA rules to disadvantage access seekers.

[39] NBN Co Limited, 2012, Overview of the NBN Co Facilities Access Service, April

[40] Telstra, 2014, Response to the Commission's consultation paper on the review of access to Telstra Exchange Facilities Record Keeping and Reporting Rules, June, p.11

Preferred approach to facilities access

5.31 In general terms, facilities access comprises a general space rental charge with additional fee for service/usage charges (such as IIC, EIC, electricity charges, inspection fees, etc.). Access seekers have a right to access telecommunications facilities through the *Telecommunications Act*. In Optus' opinion, this process has worked well and has helped to facilitate effective commercial facilities access agreements, and generally lead to commercial resolution of disputes.

5.32 In saying that, Optus does see a need for better oversight of the fee for service/usage charges. These charges should be charged on a material and labour basis; and hence be cost based and transparent. However, given that the facilities owner has exclusive rights to provide such services, Optus believes access providers have the incentive, and the ability, to impose charges significantly greater than the costs incurred to provide. Optus reiterates that fees for services should not include commercial returns — efficient commercial returns occur on capital employed and not on fees for service.

5.33 Optus recommends the following approach:

(a) Continue to rely upon the facilities access provisions contained within the *Telecommunications Act*. This includes relying upon the arbitration powers to settle any commercial disputes on the terms of access.

(b) Impose a broad cost obligation on all charges for ancillary services. Directly regulate charges where there are examples of problematic charges.

(c) Regulate non-price terms that impose restrictions on the ability of access seekers to utilise exchange space which have the effect of favouring the downstream retail divisions on Telstra.

Section 6. Other ancillary services for consideration

6.1 Optus reiterates that it is not practical for this omnibus FAD to examine in detail the full range of ancillary services across all Declared Services. As such, the ACCC should adopt a broad cost-orientation obligation for all ancillary charges levied by access providers. The burden of proof should lie with the access provider to show the costs incurred. Where additional costs are not shown, no ancillary charge should be levied.

6.2 In addition to this broad obligation, Optus wishes to identify two specific charges which, on the information available, appear to be in excess of the costs incurred to provide. Many of the costs that would be incurred appear to already be taken into account when setting the regulated recurring access charges. The two charges are:

(a) Switchport charges; and

(b) Ethernet access charges.

Switchport charges

6.3 Switchports are required elements of the interconnection handover arrangements between access seekers and access providers. It is an element of the PSTN OTA service. The service description contained in the Declared Services Register states that the PSTN OTA service comprises a number of different elements as follows:

(a) Access for calls forwarded for termination in the AP's fixed network;

(b) POI Location;

(c) Forwarding a call beyond the POI of table TPASD3 to TPASD2 where applicable (see POIs below);

(d) Signalling;

(e) CLI provision;

(f) Provision of Switchports;

(g) Network Conditioning;

(h) Fault Handling;

(i) Inter C/CSP Billing; and

(j) Restrictions on availability and others factors relating to the provision of Access are further described below.[41]

6.4 The switchport service provides the interconnect capacity at the POI. Access seekers are required to purchase adequate switchport capacity in order to deliver terminating traffic to the access provider. The expiring PSTN OTA service provides that the access seeker should provide adequate forecasts of its switchport capacity requirements. Optus notes the comments that "*forecasts will be used by the [access provider] for network planning and not*

[41] Refer to the Declared Services Register: Domestic PSTN Origination and Termination Services. Available at: http://registers.accc.gov.au/content/index.phtml/itemId/777921

charging purposes".[42] Access providers are required to accept switchport orders up to the level forecasted, but are not required to provide ports in excess of the forecasts.

6.5 The new technology-neutral FSOA and FSTA service also includes the 'nature of switchports' within the service description. While the new service description does not contain the interconnection forecasting, ordering and provisioning requirements, Optus expects that the same arrangements would remain in place for the duration of existing circuit switched interconnection arrangements.

6.6 The continuation of existing arrangements assumes that access to switchports will inevitably remain. The interconnection agreement between Telstra and Optus currently levies a charge on access to switchports (i.e. the interconnect capacity service), which continues to increase over time despite evidence to the contrary that investment in PSTN switches will likely fall in future periods.

> *The ACCC understands that Telstra is no longer investing in circuit switched as these switches cannot be used with fibre. As existing circuit switches reach the end of their useful lives, Telstra either repairs them or replaces them with surplus circuit switches transferred from elsewhere in the network.* [43]

6.7 For example, it appears that the costs associated with the switchport service (i.e. costs associated with supplying interconnection ports) are included within the general cost base allocated to the PSTN OTA service.

6.8 The costs associated with the provision of switchports appear to be included within the various fixed line cost models, including dimensioning, cost allocation factors, and costs. On the face of it, it appears that the costs associated with providing switchport capacity is included within the cost calculations for the per minute termination charge. Optus notes that:

(a) Interconnection facing ports are a core asset category within the Analysys Mason (AM) cost model. The asset class is allocated to Trunk/IEN switching within the RAF cost category groupings.

