

Public Version of Telstra's Confidential Response to the Optus Submission to the Australian Competition and Consumer Commission on Telstra's ULLS Undertaking dated March 2006

A Introduction

- 1 On 23 December 2005, Telstra lodged with the Australian Competition and Consumer Commission ("**Commission**") two access undertakings in relation to the monthly charges for the Unconditioned Local Loop Service ("**ULLS Undertakings**").
- 2 On 31 January 2006 the Commission published its discussion paper in respect of Telstra's Undertakings for ULLS ("**Discussion Paper**"). In March 2006 Optus submitted a response to the Discussion Paper ("**Optus Submission**").
- 3 Telstra welcomes the opportunity to respond to the Optus Submission.

B Confidentiality

- 4 This submission has all of the confidential information deleted and thus may be disclosed publicly.
- 5 Telstra will provide this submission and the information contained in it to interested parties subject to those parties signing appropriate confidentiality undertakings and subject to Optus providing consent.
- 6 The confidentiality undertakings do not limit the extent to which interested parties, and the Commission, can analyse and comment on the content of this submission. Rather they are intended to prevent the distribution and use of the confidential material contained in this submission for purposes other than participating in the Commission's public inquiry relating to the Undertakings.

C Averaging ULLS Prices

- 7 In its Submission, Optus states that "*the retail pricing parity obligation will not impose any burden on Telstra*".¹ Optus provides no discussion around this comment

¹ Optus Submission, at page 5.

nor does it provide any evidence to support it. Telstra has demonstrated that the burden of deaveraged wholesale prices with averaged retail prices is high.²

8 Optus also submitted several arguments as to why averaged ULLS prices are inconsistent with the Long Term Interests of End Users (“LTIE”). However, Telstra considers that Optus’ arguments are incorrect for the following reasons.

9 First, Optus submits that its roll out of ULLS-based networks will not be as financially viable with averaged ULLS prices. Telstra submits that this conclusion is incorrect for the following reasons:

- While access seekers’ margins from services delivered over their ULLS-based networks in bands 1 and 2 might be reduced by averaged ULLS prices, this could only have a limited effect on their incentives to invest in those areas. In particular, the lower margins resulting from averaged ULLS prices will not likely result in access seekers reducing their roll-outs to a smaller geographic reach within band 1 and 2 areas. For example, as discussed in paragraph 167 in Telstra’s response to the Commission’s Draft Decision (“**Telstra’s Response**”), independent analysts have demonstrated that access seekers’ payback period for ULLS investments in bands 1 and 2 will increase from 11 months to just 14 months as a result of moving from deaveraged to averaged ULLS prices. Additionally, with averaged ULLS prices, Optus will continue to earn margins of \$77 per month for customers with voice and ADSL and \$37 per month for customers with only voice in bands 1 and 2 areas.
- Access seekers’ incentives to invest in Bands 3 and 4 would be increased by averaged ULLS prices as compared with deaveraged prices.
- Hence, on balance, access seekers are likely to continue to roll out to as many band 1 and 2 exchanges as they would have with deaveraged ULLS prices and, in addition, access seekers might roll out to some band 3 areas.

10 Second, Optus claims that a move to averaged ULLS prices would result in the stranding of access seekers’ investments. As discussed in the preceding

² See Telstra Response, Section G and *Telstra Regulatory Briefing Documents*, 1 December 2005.

paragraph, independent analysts demonstrate that averaging ULLS prices will delay access seekers' pay back periods in bands 1 and 2 by only 3 months. As such, access seekers will continue to recover the cost of their investments.

11 Third, Optus claims that moving away from pricing based on cost-causation will distort incentives for the efficient use of infrastructure. Telstra submits that this concern must be assessed in the context of Telstra's retail price parity obligations. Telstra addressed this issue in Section F of Telstra's Response.

