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Optus Submission

on

Telstra's Network Modernisation Clause

July 2006

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1. Overview

Clause 6 of the Telstra ULLS Undertaking deals with certain rights of Telstra in the event it pursues network upgrades (the "**Network Modernisation Clause**").

As identified in the ACCC Discussion Paper and the Draft Decision, the Network Modernisation Clause contains substantial amendments to the network modernisation clauses included in prior ULLS undertakings lodged by Telstra. The contractual rights sought by Telstra in the Network Modernisation Clause are unacceptable and would allow Telstra to use its significant market power to force competitors to concede valuable market share to Telstra and to undermine competition in the customer access network.

As the ACCC has noted in the Draft Decision, many aspects of the Network Modernisation Clause must be seen as directly referable to Telstra's announced proposals regarding fibre to the node deployment ("**FTTN**"). Such FTTN deployment would displace the DSLAM networks based on ULLS currently deployed or soon to be deployed by access seekers and would harm competition and the long term interests of end users. In this respect Optus refers the ACCC to the report "*A Competitive Model for National Broadband Upgrade*" dated 10 July 2006 prepared by The Allen Consulting Group and dandolopartners (the "**Allen Consulting Report**").

But even more evolutionary changes may present a significant adverse risk to DSLAM investments. Optus draws the ACCC's attention to a recent presentation Telstra tabled at ACIF announcing its plans for a wide ranging programme of network upgrades[1]. The Network Modernisation Clause seeks to ensure that Telstra achieves maximum flexibility to deploy FTTN or make other network changes and therefore undermine the broadband networks of access seekers.

The Network Modernisation Clause comprises a broad series of authorizations for Telstra to do whatever it deems appropriate in upgrading its network, regardless of the impact on its competitors and their end user customers. By framing the Network Modernisation Clause in this manner, and including it in an access undertaking (which if accepted would preclude an inconsistent access arbitration decision), Telstra is in effect requesting the ACCC to concede access regime regulatory oversight of an issue which is critical to the promotion of customer access network competition in Australia. The appropriate arrangements for network modernisation need to be developed in a considered consultative manner, over the longer term, and it is imperative that the ACCC should retain its ability to exercise its access arbitration powers in respect of network modernisation. The relevant terms should not be dictated by Telstra in an access undertaking.

In the absence of Telstra having significant market power in the provision of ULLS, the arrangements for ULLS access would not include the Network Modernisation Clause. In a competitive market, decisions to engage in network upgrades would be made fairly and appropriately, taking into account the interests of access seekers, and would seek to cause the minimum disruption and expense to access seekers and their

[1] Telstra presentation: Access Network Upgrade Notification Process: Briefing to the ULLS/Fibre Think Tank, 14 June 2006.

customers. The Network Modernisation Clause reflects Telstra's significant market power, as it allows decisions regarding network upgrades to be made unilaterally by Telstra, only taking into account Telstra's business interests and the interests of Telstra's retail customers.

Optus has already commenced an investment of over $150 million on a major, national, DSL roll-out, involving the installation of Optus DSLAMs in approximately 340 Telstra exchanges and fibre connections from exchanges back into the main Optus network. Optus has already expended a considerable amount of its planned investment on the development and implementation of this project. This investment will enable Optus to reach an additional 2.9 million households and businesses in Australia. Many other carriers are also making major investments in their DSLAM networks. The decisions to make such investments have been premised on ubiquitous and continuing access to Telstra's ULLS, on the basis of existing network configurations and equipment, and at prices determined in accordance with ACCC's pricing principles.

If the ACCC accepted the Network Modernisation Clause this would confer on Telstra complete control of where, when and how it deployed FTTN, without the need to have any regard to the impact of such activities on competition. The mere existence of such an unfettered power would fundamentally change the risk profile of access seekers investing in ULLS based broadband networks. As Telstra would have the power to "strand" those investments it is far less likely that access seekers would be willing to make them. Without such investments in competitive access networks, Telstra would not face serious competition in the provision of broadband access. Absent the threat of such competition Telstra would have a reduced incentive to make FTTN investments. Ironically, accepting the Network Modernisation Clause may actually become a disincentive to FTTN deployment.