(b) The number of interconnection-facing ports and exchanges on the volume of interconnection traffic within the AM model.[44]

(c) The costs of interconnect ports are allocated to the PSTN OTA service within the core routing table in the AM model.[45]

(d) The translation of the AM model routing factors into the FLSM allocation factors appears to maintain the allocation of ports to OTA service. While the transfer to the FLSM involved altering allocation factors due to traffic developments, there is no indication that specific cost elements were removed.[46]

(e) The FLSM included costs within the RAF categories of 'Switching Equipment Trunk' and 'Switching Equipment Other'. These cost categories are consistent with the RAF cost category to which interconnection ports were mapped to within the AM model.

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[42] Domestic PSTN Terminating Service, http://registers.accc.gov.au/content/index.phtml/itemId/885823

[43] ACCC, 2011, Public inquiry to make final access determinations for the declared fixed line services, Discussion Paper, April, pp.81-82

[44] See Core.xls; NwDes.4.Core.Nodes; row 167.

[45] See Cost.xls; Dem.In.Core; PSTN Platform Costs % Allocated.

[46] ACCC, 2010, Review of the 1997 telecommunications access pricing principles for fixed line services: Draft report, September, section A7.

6.9 Optus recommends that the ACCC clarify whether the cost of providing interconnection ports is included within the costs allocated to the PSTN termination rate. The ACCC should also require Telstra to identify additional costs that are not included in either (a) the calculation of allocation factors; or (b) the relevant RAF cost categories.

6.10 Only where additional costs can be identified and verified should switchport costs be permitted to be charged separately. Even then the charge should be cost based and regulated.

Ethernet access ports for WADSL

6.11 A further ancillary charge that should be investigated is the Telstra Business Grade Ethernet (TWBGE) product which is a compulsory requirement for the provision of WADSL services. TWBGE provides access seekers with Ethernet access to Telstra's Internet Gateway Routers.

6.12 During the regulation of the WADSL service, little mention was made of the compulsory TWBGE charge. The WADSL service was described as:

> *The backhaul interface can be either an AGVC or VLAN (using either ATM or Gigabit Ethernet as the transport protocol respectively). The access seeker acquires an interface and then acquires capacity over that interface to a specified throughput that it chooses.*
>
> *In acquiring a wholesale ADSL service an access seeker must pay both a 'port charge' for the local access component and a variable AGVC charge for the backhaul component.*[47]

6.13 This description implies that an access seeker is required to purchase a port charge and AGVC/VLAN charges only to acquire a WADSL service. No mention appears to have been made either by the ACCC or Telstra of the additional TWBGE charge during the Declaration Inquiry process. The only mention of the requirement for an additional Ethernet access charge was in the Interim Access Determination which states that the AGVC charges are "*in addition to separate charges for ATM or TWE access*."[48] No further mention was made in any other FAD-related document. It would appear, therefore, that the impact of the Ethernet access charge was not properly considered during the WADSL Declaration or FAD inquiries.

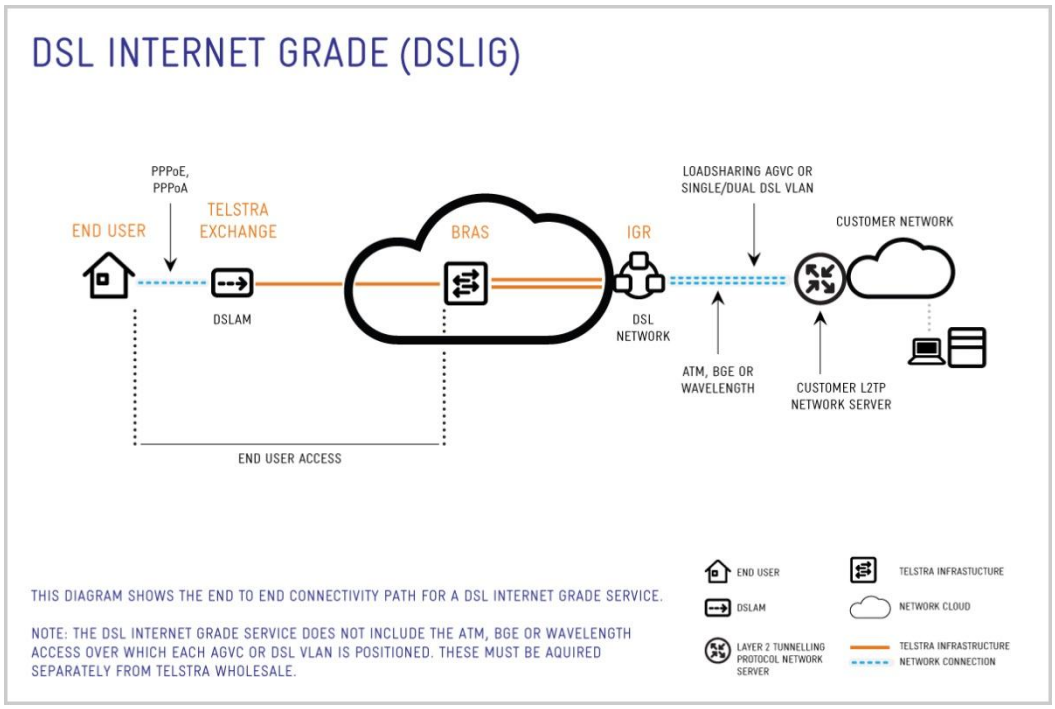
6.14 Further, the TWBGE was not considered during the development of the WADSL FLSM. This implies that, absent further information, that the TWBGE and the VLAN charges recover costs associated with the same assets — all relevant costs under the FLSM have been allocated to the end-user port and VLAN charges. Additional charges should only be levied where costs not considered within the FLSM are identified.