12 Fourth, Optus claims that averaged ULLS prices would encourage inefficient infrastructure duplication in low cost areas and discourage efficient investment in higher cost areas. Telstra submits that:

- To the extent that ULLS price averaging encourages inefficient investment in low cost areas, the extent of this is likely to be small relative to the situation where ULLS prices are de-averaged. The reason for this is because, even when ULLS prices are deaveraged, the retail price parity obligation means that there is a margin between retail prices and the cost of supply, which might encourage inefficient investment. Averaging ULLS prices are, therefore, not likely to encourage significantly more inefficient investment than what is already encouraged.³ To the extent that more inefficient investment is more attractive, this will be only in the short run, since over the long run inefficient firms must compete with and are likely to be forced out of the market by efficient rivals that already exist in these areas (e.g. Optus HFC, wireless broadband, etc).
- ULLS averaging is not likely to further discourage competitive investment in high cost areas since there is unlikely to be bypass in high cost areas even with deaveraged ULLS prices, given Telstra's retail price parity obligations. Further, competition in high cost areas is much more likely to be encouraged by averaged ULLS prices. Indeed, it is likely to be non-existent with deaveraged ULLS prices.

³ Indeed, ULLS price averaging is likely to reduce the inefficiencies associated with averaged retail prices (see Section F.3 of Telstra's Response).

13 Fifth, Optus claims that averaged ULLS prices are likely to result in cherry picking. However, as Telstra discusses in section F of Telstra’s Response, cherry picking will arise when prices are deaveraged.

14 Sixth, Optus claims that averaged ULLS pricing could distort incentives for investment in alternative technologies in high cost areas. However, as discussed above, these types of distortions are caused by Telstra’s retail price parity obligations. Deaveraged ULLS prices would not remove these distortions. However averaged ULLS prices provide substantially more opportunity for ULLS-based competition.

D Appropriate cost recovery method for ULLS specific costs

15 Optus makes several claims in relation to the unitisation of ULLS specific costs over all CAN lines. Telstra considers that this method of cost recovery is not reasonable and is impractical, as set out in Section H of Telstra’s Response.

16 Optus also responds to Telstra’s submission that ULLS specific costs must be recovered from access seekers to ensure competitive neutrality.⁴ Optus argues that, to maintain competitive neutrality, such an argument could only apply to the variable or marginal costs of ULLS specific costs and not the fixed costs. Telstra submits that the assessment of the ULLS Undertakings must have regard to the long term – the period over which all costs are variable. Hence, to maintain long-run competitive neutrality firms must face the cost of all the resources they impose or cause to be imposed.

17 Optus also argues that access seekers do not cause ULLS specific costs, but that declaration does.⁵ However, this claim is flawed since:

- If ULLS was not declared, but Telstra supplied ULLS, it would still incur ULLS specific costs; and
- If ULLS was declared, but access seekers did not demand ULLS from Telstra (as was the case for conditioned local loop services), then Telstra would not incur ULLS specific costs.

18 Optus claims that recovering ULLS specific costs from access seekers only will result in Telstra keeping the benefits of efficiency. While this is itself is a factor

⁴ Optus Submission, at page 8.

⁵ Optus Submission, at page 8.

that promotes the competitive process (that is, competition is promoted when firms invest in being more efficient than other competitors on the basis that they can retain some of the benefits of those efficiencies), Telstra has demonstrated that it does not benefit from any such efficiency. In particular, Telstra's own ordering and provisioning costs are in the same order as ULLS specific costs.⁶

19 Optus claims that Telstra has an incentive to 'sabotage' rivals. Telstra has demonstrated that this is flawed in an earlier ULLS submission.⁷

20 Optus claims that Telstra has incentives to under-forecast demand for ULLS. The expert report of David Sappington demonstrates that Telstra has no such incentive, and neither do access seekers to over-forecast demand, when Telstra is allowed to recover previously unrecovered costs.⁸

21 Optus also claims that Telstra should be allowed to only partially recover its costs. Clearly such an approach is not in the LTIE as it would result in Telstra, and other competing network providers that also incur similar types of costs, not recovering those costs.

E ULLS network costs

22 In respect of Telstra's network costs and the PIE II model Optus refers to and relies on the following previous submissions and reports:

- n/e/r/a report, "Role of TSLRIC in Telecommunications Regulation", dated July 2003;
- n/e/r/a report, "Comments on PSTN Conveyance Costs in PIE II", dated March 2004;
- n/e/r/a report, "Assessment of the PIE II Model", dated July 2003;
- "Optus submission to ACCC on Telstra's PIE II Model", dated May 2006;
- "Optus submission to ACCC on Rural PSTN costs in Telstra's undertakings", dated March 2004;

⁶ Telstra Response, at paragraph 130.