The Network Modernisation Clause should not even be considered for inclusion in an access undertaking for ULLS as it simply authorises the termination or disruption of ULLS access without first establishing the terms of an FTTN based access product that may replace ULLS and also addressing related migration issues. Indeed, the only place that a network modernisation clause could even be reasonably considered would be as part of the complete terms and conditions for the supply of such a replacement access product. Only then would the ACCC be able to consider the manner in which ongoing competition could be supported. However, the Network Modernisation Clause allows Telstra to dismantle the foundations of customer access network competition before any alternative foundations have been established.

The Network Modernisation Clause goes well beyond what could be considered reasonable under section 152AH of the TPA. Telstra has not and could not ever satisfy its onus of affirmatively proving the reasonableness of the Network Modernisation Clause.

Accordingly, Optus submits that the ULLS Undertaking must be rejected by the ACCC as a result of the inclusion of the Network Modernisation Clause.

2. Essential elements to be included in a potentially acceptable network modernisation clause

If the ACCC did accept any form of network modernisation clause it would necessarily need to include at least the following elements:

- No network modernisation that displaces the ULLS should be authorized until such time as the ACCC and the industry have finalised all the terms of supply of a replacement FTTN access product, and those terms preserve an equality of opportunity to compete in downstream markets.

- Telstra's decisions to engage in network upgrade activities should be no more than is reasonably required to promote Telstra's legitimate business interests. Those decisions should specifically take into account the interests of access seekers and their end user customers and avoid or minimise any disruption to their services. In particular, network upgrades should not have any anti-competitive purpose or effect.

- A longer period of minimum notice of network upgrades should be given by Telstra to access seekers. The notice should also be required to include a range of detailed information to allow the access seeker to fully assess and respond to the proposed network upgrade.

- Telstra's internal retail units should not be given any greater opportunity than third party access seekers to adjust to a network upgrade. In particular, any minimum notice period should be extended by any additional period of notice given by Telstra to its internal retail units and access seekers should receive all the same information in respect of the network upgrade as Telstra's internal retail units.

- There should be extensive good faith negotiations between Telstra and access seekers in relation to any necessary upgrade and Telstra should observe the legitimate business interests of access seekers.

- Telstra should bear the costs of access seekers that are necessary to reconfigure their networks to continue to use the ULLS or to appropriately compensate access seekers if the use of ULLS is no longer economically viable.

- To the extent that there is any disagreement regarding the costs of reconfiguration or compensation, the timing of implementation of a network upgrade, and any systems changes to be made by the access seeker, then Telstra should not be allowed to make those changes until the relevant dispute has been settled by arbitration.

- The ACCC should retain the right to intervene and prevent a network upgrade where it is concerned that the network upgrade may disrupt the availability of competitive customer access networks or contravene the competition rule in Part XIB of the TPA.

3. The unacceptable elements of the Telstra Network Modernisation Clause

None of the above essential elements are included in the Network Modernisation Clause. The material adverse elements of the Network Modernisation Clause that Telstra requires access seekers to acknowledge and accept are as follows:[2]

- The "network upgrades" it authorises would include the removal, rearrangement, replacement (for example with fibre optic cable) or decommissioning of the copper local loop (clause 6.1(c)).

[2] Telstra ULLS Undertaking, 23 December 2005.

- A network upgrade may also include the installation of TCAMs closer to end user customers than a Telstra exchange building (i.e. the copper local loop may terminate in a cabinet in the street and fibre optic cable transmission capacity would then need to be used to serve that cabinet) (clause 6.2(a)).