6.15 A simple network schematic is shown in Figure 7, showing the compulsory nature of the BGE charge. To resell a WADSL service, access seekers are required to purchase the underlying Ethernet port and link capacity, as well as the VLAN charge and the monthly charge per end-user port. In addition to the monthly recurring charge, there are additional set-up and connection charges.

[47] ACCC, 2012, Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final Decision, February, section 2.3

[48] ACCC, 2012 Interim access determination for the wholesale ADSL service: Statement of Reasons, February, p.4

Figure 7 WADSL service schematics



Source: Telstra Wholesale

6.16 The current Telstra Wholesale charges for TWBGE product are as follows:

(a) 1Gbps BGE — **[CiC]**

(b) 20Mbps BGE — **[CiC]**

(c) VLAN — $32.31

(d) Install charge (10Mbps within TEBA) — **[CiC]**

(e) Install charge (1Gbps within TEBA) — **[CiC]**

6.17 The efficiency of the charges can be examined by comparing it to equivalent (or near equivalent) NBN Co charges. NBN Co charges:

(a) NNI (1000Base LX) — $200 per month

(b) CVC — $20 per Mbps per month

(c) NNI set-up — $1,000

6.18 The total monthly cost to provide the same 1Gbps capacity is as follows:[49]

(a) NBN — $20,242

(b) Telstra WADSL — **[CiC]**

6.19 The total monthly cost to provide the same 20Mbps capacity is as follows:[50]

[49] Apportion fixed fees across 24 month period.
[50] Apportion fixed fees across 24 month period.

(a) NBN — $642

(b) Telstra WADSL — **[CiC]**

6.20 The total Telstra WADSL cost is around **[CiC]** times the NBN Co charge when ordering 1Gbps capacity per month; but is almost **[CiC]** times the NBN Co charge when ordering 20Mbps capacity per month.

6.21 While it is difficult to make a direct comparison between the NBN Co NNI and TWBGE charges, Optus notes that the sum of the NNI and CVC charges and the TWBGE and VLAN charges are for similar services.

6.22 Optus reiterates that the key reason for the declaration of the WADSL service was to promote the LTIE during the transition to NBN:

> *The ACCC considers availability of wholesale ADSL services on reasonable terms while the NBN is being deployed as important to the development of effective retail-based competition in the medium to long term. This is primarily because regulated wholesale ADSL could potentially enable access seekers to effectively compete with Telstra for retail customers.*[51]

6.23 The fact that for a similar capacity backhaul service, Telstra Wholesale charges far in excess of the NBN Co charge warrants further investigation into the extent to which the non-regulated prices of the WADSL Declared Service are cost based and promote the LTIE.

6.24 As noted above, it is not immediately clear the extent to which the cost allocation in the amended FLSM included costs associated with assets that are also used to provide the TWBGE product. Optus notes Telstra's comments (as approved by the ACCC) that:

> *All parts of the ADSL network are necessary for the provision of Telstra's wholesale ADSL service, and the AGVC/VLAN charging components 'do not provide access to a specific part of the Telstra ADSL network, nor do they provide the carriage of DSL traffic over a defined network part'.*[52]

6.25 The FLSM utilised the cost allocation factors produced by Analysys Mason in its optimised network cost model. It would appear reasonable that all network assets utilised by WADSL would be included within the allocation factor (including the full cost of associated transmission and backhaul links). Optus submits that the ACCC seek additional information from Telstra to identify the extent to which the TWBGE charge relates to assets and costs not already included within the relevant core asset classes within the FLSM.

6.26 In summary, on the information available it appears that:

(a) The TWBGE was a charge not fully considered during development of the WADSL FLSM.

(b) All costs associated with assets utilised for the provision of WADSL have been allocated to either port of AGVC/VLAN charges within the FLSM.

(c) TWBGE is an additional non-regulated charge on top of the regulated WADSL charges. This may represent above cost recovery.

[51] ACCC, 2012, Declaration of the wholesale ADSL service under Part XIC of the Competition and Consumer Act 2010, Final Decision, February, Section 3.4.6

[52] ACCC, 2013, Public inquiry to make a final access determination for the Wholesale ADSL service, Final Decision, May, p.49

(d) WADSL charges (including TWBGE) are far in excess of similar NBN Co charges. This has the potential to limit the LTIE during transition to NBN — the key reason for the declaration of the WADSL service.