

## **Telecommunications Final Access Determination inquiries**

### **— Non-price terms and conditions and connection charges for fixed line services**

**Submission by iiNet in response to ACCC Draft Decision of 25 March 2015**

**Public Version**

## 1. INTRODUCTION

The Australian Competition and Consumer Commission (**ACCC**) is currently undertaking public inquiries into making new final access determinations (**FADs**) for:

- the six fixed line services<sup>1</sup>;
- the Wholesale ADSL service (**WDSL**);
- the Domestic Transmission Capacity Service (**DTCS**); and
- the mobile terminating access service (**MTAS**),

**(the Declared Services).**

The current FADs for the Declared Services specify certain price and non-price terms and conditions. The ACCC has divided the price terms into two categories:

- **Primary prices** - these are charges for direct use of the services, that is:
  - the monthly access prices for the ULLS, LSS, WLR and wholesale ADSL port service;
  - the usage charges for the LCS, MTAS, FOAS and FTAS and wholesale ADSL AGVC service; and
  - the annual charges for the DTCS.
- **Supplementary prices** - these refer to additional charges incurred in using the services, for example, connection and disconnection charges.

Due to the complexity and number of issues involved in determining the primary prices for the Declared Services, the ACCC decided to consult separately on:

- the primary prices for the Declared Services; and
- the non-price terms and supplementary prices for the Declared Services.

In May 2014 the ACCC issued a position paper entitled: *Telecommunications Final Access Determination inquiries – non price terms and conditions and supplementary prices Position Paper (the Position Paper)*. iiNet provided a response to the Position Paper which set out iiNet's views in response to the issues raised in the Position Paper (**the Position Paper Submission**).<sup>2</sup>

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<sup>1</sup> These are: the Local Call Service (**LCS**), Line Sharing Service (**LSS**), Fixed Originating Access Service (**FOAS**), the Fixed Terminating Access Service (**FTAS**), the Unconditioned Local Loop Service (**ULLS**) and the Wholesale Line Rental Service (**WLR**).

<sup>2</sup> That submission was provided by Thomson Geer lawyers on behalf of iiNet.

On 30 October 2014 the ACCC issued a Discussion Paper which sought input from stakeholders on issues relating to non price terms and conditions (**the Discussion Paper**). iiNet provided a response to the Discussion Paper which set out iiNet's views in response to the issues raised in the Discussion Paper (**the Discussion Paper Submission**).

On 8 December 2014 the ACCC sent an email to a number of industry participants, including iiNet, that requested comments on the drafting of certain non price terms and conditions (**the Information Request**). iiNet provided a response to the Information Request which set out iiNet's views in response to the issues raised by the Information Request (**the Information Request Submission**).

On 25 March 2015 the ACCC made a draft decision on the non price terms and conditions for the Declared Services and for connection charges for the ULLS, LSS and WDSL (**the Draft Decision**). The ACCC released a draft FAD with the Draft Decision (**the Draft FAD**). The ACCC is seeking submissions in response to the Draft Decision. iiNet welcomes the opportunity of responding to the Draft Decision. iiNet's comments in response to the Draft Decision are set out in this submission.

Please note this submission contains confidential information which has been marked as [c-i-c] and highlighted in yellow.

## 2. OVERVIEW OF THIS SUBMISSION

iiNet makes the following points in response to the Draft Decision:

- iiNet acknowledges and agrees with the ACCC's reasons for not making a comprehensive FAD, and iiNet is, in broad terms, and subject to the comments in section 3 of this submission relating to drafting issues, comfortable with the non price terms (**NPTs**) included in the ACCC's Draft FAD. However, in iiNet's view, the ACCC's proposed approach to making a targeted FAD does not promote the LTIE as well as an approach based on the 'reference offer model' previously suggested by iiNet. This issue is considered further in section 4 below.
- iiNet welcomes the ACCC's decision to update the relevant costs models for connection charges for the ULLS and the LSS and to use the updated cost model to set connection charges for the WDSL. iiNet also welcomes the ACCC's decision to engage a technical consultant (UXC Consulting (**UXC**)) for that purpose. However, iiNet is concerned that the updating of the relevant costs models may have been done without having regard to possible changes to relevant Telstra processes. This issue is considered further in section 5 below.
- iiNet welcomes and supports the ACCC's decision not to allow Telstra to impose an LSS disconnection charge or an early termination charge for the WDSL. However, iiNet believes that the ACCC needs to give consideration to what is required to give legal effect to that decision. The ACCC should also consider back dating its decision in respect of the LSS disconnection charge. The issues relating to disconnection charges are considered further in section 6 below.