- A network upgrade may require the truncation of ULLS provided from Telstra exchange buildings so that a new POI would then need to be established in the vicinity of a relevant TCAM (i.e. again confirming the displacement of copper local loop by optic fibre) (see clause 6.2(b)).

- A network upgrade may require the alteration of deployment classes and authorised equipment used by access seekers in respect of the Telstra ULLS (i.e. such authorised equipment may physically need to be changed) (see clause 6.2(b)).

- As a result of a network upgrade, a Telstra ULLS may no longer be supplied at all, or supplied at a reduced quality (clause 6.2(c)). An access seeker therefore has no ongoing guarantee of supply or quality of service.

- No consideration is given to the need to take into account the interests of access seekers in planning network upgrades or to engage with the access seeker in an effort to maintain the continuity of supply of ULLS in an economically efficient manner.

- The only protection given to access seekers is that Telstra will give not less than 15 weeks notice to affected access seekers in circumstances where the network upgrade is not an emergency network upgrade (see clause 6.3). However, it is entirely unclear what information is supplied in such a notice and the access seeker is not entitled to any level of consultation or any rights.

- "Emergency network upgrades" are excluded from the 15 week notice period and they include network upgrades required to protect the security or integrity of Telstra's network. Optus would be concerned that Telstra may argue that particular FTTN deployments improve network security or integrity, and therefore do not require any notice.

- Where a network upgrade requires an access seeker to take particular action to continue to use a Telstra ULLS, and the access seeker fails to do so within a time specified in the notice (and it is entirely unclear what period may be allowed by Telstra), or the network upgrade will result in the ULLS no longer being able to be supplied, then Telstra may terminate the supply of the service and the access seeker must hand back the customer to Telstra (see clause 6.4). As the ACCC has noted in the Draft Decision "it is in Telstra's interest to recover end-user customers from its competitors".

- In the event of such a network upgrade, the prices set by Telstra under the ULLS Undertaking will remain unchanged. Access seekers will bear all of the costs and effort of reconfiguring their own equipment and the cooper local loop supplied by Telstra will be economically unviable to access because of the need to use smaller more widely distributed POIs. Accordingly, even if ULLS access remains economically viable, access seekers would be required to acquire an inferior truncated cooper local loop that increases their own internal costs.

In short, provided Telstra gives 15 weeks notice of the relevant network upgrade it is authorised to do whatever it likes up to and including terminating the service and forcing the hand back of customers. The rights held by Telstra under the Network Modernisation Clause may render ULLS entirely ineffective as a declared service that supports competition in the customer access network. Its terms are specifically designed to authorise changes to the current and viable competitive networks of access seekers that will strand their investments in DSLAMs, substantially change the interconnection configurations for ULLS and make the process for achieving interconnection considerably less efficient and more costly. The "notice period" is largely window dressing since, for such network changes, there are no practical alternate access arrangements available.

The rights afforded to Telstra under the Network Modernisation Clause could be used to fundamentally undermine the Optus ULLS based broadband network. For example, Telstra would be entitled to give Optus 15 weeks notice that it was replacing part or all of the copper local loop at all the major exchanges served by Optus DSLAMs around Australia. Optus would then have only 15 weeks to take any necessary action to allow it to continue to use a truncated ULLS configuration or to hand back a customer. However, that action may involve a major network reconfiguration requiring the need to purchase and install replacement DSLAMs and to connect its own transmission capacity or lease transmission capacity from Telstra to connect the Optus network to the new POIs established by Telstra.

In such circumstances, Optus' broadband network based on ULLS would be substantially disrupted or rendered economically unviable. Of course such an outcome would motivate Telstra to exercise its rights under the Network Modernisation Clause in a manner designed to damage the ability of Optus and other competitors to compete with Telstra.

Notably, the Network Modernisation Clause does not observe the principles set down by the ACCC in its ULLS model terms and conditions, protections designed to deal with upgrades of less significance than a major FTTN rollout.

