

Your ref:  
Our Ref:

Date: Tuesday, 15 July 2014

Ms Nicole Ross  
Australian Competition and Consumer Commission

By Email: Nicole.ross@accc.gov.au

Dear Ms Ross

**ACCC DTCS FAD Inquiry 2014: Non-price Terms and Conditions & Supplementary Prices**

In its position paper *Telecommunications Final Access Determinations Inquiries: Non-price Terms and Conditions & Supplementary Prices* dated 2 May 2014 (Position Paper) the ACCC raised Q2 as follows:

*Q2. 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.*

**Introduction**

Basslink Telecoms Pty Ltd (**Basslink**) operates a domestic transmission capacity service between Melbourne and Hobart (**DTCS**) which consists of both a land component and a submarine component. Relevant characteristics of the network include the following:

- The submarine component is 300km long and represents approximately half of the distance which makes up the Basslink network.
- On the Victorian land component, which represents 160km of the 300km land component, Basslink uses third party providers to offer DTCS services.

The only other carrier that is reliant on an undersea cable to provide the DTCS is Telstra. However, unlike Telstra, Basslink does not own its network from end-to-end having instead to rely on third party service providers. Also Basslink does not provide any other telecommunication services which help subsidise its DTCS service between Tasmania and the mainland. Basslink's DTCS business is a completely stand-alone telecommunications business offering a single wholesale product. The use of third party providers in conjunction with the operation of an undersea cable means that Basslink's business model is unlike that of any other DTCS provider in Australia.

Basslink makes the following submission in respect of Q2:

1. Basslink does not consider it necessary for a comprehensive suite of non-price terms of applicability to the provision of the DTCS by it to be included in the Final Access Determination for the DTCS (FAD), having regard to the matters set out in s152BCA.

In particular, Basslink does not consider this approach is necessary to promote the long-term interests of end users (LTIE), who have the right to use Basslink's DTCS, or the economically efficient operation of a carriage service, telecommunications network or facility.

This is because:

- o Telstra is a commercial and technical alternative to access seekers in the event that access seekers are unable to negotiate reasonable terms with Basslink, which in turn confers on access seekers countervailing power in their negotiations with Basslink. On this point see Basslink's previous submission to the ACCC dated 5 September 2011, in response to the ACCC Discussion Paper for a public enquiry into a final access determination for the DTSC (issued in June 2011).

Experience shows that Basslink and access seekers readily reach commercial agreement - i.e. negotiations are not 'hard fought', they are relatively expeditious and to Basslink's knowledge access seekers consider the outcome commercially acceptable - giving rise to a presumption that the terms negotiated by Basslink and access seekers for access to the DTCS are reasonable (having regard to the matters set out in s152BCA of the CCA).

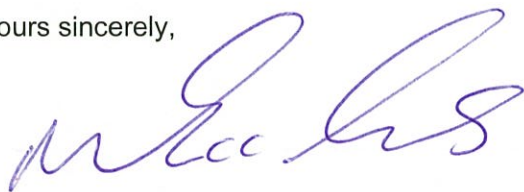
Basslink is happy to provide further information on a confidential basis on this point upon request.

2. It is impractical and adverse to the matters in s152BCA to include a comprehensive suite of non-price terms of applicability to the provision of the DTCS by Basslink in the access determination because:
  - o There is no 'one size fits all' set of reasonable terms for access to Basslink's DTCS. Basslink Telecoms customers are all different: while all are sophisticated users of transmission services, some are aggregators, some are wholesale customers and some are non-for-profit entities. Customers are willing to accept, and in fact demand, bespoke terms reflecting their individual preferred risk allocations and pricing that is referable to that risk allocation.
  - o Terms in a contract reflect the risk allocation that the parties are willing to accept. This risk allocation affects the price at which the parties are willing to transact. The inter-relationship between price and risk allocation by non-price terms means that the inclusion of such a suite of non-price terms in the FAD may deter commercial agreements pursuant to which access seekers accept additional risk, so resulting in a 'higher' price than would otherwise be the case, contrary to the LTIE (which, in the Appendix to the position paper, the ACCC recognises involves lower prices for access all else being equal).
  - o As the ACCC itself notes, the development of such a comprehensive suite of terms suitable for application to Basslink would involve more time for the ACCC and industry (see p9 of the Position Paper), and may result in less flexibility and so less ability to deal with a changing commercial environment (see p10). This in turn means such an approach would involve additional regulatory costs and may hinder commercial negotiation of bespoke arrangements that better promote the interests of Basslink and those persons with rights to use its DTCS, contrary to s152BCA(1)(b) and (c).
3. Accordingly, Basslink maintains that, if the ACCC is minded to specify a more comprehensive set of non-price terms in its access determination, it should confine their application to carriers and carriage service providers other than Basslink in accordance with s152BC(5) of the CCA. For

Basslink's DTCS, the applicable non-price terms in the FAD should be confined to those aspects where commercial agreement is less likely to result (i.e. the first option outlined by the ACCC in the Position Paper on p9).

If you have any queries on the above please do not hesitate to contact me.

Yours sincerely,



**Malcolm Eccles**

Chief Executive Officer

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