- iiNet submits that there is an urgent need for the ACCC to make regulated prices for TEBA rack and power services. This issue is considered further in section 7 below.
- iiNet submits that the ACCC should reconsider its draft decision not to set a connection charge for WLR. This issue is considered further in section 8 below.

### 3. DRAFTING COMMENTS ON THE NPTS INCLUDED IN THE DRAFT FAD

iiNet makes the following comments as regards the drafting of the NPTs included in the Draft FAD.

#### **Billing and notification**

iiNet questions the need to amend clause 3.14 in the way it has been amended in the Draft FAD. iiNet believes that commercial realities will lead to access seekers notifying billing disputes promptly rather than deliberately delaying the notification of a billing dispute simply because they may be able to claim interest on any over payments. However, if the ACCC is minded to amend clause 3.14 to remove any perceived possibility of access seekers deliberately delaying the notification of a billing dispute, iiNet suggests that, as a matter of drafting, it would be appropriate to insert the word 'reasonably' before the word 'practicable' so that clause 3.14 reads as follows (emphasis added):

*A Billing Dispute Notice must be given to the Access Provider in relation to a Charge, as soon as **reasonably** practicable after the Access Seeker becomes aware a Billing Dispute exists, and within six Months of the invoice for the Charge being issued in accordance with clause 3.6.*

iiNet believes that insertion of the word 'reasonably' is appropriate so that it is clear that an access provider will not be able to argue that an access seeker should be barred from raising a billing dispute due to a delay in notifying a billing dispute in circumstances where it was not reasonable for the access seeker to notify the billing dispute sooner than it did.

#### **Confidentiality provisions**

As stated in the Information Request Submission, iiNet has no objections to the FAD terms permitting Telstra to disclose access seeker confidential information to a government or regulatory authority where it is necessary for Telstra to meet an obligation under its SSU (or any other legal obligation) provided that Telstra notify:

- the relevant access seeker that the information has been disclosed; and
- the recipient of the information that the information is confidential information of the access seeker.

Given iiNet's views as expressed in the Information Request Submission, iiNet is concerned with the drafting that has been included in new clauses 6.5(j) and (k) because Telstra is permitted to disclose an access seeker's confidential information not only where Telstra is obliged to but also pursuant to any request from a government or regulatory authority that

relates to the SSU or interception capability. iiNet submits that a requirement that Telstra notify the access seeker of the disclosure is an important safeguard so that any disclosures pursuant to a request from a government or regulatory authority can be subject to appropriate scrutiny to avoid any abuse of this power to disclose. In this regard it should be noted that a requirement to notify the other party of a disclosure is also a common requirement where disclosure is required by law (as is the case under clause 6.5(e) of the Draft FAD). Therefore, if it is appropriate to require notification of disclosure where disclosure is required by law (as in the case of clause 6.5(e)), it is all the more appropriate that notification be required where disclosure takes place pursuant to a mere request by a government or regulatory body. That said, iiNet acknowledges that in the case of routine disclosures under reporting obligations under the SSU, a requirement that Telstra notify the access seeker may not be necessary (noting that clause 6.5 of the Draft FAD carves out the requirement for notification of disclosure in respect of disclosures pursuant to section 152BEA of the Competition and Consumer Act 2010).

In light of the above comments, iiNet suggests that the relevant circumstances in which Telstra is permitted to disclose access seeker confidential information under new clauses 6.5(j) and (k) be broken down further so that new clauses 6.5(j) and (k) are replaced with the following clauses 6.5(j), (k) and (l):

*(j) in accordance with a reporting obligation in connection with the Access Provider's Structural Separation Undertaking, provided that:*

- i. the Access Provider cannot comply with the reporting obligation without making the disclosure; and*
- ii. prior to disclosing the Confidential Information of the other party the Disclosing Party informs the relevant person or persons to whom disclosure is to be made that the information is the confidential information of the other party.*

*(k) in response to a request from a regulatory authority or any other Government body, in connection with the Access Provider's Structural Separation Undertaking, provided that prior to disclosing the Confidential Information of the other party the Disclosing Party informs:*

- i. the other party as soon as reasonably practicable after receiving the request for disclosure that the Disclosing Party has received the request for disclosure and the Disclosing Party intends to comply with the request for disclosure; and*
- ii. the relevant person or persons to whom disclosure is to be made that the information is the confidential information of the other party.*