4. The ACCC cannot be satisfied the ULLS Undertaking is reasonable

In accordance with section 152BV of the TPA, the ACCC must not accept an undertaking unless, amongst other matters, the ACCC is satisfied that the terms and conditions specified in that undertaking are "reasonable", as determined under section 152AH (the "**Reasonableness Criterion**"). Optus submits that the ACCC cannot be satisfied that the ULLS Undertaking meets the Reasonableness Criterion if it includes the Network Modernisation Clause. An assessment of the Reasonableness Criterion is set out below in respect of the Network Modernisation Clause. A more detailed assessment of Telstra's FTTN proposal is set out in the Allen Consulting Report.

The consequences of accepting the ULLS Undertaking, and therefore the Network Modernisation Clause, would be to prevent the ACCC making any future determinations in access arbitrations for the term of the ULLS Undertaking that are inconsistent with that undertaking. Yet at this time, the ACCC cannot properly assess the costs and competitive impact of the rights held by Telstra under the Network Modernisation Clause. Moreover, the alternative access services that may be offered to access seekers are not fully understood or confirmed by contract or the regulatory environment.

While the overall access arrangements between Telstra and competitive carriers should address network upgrades, this must be done in a more balanced manner and, importantly, in a manner that does not restrict the powers of the ACCC to ensure the objectives of Part XIC are met. If the ACCC accepts the Network Modernisation Clause this would significantly constrain its arbitration powers under Part XIC of the TPA. In addition, while such a decision would not formally constrain the ACCC's powers under Part XIB, or the TPA more generally, Telstra will inevitability argue that the ACCC should not exercise its Part XIB powers in circumstances where the ACCC has approved the Network Modernisation Clause and Telstra is simply operating in accordance with its terms.

The long term interests of end users

Optus submits that the inclusion of any network modernisation clause in the ULLS Undertaking, and the terms of this Network Modernisation Clause in particular, will not promote the long term interests of end users ("**LTIE**"). While Optus does not dispute that network upgrades may be in the long term interests of end users, the unfettered rights sought by Telstra in the Network Modernisation Clause are certainly not in the LTIE.

Optus submits that the purpose and effect of the Network Modernisation Clause is to stifle competition, increase investment uncertainty for access seekers, and potentially, to enable Telstra to roll out FTTN in a manner that disregards (or is intentionally designed to damage) the interests of access seekers. The inclusion of the Network Modernisation Clause in the ULLS Undertaking undermines the very object of the declaration, namely, facilitating a competitive market. It places access seekers at a significant competitive disadvantage and in a position of significant investment uncertainty.

If the Network Modernisation Clause were to be accepted then the maximum protection afforded to access seekers is 15 weeks notice of a network upgrade that may render unviable any further use of a truncated ULLS configuration. The decision of when, where and how to undertake that network upgrade would be totally at the discretion of Telstra and its economic incentive would be to deploy FTTN in a manner that undermines the ability of access seekers to compete with Telstra.

The legitimate business interests of the carrier

Optus does not dispute that there may be legitimate business reasons for Telstra to engage in network upgrades in accordance with a procedure that appropriately protects competition. However, the Network Modernisation Clause gives Telstra contractual rights and protection from regulatory intervention that go well beyond any legitimate business interest.

The Network Modernisation Clause does not include any appropriate checks and balances to ensure that:

- decisions to engage in upgrade activities are made solely to promote Telstra's legitimate business interests;
- the interests of access seekers are taken into account and all reasonable efforts are made by Telstra to ensure that ULLS can continue to be provided with minimum disruption to access seekers and their customers; and

- there is a process in place to resolve any disputes fairly.

The Network Modernisation Clause does not limit its applicability to Telstra's pursuit of legitimate business interests and it could therefore sanction Telstra undertaking "upgrade" activities in a manner designed to damage competition. For example, Telstra may seek to physically displace part or all of the copper network where it deploys FTTN, in a manner that would frustrate access to the ULLS. Indeed, Telstra may follow a strategy similar to that adopted for the deployment of its HFC network, by giving priority to the rollout of the FTTN in those exchange serving areas in which Optus and other carriers have the highest customer penetration using ULLS.