⁷ See Telstra's Submission in Response to the *Commission's Draft Decision on Telstra's ULLS and LSS Monthly Charges Undertakings*, 23 September 2005, at Annexure F, Attachment A.

⁸ Expert report of David Sappington on *ULLS - specific cost and payment reconciliation* dated 28 July 2006; Telstra Response, at Section H.2.

- "Optus submission to ACCC on Telstra's Undertaking for Domestic PSTN OTA, ULLS and LCS", dated March 2004;
- "Optus submission to ACCC on Model price terms and conditions for PSTN, ULLS and LCS", Confidential version, dated May 2003; and
- "Optus submission to ACCC on Telstra's Undertaking for Domestic PSTN OTA, ULLS and LCS", dated August 2003.

23 In response to the above Telstra refers to and relies on:

- the expert report of Bridger Mitchell titled "ULLS Commentary on NERA/ Optus submissions", dated August 2006;
- section E of Telstra's Response; and
- previous submissions by Telstra responding to each of the above Optus submissions and reports. Telstra incorporates all of these submissions by reference in the context of the Undertakings. In that regard, Telstra is unable to re-provide those submissions to the Commission as it is bound by confidentiality undertakings to either destroy those submissions or not disclose them in any context other than in which they were originally provided to the Commission. However, the Commission has those submissions and should take account of them in the context of the Undertakings.

24 Telstra also notes that it requested from Optus a copy of the models referred to and relied on by n/e/r/a in its reports and by Optus in its various submissions. Optus did not provide those models to Telstra. Therefore, Telstra has not been able to review nor test the models relied upon and thus is not able to provide submissions in response to criticisms of the PIE II model to the extent that reliance is placed on those models. As such, no weight should be given by the Commission to any material which relies on those models.

F ULLS specific costs inputs

ULLS demand forecasts

25 In response to Optus' arguments regarding ULLS demand forecasts, Telstra refers to and relies on the statement of [c-i-c] dated 26 July 2006 ("**[c-i-c] Statement**").

- 26 Optus claims that Telstra will pocket windfall gains if demand forecasts are under-estimated. However, demand forecasts have not been under-estimated. Indeed, demand forecasts have been significantly over-forecast by the Commission and access seekers to the extent that Telstra must now recover previously unrecovered costs. Optus says that the ULLS Undertakings do not include any mechanism to prevent over recovery of costs and suggests an approach (at paragraph 5.54) such that “*the ULLS specific cost component is adjusted downwards as ULLS volumes increase*”. Optus would remember that, in a previous undertaking process, Telstra had proposed an adjustment mechanism for ULLS prices to account for uncertain demand forecasts. However, this was rejected by the Commission.
- 27 Even if demand forecasts for the period of the ULLS Undertakings turn out to be too low, then the matter of accounting for that over-recovery would be considered in ULLS pricing beyond the term of the ULLS undertakings.
- 28 Further, as noted above at paragraph 20, if Telstra is allowed to recover previously unrecovered specific costs this provides the right incentives for both Telstra and access seekers to accurately estimate demand.
- 29 Optus claims that Telstra estimates demand forecasts without any engagement with access seekers. This assertion is incorrect. In that regard, Telstra refers to and relies on the [c-i-c] Statement.

Capital expenditure

- 30 Optus claims that Telstra could and should have modified its existing systems to accommodate ULLS ordering and provisioning rather than build ULLCIS. In response, Telstra refers to and relies on the statement of [c-i-c] dated 28 July 2006 (“[c-i-c] Statement”). As set out in the [c-i-c] Statement, Optus’ claim indicates a lack of understanding of the approach adopted by Telstra in implementing [c-i-c]. As set out in the [c-i-c] Statement:

- [c-i-c]; and
- [c-i-c].