*(l) in response to a request from a regulatory authority or any other Government body in connection with interception capability (as that term is used in Chapter 5 of the Telecommunications (Interception and Access) Act 1979 (Cth)) relating to access to a declared service, provided that prior to disclosing the Confidential Information of the other party the Disclosing Party informs:*

- i. *the other party as soon as reasonably practicable after receiving the request for disclosure that the Disclosing Party has received the request for disclosure and the Disclosing Party intends to comply with the request for disclosure; and*
- ii. *the relevant person or persons to whom disclosure is to be made that the information is the confidential information of the other party.*

### **Suspension and termination**

iiNet acknowledges why the ACCC has included new clause 7.5A in the Draft FAD. However, iiNet's view is that the inclusion of new clause 7.5A into schedule 7 appears anomalous because schedule 7 is concerned with the circumstances in which an access provider is permitted to suspend or terminate a declared service. Given that the access provider has a statutory obligation to supply the declared service, it is appropriate that the FAD deal with the circumstances in which an access provider can suspend or terminate a declared service. In contrast, given that an access seeker has no statutory obligation to acquire a declared service (or acquire a declared service for any minimum period of time), new clause 7.5A appears to have little, if any, utility. Therefore, rather than just including new clause 7.5A, the ACCC may wish to consider including a separate schedule that sets out the circumstances in which an access seeker is permitted to cease to acquire the declared service. In light of the fact that an access seeker has no statutory obligation to acquire a declared service (or acquire a declared service for any minimum period of time), any such schedule of the FAD would have to include a right to terminate on a reasonable period of notice (e.g. 30 days).

### **Recourse to regulated terms**

iiNet welcomes the inclusion in the Draft FAD of terms that deal with recourse to regulated terms. However, in iiNet's view the inclusion of schedule 14 of the FAD would be more effective if the access provider was obliged to offer the terms in this schedule to access seekers under a 'reference offer model'. This issue is discussed further in section 4 below.

Furthermore, as a matter of drafting, iiNet submits that it should be made clear that clause 14.2 is subject to the standard access obligations (i.e. so that if an access agreement is terminated pursuant to clause 14.2, the access provider will still, nevertheless, continue to have an obligation to supply the service without interruption). This could be achieved by making clause 14.2 subject to the following new clause 14.3:

*For the avoidance of doubt, the exercise of the right of termination by either party under clause 14.2 does not permit an access provider to suspend, interrupt or terminate the supply of a declared service in circumstances where the Access Seeker has requested supply of the declared service to continue under the terms of an access determination, binding rules of conduct or replacement access agreement.*

**4. THE ACCC'S PROPOSED APPROACH TO MAKING A TARGETED FAD DOES NOT PROMOTE THE LTIE AS WELL AS AN APPROACH BASED ON THE 'REFERENCE OFFER MODEL' PREVIOUSLY SUGGESTED BY IINET**

iiNet supports the ACCC's decision to include terms and conditions in the Draft FAD relating to the following:

- billing and notification;
- creditworthiness and security;
- general dispute resolution;
- confidentiality (including disclosure of confidential information to regulatory bodies);
- communication with end users;
- suspension and termination;
- changes to operating manuals;
- liability (risk allocation) and indemnity;
- network modernisation and upgrade notice periods;
- resale services (WDSL only);
- ordering and provisioning processes (managed network migrations and ULLS to LSS transfer) (for ULLS and LSS only).

(for ease of reference referred to collectively as **the Included NPTs**).

In broad terms, and subject to the comments about drafting in section 3 above, iiNet is comfortable that the Included NPTs represent reasonable terms of access which appropriately balance the interests of the access provider and the access seeker and which, thereby, promote the LTIE. iiNet notes that the Included NPTs address a targeted set of subject matter rather than provide a comprehensive set of terms and conditions of access.

As regards the option of making a comprehensive FAD, iiNet notes that the ACCC states the following in the Draft Decision:<sup>3</sup>

*The evidence provided by industry to date has varied and does not at this point suggest a widespread problem of sufficient magnitude to warrant a more interventionist regulatory response (such as a FAD which sets out a comprehensive set of all terms and conditions of access), which would represent a significant regulatory burden on both industry and the ACCC in developing consulting on and ensuring compliance with such a FAD.*

iiNet agrees that developing a comprehensive FAD that is fit for purpose and which will remain fit for purpose would represent a significant task that would impose a significant regulatory burden, and iiNet agrees that a targeted FAD is more appropriate under the current circumstances.

On the assumption that:

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<sup>3</sup> Draft Decision Executive Summary, at p.v.