A notice period that is as long as Telstra gives to itself cannot adversely affect Telstra's legitimate business interests. Neither can a requirement to consult, to make upgrades only where reasonably necessary and to observe the legitimate business interests of access seekers.

The interests of persons who have a right to use the declared service

In considering whether the Network Modernisation clause is reasonable the ACCC is required to take into account the interests of persons who have a right to use the declared service. Optus submits that the Network Modernisation Clause is entirely detrimental to the interests of access seekers.

The Network Modernisation Clause seeks to ensure that Telstra is able to deploy FTTN and displace ULLS, regardless of its impact on the access seekers that have installed DSLAMs and the end users that have acquired services from those access seekers.

Telstra will only ever give the minimum period of notice to access seekers and 15 weeks is patently insufficient for an FTTN deployment. Telstra will need to plan well ahead of this period and would therefore be withholding notice from access seekers until the last moment. Of course, throughout this period, Telstra's retail business units would be preparing for a known FTTN deployment and would be ready to target the end-user customers of access seekers whose services are disrupted by the network modernisation.

Whether or not FTTN or other significant changes to network configuration are made, the inclusion of the Network Modernisation Clause in and of itself would have a significant and detrimental effect on access seekers, because it would require all further investment decisions in respect of ULLS to be made in circumstances where any DSLAM deployed could be a redundant investment within 15 weeks. For many access seekers it is likely that such a high degree of investment uncertainty would make investments in their ULLS based broadband networks untenable.

Accordingly, the network modernisation process would be a powerful tool for Telstra to suppress access seeker investment and, if that investment is made, to disrupt and strand it and to force the hand back of customers.

Economically efficient use and investment

Optus also submits that the inclusion of the Network Modernisation Clause does not promote the economically efficient operation of a carriage service, telecommunications network or facility.

The Network Modernisation Clause significantly hampers the ability of access seekers to make investment decisions in relation to the provision of ULLS and therefore does not promote economic efficiency.

In addition to the stranding of DSLAMs, and the consequent waste of investments that has already been made by access seekers, a FTTN roll out could substantially change the interconnection configurations for ULLS and make the process for achieving interconnection considerably less efficient and more costly for access seekers.

Because the Network Modernisation Clause allows Telstra to dictate outcomes in a unilateral process, it neither provides any mechanism for consultation nor any principles designed to minimise inefficient economic impacts on the commercially efficient operation of the networks of access seekers. Access seekers are simply left to address the material adverse impact of the network upgrade as best as they can within the notice period and, if they cannot, then they must hand back their customers to Telstra.

Finally, Optus believes that Telstra regards the opportunity to disrupt its competitors customer access strategies as being of significant value. That is, Telstra's FTTN deployment is not solely motivated by efficient investment decisions, but by the value to Telstra of neutralising the competitive activities of access seekers. Such a motivation should be discouraged and Telstra's economic justification for any given FTTN deployment should be limited to a business case, based on a fair TSLRIC wholesale price. A business case based on Telstra's ability to discriminate a favour of its retail operations or to damage competitive initiatives of access seekers would not be a legitimate business interest or a factor that promoted economically efficient investment.

5. Comparable jurisdictions

Comparable provisions and regulatory requirements in other jurisdictions provide for the following:

- the preservation of appropriate powers of the relevant regulator;
- a longer minimum notice period;
- extensive requirements for the content of notices provided by an access provider in respect of network upgrades;
- access seekers are provided with all the details necessary to allow them to undertake the alterations necessary to continue their access arrangements and to be made properly aware of the potential implications of the network upgrade;
- a presumption that the access provider will pay the cost of alterations to the access seeker's network in order to allow the access service to continue;
- a specific process for the resolution of disputes between the parties in relation to network upgrades and interoperability; and
- in some cases, the access provider is prohibited from proceeding with the network upgrade until any disputes have been resolved.