- 31 [c-i-c]

32 Optus goes on to say that the key development requirement for accommodating ULLS ordering and provisioning would be to build an interface gateway between Telstra and access seekers. Optus argues that the cost to develop such an interface should be no more than around \$300,000. [c-i-c]

33 [c-i-c]

34 Optus also refers to the Industry Number Management Service (“INMS”) interface system as a relevant benchmark in relation to the capital costs of a ULLS operating and provisioning system. However, as set out in ULLCIS Statement, the INMS is not a comparable system to ULLCIS. ULLCIS performs considerably more complicated tasks in handling end to end ordering and provisioning tasks.

Capital Expenditure Projects: 2004/05 and 2005/06

35 Telstra’s response to the claims made by Optus in respect of Telstra’s 2004 - 2006 expenditure is set out in the statements of [c-i-c] dated 28 July 2006, [c-i-c] dated 23 June 2006, [c-i-c] dated 25 July 2006 and the [c-i-c] Statement.

IT O&M

36 In response to Optus’ claims regarding the use of mid-range and main-frame systems, Telstra refers to and relies on the [c-i-c] Statement.

Front of House Connection Group

37 In response to Optus’ arguments in relation to the costs of the front of house connection group, Telstra refers to and relies on the statements of [c-i-c] dated 25 May 2005, [c-i-c] dated 26 July 2006 (“[c-i-c] Statement”) and the supplementary statement of [c-i-c] dated 4 August 2006.

38 Optus argues that economies will arise from bulk migrations, however, as set out in the [c-i-c] Statement, a separate group, [c-i-c] is responsible for ULLS managed network migrations. The costs of the [c-i-c] have not been claimed in respect of the ULLS monthly charges.

39 Optus further argues that “many of the activities that ULLS orders will initiate are largely covered in the separate connection charges levied by Telstra”. As set out in the [c-i-c] Statement, the [c-i-c]. As stated in the supplementary statement of [c-

i-c] dated 11 August 2006 (“[c-i-c] Statement”), ULLS specific costs, [c-i-c], are not recovered by Telstra as part of its connection charge.

Wholesale Product Management

40 Optus argues that wholesale product management costs should only include the costs attributable to functions that are “intended to assist access seekers to gain access to the services and to improve the quality of the service”. Optus argues that sales activities should not be included in these costs.

41 Telstra claims the costs of the equivalent of two full time product managers. However, as set out in the statements of [c-i-c] dated 2 August 2006 (“[c-i-c] Statement”) and [c-i-c] dated 21 July 2006 (“[c-i-c] Statement”) the activities of the product management group extend more broadly than those of the product managers. Whilst Optus claims that the costs of sales should not be included in the product management costs, Telstra submits that the functions identified in the [c-i-c] Statements fall directly within those category of costs said to be acceptable by Optus. That is, the functions of the ULLS sales team are intended to assist access seekers to gain access to the service. The ULLS activities of the sales staff and business operations managers include:

- meetings with prospective access seekers to establish the ‘best fit’ to the access seeker’s business requirements;
- negotiating and developing contracts and contract variations with each access seeker to meet their individual requirements;
- explaining to access seekers the technical issues contained in the contracts;
- meetings to negotiate and discuss provisions of the operational manuals, including physical process, IT processes, service provisioning processes, trouble report management and billing;
- contract maintenance meetings;
- dealing with access seeker disputes, including mediation;
- dealing with regulatory issues;
- establishing on-line interfaces to allow orders to be placed by customers using Telstra’s ordering and provisioning system;

- working with access seekers to establish required billing interfaces which are compatible with the billing product used by the access seeker;
- undertaking monthly service reviews with each access seeker; and
- dealing with escalated operational issues.

42 In addition to the above, the ULLS activities of the product managers, as set out in the [c-i-c] Statement, include:

- attending customer meetings in relation to pricing and technical issues;
- estimating demand forecasts;
- preparing details of proposed annual capital expenditure outlays;
- managing or assisting with development and implementation of ULLS projects, including projects designed to meet access seeker demands or improve efficiencies in the provision of ULLS;
- management of access seeker operational issues; and
- attending to access seeker requests.