- the existence of regulated NPTs are important to the promotion of the LTIE; and
- the ACCC has rejected the option of making a comprehensive FAD,

the question that needs to be considered is what model of targeted FAD the ACCC should adopt. As discussed in the Discussion Paper Submission, it is possible to distinguish between the following targeted FAD models:

- The ACCC includes non price terms on a limited number of subject matter. The FAD does not include an obligation on the access provider to incorporate the FAD terms into its standard offer (**the Narrow Model**).
- The ACCC includes non price terms on a limited number of subject matter. The FAD includes an obligation on the access provider to incorporate the FAD terms into its standard offer (**the Reference Offer Model**).

It should be noted that the Reference Offer Model as described above cannot properly be categorised as a comprehensive FAD because it does not include a complete set of terms and conditions. The Reference Offer Model does not, therefore, impose the same level of regulatory burden as a comprehensive FAD because it does not require the ACCC to turn its mind to, and impose on access providers, a complete set of access terms.

In iiNet's opinion the Reference Offer Model represents less overall cost to industry than the Narrow Model. The relevant types of cost to industry are set out in the table below:

Model Type	Cost to ACCC of making targeted FAD	Cost to access seekers of achieving an access agreement that is consistent with the NPTs	Cost to access provider of complying with FAD
Narrow Model	Cost of consulting on and drafting the targeted terms	Cost of reviewing the access provider's standard offer and ascertaining if it is consistent with the NPTs. Cost of negotiating with the access provider to obtain changes to the access provider's offer to ensure that the access agreement will be consistent with the NPTs.	Cost of negotiating with access seekers who request changes to bring the standard terms into line with the NPTs. Cost of making amendments to the standard offer terms to create an access agreement that is consistent with the NPTs.
Reference Offer Model	Cost of consulting on and drafting the targeted terms. <sup>4</sup>	None	Cost of drafting reference offer

<sup>4</sup> Note the terms of access included in the FAD will be the same as under the Narrow Model. The only difference is that the Reference Offer Model FAD will include an obligation on the access provider to incorporate the NPTs within the access provider's standard offer.



In iiNet's view, a fundamental advantage of the Reference Offer Model is that it removes from industry the costs of negotiation that would otherwise be required to achieve an access agreement that is fully consistent with regulated NPTs. Although iiNet acknowledges that moving to a Reference Offer Model may involve a one off cost to access providers of redrafting current standard offers to incorporate the NPTs, this cost will be short term and is likely to be outweighed by the avoidance of the costs of negotiation that would otherwise arise from an access seeker's desire to achieve an access agreement that is fully consistent with the NPTs. Furthermore, the cost of developing and updating standard contractual terms is a cost that access providers will incur in any event.

In iiNet's view, another fundamental advantage of the Reference Offer Model is that it will avoid the following mischief identified by the ACCC in the Draft Decision:<sup>5</sup>

*However, the ACCC is aware from its review of the access agreements lodged with it under s152BEA (now amended), that access agreements may include clauses that could have the effect of entirely excluding the application of current and future regulated terms during the life of the agreement. Whilst acknowledging that these access agreements are commercially negotiated between the parties, the ACCC is nonetheless concerned that such clauses have the potential to prevent regulated terms applying to 'fill the gaps' in commercial agreements during the life of the agreements and are at odds with the underlying premise behind the Part XIC telecommunications access regime.*

Although inclusion of the 'regulatory recourse' terms in Schedule 14 of the Draft FAD (**the Regulatory Recourse Terms**) may go some way to alleviating this mischief, it does not solve the problem entirely because an access provider is free to develop a standard offer that does not include the Regulatory Recourse Terms. This means that if an access seeker is not alive to this issue or is unable to negotiate the Regulatory Recourse Terms into its access agreement, the access seeker may simply accept or be given the access provider's standard offer and, thereby, be locked out of relying on regulated terms notwithstanding the inclusion of the Regulatory Recourse Terms in the FAD. In contrast, the Reference Offer Model would avoid this mischief entirely because it would require the access provider to incorporate all of the Included NPTs (including the Regulatory Recourse Terms) into a reference offer that the access provider is legally obliged to make available to access seekers.

iiNet submits that an approach that achieves the following outcomes:

- reducing the cost to industry of achieving access agreements that are consistent with regulated NPTs; and
- removing any potential for access seekers to be inadvertently locked out from regulated NPTs,

would better promote the LTIE than an approach that does not achieve these outcomes but is in all other respects the same. Therefore, on this basis, iiNet submits that the Reference Offer Model would better promote the LTIE than the Narrow Model.

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<sup>5</sup> Draft Decision, at p.7.