An important aspect of the three regimes outlined below (ie United Kingdom, Canada and the United States) is that, to the extent that there are publicly identified procedures for dealing with the arrangements between carriers in relation to network upgrades and those arrangements do not seek to exclude the participation of the relevant regulators in the same manner as would be the case as a result of the acceptance of an access undertaking in Australia. Accordingly, while these regimes have established certain minimum periods for general network upgrades, they have not accepted an expansive network modernisation clause advocated by the incumbent that marginalises the relevant regulator in the same manner as an accepted access undertaking in Australia.

In addition, a comparable network modernisation clause must be considered in the context of the wider competitive and regulatory environment. For example, in the United States the historical structural separation between incumbent telecommunications carriers and cable television providers has meant that the control by incumbents of the customer access network is not as great as in Australia. Moreover, regimes such as the United Kingdom have given greater consideration to the development of next generation networks by the incumbent carriers and have implemented more significant regulatory controls.

United Kingdom

The relevant regime in the United Kingdom needs to be understood in the context of the existing reference offer ("**RO**") of British Telecom ("**BT**") in respect of wholesale services such as ULLS together with BT's undertakings given to Ofcom pursuant to the Enterprise Act 2002 ("**BT Undertakings**") as well as a range of consultations undertaken by Ofcom in relation to Next Generation Networks ("**NGNs**").

BT's RO is a document it developed in response to certain access principles, including its obligation to provide reasonable access. The relevant network upgrade provisions it includes were therefore proposed by BT as an outcome it considered reasonable, without the need to impose a more restrictive regime through regulatory mandate. It was not specifically developed for the purposes of such material network upgrades as a widespread FTTN rollout but to provide a scheme for significant but less material upgrades in the current generation network, such as major switch upgrades. Nevertheless, it is still significantly more balanced than the Network Modernisation Clause proposed by Telstra.

The provisions applicable to such network upgrades in the BT RO include the following material terms:[3]

- A minimum period of 7 months notice must be given prior to the network upgrade being implemented.
- The relevant notice must include all technical details of the alteration and the anticipated date of the network upgrade.
- After the original notice is given both parties must supply reasonable information to each other, on request, detailing the potential impact of the network upgrade on the other party's network.

[3] BT, (PECN) C7 Standard Interconnect Agreement, Issue 4.1, 23 August 2004.

- If there is a dispute regarding the network upgrade then it cannot be implemented until that dispute is resolved.

Under the United Kingdom arrangements the access seeker must respond within one month of receiving the notice of a network upgrade with a quotation for the cost of any alterations it is required to make. If the alterations it requires are agreed, then the parties will agree on a plan to implement the network upgrade within three months. If the access provider does not agree to the alterations or quotation provided by the access seeker, then the matter will be treated as a dispute. Importantly, the arrangements prohibit the access provider from implementing the relevant network upgrade until the dispute is resolved.

Ofcom has noted that, in order for BT to meet its obligations under the requirement to provide network access on reasonable request, periods of notification must be appropriate to their circumstances. If they are not, BT may be in breach of its obligations to provide network access reasonably. Ofcom has noted that BT's standard interconnection agreement provides for 7 month notification periods for major system alterations and changes such as the closure or modification of a switch and has indicated that BT should continue to use such notification periods for these major changes.

In the United Kingdom, the migration from ULLS to NGN is already subject to a variety of regulatory measures that will assist in protecting against anti-competitive outcomes. For example, the BT Undertakings require an equivalence of inputs for both the existing access products, such as ULLS, as well as equivalent products that may be offered in the context of an NGN. Operational separation in the United Kingdom is also a far more exacting regime than is proposed in Australia. Moreover, Ofcom specifically contemplates that access seekers will not be disadvantaged in the process of migrating from a legacy network to an NGN.