43 Optus further states that any regulatory related activities of Telstra's ULLS product managers should be excluded as they are likely to "*involve tasks that are intended to protect or grow Telstra's overall profitability*". Telstra notes that if it was not supplying ULLS or if ULLS was not declared, Telstra would not be incurring these costs. Accordingly, it is entirely appropriate for Telstra to recover them.

44 Optus further claims that Telstra's ULLS product managers also work on other services such as the line sharing service ("LSS"). The activities undertaken by Telstra's product managers are described in the [c-i-c] Statement. As set out in his statement, [c-i-c] made enquiries of all of the members in his team who undertake ULLS related activities and he includes in his statement an estimate of the time spent by those people on ULLS related activities. These activities are distinct from LSS activities. To the extent that any activity may be undertaken for the purposes of both ULLS and LSS, only the ULLS component was included in the estimates in the [c-i-c] Statement and the statement of [c-i-c] dated 1 August 2006.

G Previously Unrecovered Specific Costs

45 Optus also comments (from paragraph 5.57 onwards) on the recovery of previously unrecovered costs. Telstra has demonstrated why this is reasonable in Section H.2 of Telstra's Response.

H Levelisation

46 Optus submits, at 5.58, that "*the appropriate cost recovery period for the ULLCIS was over ten years*".

47 Telstra's ULLS specific cost model does not levelise annualised ULLS specific costs during the undertaking period, however, this has little effect on the Undertaking ULLS prices for the following reasons:

(a) Telstra's Undertaking ULLS prices are \$30 over the undertaking period, regardless of variation from year to year in unit ULLS specific costs.

(b) Second, while annualised unit ULLS specific costs decrease over the undertaking period, this is outweighed by increases in network costs. Therefore, the total ULLS costs (network costs and specific costs) remain relatively stable over time.

48 Even if Telstra did levelise ULLS specific costs, it could not do so beyond the end of the undertaking period (30 June 2008). To do so would require Telstra to forecast additional specific costs required to provide ULLS beyond this time. The possibility of changes in the structure and amount of future ULLS specific costs beyond June 2008 means that any forecast of future costs would be speculative.

49 Optus also submits that "*even if the ACCC did accept that Telstra's past losses should be carried forward to future regulatory periods, Optus does not believe that they need necessarily be recovered in full during the period of the undertakings*".

50 Telstra recovers its previously unrecovered costs over the 2.5 year undertaking period.

51 Telstra submits that these costs have been unrecovered due to regulatory error arising from the Commission over-forecasting ULLS demand when setting model prices for ULLS. They have been unrecovered for a period of up to five years already. Hence, Telstra considers that there should be no further delay in their recovery, and a further 2.5 years is the maximum reasonable recovery period.

I Risk of double dipping by Telstra

52 Optus states that there is a risk that double dipping may occur between the charges in the ULLS Undertakings and Telstra charges for once-off ULLS related services. In response, Telstra refers to and relies on the [c-i-c] Statement.

53 At paragraph 32 of his supplementary statement, [c-i-c] states that the ULLS specific costs are not recovered by Telstra as part of the following charges: connection charge; call diversion; invalid request; service qualification; order withdrawal; late order withdrawal/retarget; change of deployment class; incorrect call-out; category D Port; and reversal of Category D Port.

J PSTN related costs

54 Telstra discusses why it is reasonable to recover the costs of its carrier of last resort obligations in section K of Telstra's Response.

K Network modernisation provisions

55 In the Optus Submission at paragraph 8, Optus submits that the network modernisation provisions included in the Undertakings are unreasonable because they are inconsistent with the reasonableness criteria set out in section 152AH of the Trade Practices Act 1974 (Cth) ("TPA"). In particular, Optus submits that those provisions fail to give regard to:

- (a) the rights of access seekers to continued use of the ULLS; and
- (b) broader issues in relation to the promotion of the LTIE.

56 Telstra responds to the Optus Submission in respect of network modernisation in the paragraphs below. Telstra notes that it has also responded to points raised in the Optus Submission in Telstra's submission in response to the Commission's Draft Decision.

57 Network modernisation (including upgrades and maintenance) has been occurring for the life of the Telstra network in order to meet changes in technology and the demands of Australian end-users for telecommunication services. More recent examples of network modernisation have been the replacement of copper with fibre optic cable (which began over ten years ago) and the enablement of exchanges and distribution areas to provide or augment broadband capability.