While Ofcom acknowledges that NGN access products will ultimately replace legacy network access products, it has acknowledged the need to have a defined path to get from the former to the latter without adversely impacting competition. For example, in its paper *Next Generation Networks: Further Consultation* dated 30 June 2005, Ofcom specifically noted that:

> *To enable business planning for alternative providers there initially needs to be continuity of existing SMP products (those products that BT is obliged to offer in markets where they have Significant Market Power), but we believe that this should only be for an interim period during which both legacy and next generation products are available. To ensure a timely move to next generation interconnect we propose that legacy products should be withdrawn once there is no longer reasonable demand or when next generation products provide an adequate replacement that providers are able to migrate to."*[4]

For major changes such as the migration to NGNs, Ofcom has indicated that it considers a consultation with the industry would continue to be the best way for BT to meet its obligations in relation to the provision of network access on fair and reasonable terms. In addition, access seekers consider that a technical change notified by BT is not consistent with its requirement to provide network access on fair and

[4] See paragraph 1.11

reasonable terms, it may have the option of referring the dispute to Ofcom for resolution or making a complaint regarding a breach of an SMP condition.

In other words, access seekers retain the right to seek an equivalent remedy to an access arbitration in Australia, precisely the remedy that Telstra seeks to avoid through inclusion of the Network Modernisation Clause in the ULS undertaking.

Canada

The Canadian telecommunications regulator, the Canadian Radio-television and Telecommunications Commission ("**CRTC**"), has recently issued a decision relating to the deployment of fibre network by incumbent local exchange carriers ("**ILECs**")[5]. ILECs must comply with the following process:

- The ILEC must provide network reconfiguration information to affected competitive local exchange carriers ("**CLECs**") at least 6 months prior to the planned implementation date of the network reconfiguration.
- Notices must include specified content including a general description of the reconfiguration; details of the affected areas; information for the CLEC detailing how the unbundled loops it uses will be affected and reasons why the reconfiguration cannot be accommodated without impacting a CLEC's network or customers.
- Where a CLEC alleges that a reconfiguration will have a "*discriminatory negative impact on its operations or customers*", and negotiations have failed between the parties, the CRTC will address each situation on an individual basis when brought to its attention by the affected competitor.

Importantly, the CRTC is of the view that where there is evidence of such a negative impact, there should be an obligation on the part of the ILEC to pay CLEC costs and it has stated that:

> *59. The Commission notes, however, that in some instances CLECs are customers of the ILECs for certain essential services. The Commission is of the view that since CLECs require these services to provide various telecommunications services to their own customers, changes to the ILEC's local network may result in the degradation or disruption of a CLEC's ability to serve its own customers and therefore, greatly disadvantage CLECs in a competitive environment.*
>
> *60. The Commission considers that the principles of continuity and reliability in services, non-discrimination, and parity of quality of service for CLECs, should govern the manner in which CLECs interconnect with the ILECs. The Commission is of the view that adhering to these principles during ILEC-initiated local network changes and reconfigurations will prevent CLECs from being placed at a financial and competitive disadvantage.*

[5] CRTC, Telecom Decision CRTC 2005-51, 9 September 2005.

61. *The Commission considers that there should be an obligation on the part of the ILEC to pay CLEC costs whenever the planned ILEC-initiated network reconfiguration has a discriminatory negative impact on CLEC operations or customers. The Commission is of the view that if such a negative impact exists when implementing an ILEC-initiated network reconfiguration, it would be more appropriate to address the issue of cost recovery of a network reconfiguration on a case-by-case basis.*

62. *In light of the above, the Commission determines that ILECs and CLECs are to bear their own costs with respect to a planned ILEC-initiated local network reconfiguration. However, when a CLEC alleges that a local network reconfiguration has a discriminatory negative impact on its operations or customers and negotiations between the CLEC and ILEC to settle the issue have failed, the Commission will address each situation on a case-by-case basis when brought to its attention by the affected party.*

Accordingly, the CRTC has noted that FTTN deployments can have discriminatory and negative impact and in such cases ILECs should bear the costs of affected CLECs.