58 As ULLS is a technology-specific service (in that it applies where there is copper between an end-user premises and a customer access module (as that term is defined in the service description)), there is an obvious tension between the declared service and any network modernisation or Network Upgrade (as that term is defined in the Undertakings) activity by Telstra that affects Telstra's customer access network or CAN. Telstra highlighted this tension in its submission to the Commission at the time the ULLS was declared. Telstra notes that the Commission accepted in its final report on the declaration of the ULLS⁹ that Telstra should not be prevented from making changes to its network even though it may have reduced flexibility or be limited in the manner in which it changes its network because of the terms and conditions under which Telstra is supplying services to access seekers.

59 Optus submits that the issue of network modernisation has been overlooked in the assessment of past undertakings and that recent developments such as Telstra's announced fibre to the node ("FTTN") strategy and developments overseas means that this issue needs to be given due attention in the current consultation process.

60 Telstra is surprised at the suggestion that due to developments such as Telstra's FTTN announcements and overseas developments this issue must now be given due attention. Telstra submits that all industry participants have been aware for many years of the technological limitations of the legacy copper network (including interference issues) and the likelihood that the ULLS would be constrained or no longer available due to network modernisation. For Optus to suggest otherwise suggests that Optus never read the Commission's final report on the declaration of the ULLS.¹⁰

61 Telstra also notes that Telstra has been involved since August 2005 in reviewing and redrafting its network modernisation provisions in its standard access arrangements for the supply of the ULLS and other Telstra services in order to

⁹ Commission, *Declaration of local telecommunications services - A report on the declaration of an unconditioned local loop service, local PSTN originating and terminating services, and a local carriage service under Part XIC of the Trade Practices Act 1974 - July 1999*, at pages 89-90.

¹⁰ See, for example, *ibid* at page 90 where it was made clear in July 1999 that (i) Telstra was reducing the amount of copper in the network and linking RIMs/IRIMs to the Telstra exchange building by means of optical fibre; and (ii) where Telstra introduces a RIM, service providers would no longer be able to interconnect at the former exchange building and would need to interconnect at the street based housing containing the RIM.

update outdated terminology in the terms and conditions to reflect recent advances in technology and to expand on and better explain the notification process for notifying access seekers of network modernisation and upgrade activity - particularly network modernisation and upgrade activity that impacts on ULLS already being supplied by Telstra. Telstra refers to paragraphs 8 and 9 of the Statement of [c-i-c] (“[c-i-c] Statement”) in this respect.

- 62 Optus claims in its submission that the network modernisation provisions allow Telstra to push through changes to its network without due regard to access seekers rights to use ULLS.
- 63 Telstra accepts that access seekers have interests that need to be accounted for (such as needing time to move their DSLAMs or seek alternative services for their end-users). However, Telstra submits that it is for this reason that Telstra has undertaken to give not less than 15 weeks notice for network modernisation that will affect access seekers in the ways described in the Undertaking. Telstra notes that Optus describes this notice period as ill-defined but rejects this claim on the basis that it provides access seekers with a minimum of 15 weeks notice - except in the limited situations where there may be an emergency. Telstra submits that it is well accepted within the industry that where an emergency situation exists, the notice periods that would otherwise apply are unlikely to be appropriate. In this regard, Telstra refers to paragraph 74 of the Statement of [c-i-c] dated 4 August 2006 (“[c-i-c] Statement”) and paragraph 15 of the [c-i-c] Statement.
- 64 Optus further submits that because the proposed changes to Telstra’s network would proceed regardless of the impact on the access seeker, Telstra ultimately reserves the right to cancel an existing ULLS and therefore the proposed network modernisation provisions are contrary to the interests of access seekers rights to use the ULLS as a declared service. Telstra notes, however, that Telstra can only terminate the ULLS under clause 6.4 of Service Schedule x167 set out in Attachment A to the Undertakings where the access seeker chooses not to comply with particular action required to continue to use the ULLS or where the Network Upgrade will result in the ULLS no longer being able to be supplied.
- 65 Optus also claims that the network modernisation provisions give Telstra an unfettered right to contract out of its standard access obligations to provide the

declared service and that use of the proposed provisions is likely to undermine competition which would not promote the LTIE.