United States

In addition to provisions made in bilateral Reference Interconnection Offers ("**RIOs**"), the US Federal Communications Commission ("FCC") rules require all ILECs to provide public notice of certain network changes.[6] These rules also heavily regulate the relevant notice requirements.
The relevant procedure in the United States may be summarised as follows:

- The applicable network changes under the retirement of copper loops and their replacement in whole or in part with fibre.
- The relevant RIO generally requires that the ILEC give "*reasonable notice*" of network upgrades consistent with the FCC rules[7]. The FCC rules then provide for a more involved system for determining the appropriate notice period.
- The FCC regulations set out specific content requirements. Among other things, the notice must set out the implementation date of the planned changes, an adequate description of the changes, and a description of the "*reasonably foreseeable impact of the planned changes*".
- Public notice must be given at the earlier of the date the rules define as the "make/buy point" and 12 months before the implementation. If the changes can be implemented within 12 months of the make / buy point, then public notice must

[6] See Part 51 of Title 47 of the Code of Federal Regulations (CFR).

[7] See for example SBC Texas, Interconnection Agreement - General Terms and Conditions, 25 August 2005.

be given at the earlier of the make/buy point and six months before implementation. If the changes can be implemented within six months of the make/buy point then it is possible to shorten the notice period if the ILEC complexes with special short term notice provisions.

- The make / buy point is defined as the "*time at which an incumbent LEC decides to make for itself, or to procure from another entity, any product the design of which affects or relies on a new or changed network interface*". If no such product is required to be procured, then the make/buy point is when the incumbent LEC "makes a definite decision to implement a network change".
- A "definite decision" is reached when an ILEC determines that the change is warranted and takes any action toward the implementation.
- Moreover, until such public notice is given, the ILEC may not disclose any information about the planned network changes to: "*separate affiliates, separated affiliates, or unaffiliated entities (including service providers or competitors)*".

Where the short term notice provisions allow for ILECs to give a shorter period of notice the following procedure is followed:

- The ILEC must serve the public notice on all access seekers that directly interconnect with the ILECs network.
- Notices of replacement of copper loops will be deemed final after 90 days, unless an objection is filed.
- An objection may be filed by any CLEC that directly interconnects with the ILECs network and must be filed within 9 business days of the notice. The objector must give good reasons for why they cannot accommodate the changes by the date stated in the notice and state the earliest possible date that the changes might be accommodated.
- The ILEC is required to respond to any objection within 14 days of the original public notice.
- If this response does not resolve the matter the FCC may determine a reasonable notice period. In relation to copper loop replacement, the incumbent may not proceed with the changes until either the FCC has determined a period or the 90 days has expired.

The FCC rules therefore address the situation where an ILEC seeks to give notice after the make/buy point. For example an ILEC makes a decision to proceed with a project that has a 12 month implementation period, but then gives a minimum period of notice even though longer notice could have been given. However, the scheme is sufficiently flexible to adjust to shorter periods for more minor network modifications, subject always to detailed notices and an opportunity for CLECs to respond.

The US regime is perhaps the most pro-incumbent to be found amongst the comparable jurisdictions, in large part because of the wider preponderance of competitive broadband networks resulting from the traditional separation of ILECs from cable television providers. Nevertheless it still provides a more attractive regime for fibre upgrades than that proposed by Telstra.

6. Conclusions

In none of the other jurisdictions has the incumbent carrier sought such a broad authorisation as Telstra that exhibits no mechanism for taking into account the interests of access seekers or their end users. Moreover, they have not requested an authorisation that has the same impact on the discretionary powers of the relevant regulator in the same manner as an accepted access undertaking under the Australian regulatory regime.