66 As noted in paragraph 60 above, when declaring the ULLS, the Commission specifically recognised that Telstra would not be prevented by the declaration from making changes to its network. Telstra notes that the constraints of any existing terms and conditions of supply specified by the Commission were:

- (a) time-based supply arrangements that take account of Telstra's network modernisation plans or network upgrade policy;
- (b) a process for the notification of network changes; and
- (c) a process for negotiating the establishment of a point of interconnection at the RIM/IRIM.¹¹

67 None of these examples provide the access seeker with the ability to prevent a network upgrade from proceeding.

68 Further, Telstra notes that when releasing its model terms and conditions in relation to the core services and, in particular, in relation to the relocation of telecommunication facilities, the Commission recognised that the model clauses were only to determine how much notice should be given and did not provide the access seeker a right of veto.¹² The Commission explicitly acknowledged that notwithstanding any negotiations between the parties, relocation will nevertheless proceed at the time specified by the access provider.

69 Telstra submits that by saying that Telstra should not have the ultimate right to terminate a ULLS in the circumstances described would effectively nullify any right that Telstra has to modernise its network in a way that has been clearly recognised by the Commission.

70 Telstra further submits that an access seeker does not have an absolute right to continual access to ULLS enforced via the application of the reasonableness criteria in section 152AH of the TPA that does not otherwise exist through the

¹¹ Commission, *Declaration of local telecommunications services - A report on the declaration of an unconditioned local loop service, local PSTN originating and terminating services, and a local carriage service under Part XIC of the Trade Practices Act 1974 - July 1999*, at page 90.

¹² Commission, *Final Determination - Model Non-price Terms and Conditions*, October 2003 at page 36.

standard access obligations in section 152AR of the TPA. For example, network modernisation may result in parts of the Telstra network no longer falling within the ULLS declaration and therefore not being subject to the standards access obligations. As the Commission is well aware, this is because ULLS is specific to the copper wire between an end-user premises and a customer access module.

71 On this basis, Telstra submits that the maintenance of the ULLS as an active declared service is therefore an irrelevant consideration for the purposes of section 152AH and rejects Optus' submission that any network modernisation provision should seek to ensure the continued supply of the ULLS or make alternative access services available.

72 In addition, Telstra does not accept that use of the proposed provisions would provide Telstra with an unfettered right to change its network for purposes that are improper as such conduct would in any event still be constrained by other laws (including Parts IV and XIB of the TPA).

73 Telstra submits that a restriction to modernise its network only when "absolutely" necessary would:

(a) be inconsistent with its rights to modernise its network that have been clearly recognised by the Commission on at least two occasions; and

(b) offer access seekers no additional protection against improper conduct.

74 In relation to Optus' submission that network modernisation would not be in the LTIE or that it would be anti-competitive, Telstra notes that Optus has provided no evidence to support this. Telstra strongly refutes the suggestion that merely because some end users of access seekers will be inconvenienced or disadvantaged in the short term as a result of Network Upgrades, that there will be any substantial lessening of competition or would not be in the LTIE. Telstra submits that, on the contrary, the network modernisation provisions encourage investment in underlying network infrastructure, allow a more efficient allocation of resources and will result in better quality and better choice of services for end-users. Further, Telstra submits that network modernisation provisions will always be in the LTIE regardless of the effect on the supply of the ULLS to access seekers due to the fact that Network Upgrades occur as a result of a need to:

- (a) enable or augment broadband capacity as a result of held orders for both retail and wholesale customers and projected demand;
- (b) augment or reallocate narrowband capacity as a result of held orders for both retail and wholesale customers and projected demand and in order to meet obligations under the Telecommunications (Consumer Protections and Services Standards) Act 1999 (Cth), including the Customer Service Guarantee and Universal Service Obligation; and
- (c) repair Telstra's network in order to sustain current levels of broadband and narrowband capacity and quality of service for both retail and wholesale customers.

75 In this regard, Telstra refers to paragraphs 64 to 70 of the [c-i-c] Statement.

Dated: 17 August 2006