Accordingly, iiNet submits that the ACCC should vary the Draft FAD by including an obligation that requires the access provider to develop a standard offer that incorporates the Included NPTs. Specific drafting suggestions to achieve this were included in the Information Request Submission.<sup>6</sup>

**5. THE UPDATING OF THE RELEVANT COSTS MODELS MAY HAVE BEEN DONE WITHOUT HAVING REGARD TO POSSIBLE CHANGES TO TELSTRA'S RELEVANT PROCESSES**

iiNet notes that the costs models for the LSS and ULLS connection charges were last updated in 2007 and 2008 respectively.<sup>7</sup> iiNet welcomes the ACCC's decision to update the relevant costs models. iiNet notes that the relevant costs models include inputs to account for Telstra's back of house costs, and iiNet also notes that accounting for those back of house costs includes calculating the cost of processes used by Telstra's Data Activation Centre (DAC) and Integrated Deployment Solutions (IDS). For ease of expression, the relevant DAC and IDS processes that were considered when the relevant costs models were last updated in 2007 and 2008 will be referred to collectively as the **Relevant Telstra Processes**.

iiNet is concerned that the updating of the relevant costs models by UXC may have been done without having regard to possible changes to the Relevant Telstra Processes. iiNet's concern is based on two statements in UXC's report. Firstly, UXC states (emphasis added):<sup>8</sup>

*Telstra advised informally that the DAC and IDS (i.e. the back of house costs in the 2008 model) are now known by different terms. The processes and systems contained in the Telstra Wholesale SSU webpage describe Telstra's current back of house processes. **However it is unclear from those descriptions what the new terms are, and at the time of writing this report Telstra has not provided any further information on those new terms or how those changes map to the previously named and described DAC and IDS processes or costs.***

In iiNet's view, this statement suggests that there is a basis to suspect that the Relevant Telstra Processes have been overhauled. If, in fact, the Relevant Telstra Processes have been overhauled, iiNet believes that any gains in efficiency should be taken into account when updating the relevant costs models. However, it appears that Telstra has not been required to confirm whether or not there has been any streamlining or other efficiency gains relating to the Relevant Telstra Processes since the Relevant Telstra Processes were last considered.

Secondly, UXC states (emphasis added):<sup>9</sup>

*Further in this regard, based on the descriptions of the activities for single LSS connections and single ULLS connections, **and in the absence of direct information on DAC activity time for LSS**, we have formed the view that it would be reasonable*

<sup>6</sup> See section 4.2 of the Information Request Submission.

<sup>7</sup> UXC Consulting - Technical Advice on connection charges for the ULLS, LSS and WADSL services: Initial Report (Public Version) Australian Competition & Consumer Commission – 12 March 2015, at p.4.

<sup>8</sup> *ibid*, at p. 12.

<sup>9</sup> *ibid*, at p. 21.

*to use the same DAC activity time for single LSS connections for single ULLS and wholesale ADSL connections.*

This conclusion appears to have been based on an assumption about DAC processes in circumstances where, iiNet respectfully submits, it would be reasonable to make inquiries of Telstra in order to confirm what the position is.

## 6. LSS DISCONNECTION CHARGES AND EARLY TERMINATION CHARGES FOR THE WDSL

iiNet has previously raised concerns about the LSS disconnection charge and WDSL early termination charge (**the Disconnection Charges**) on the basis that the imposition of the Disconnection charges by Telstra has the potential to seriously harm competition and the LTIE.<sup>10</sup> Accordingly, iiNet welcomes and supports the ACCC's draft decision not to allow Telstra to impose the Disconnection Charges. iiNet notes that as regards implementation of the ACCC's decision not to allow Telstra to impose the Disconnection Charges, the draft FAD includes the following note:

*Note: the ACCC's draft decision is not to allow Telstra to impose ULLS or LSS disconnection charges or an early termination charge for the wholesale ADSL service.*

If the ACCC's draft decision not to allow Telstra to impose the Disconnection Charges is included in the reasons that accompany the new FADs, iiNet would fully expect Telstra to abide by that decision. However, in strict legal terms, if the FAD does not include any operative terms about the Disconnection Charges, then it may still be legally permissible for Telstra to include those charges in Part B of Telstra's Rate Card (or otherwise seek to impose those charges on the basis that they are not subject to regulation).

Therefore, in order to ensure that the ACCC's decision not to allow Telstra to impose the Disconnection Charges will have full legal effect, iiNet submits that the ACCC should do either of the following:

- include an operative term in the FAD that prohibits Telstra from imposing the Disconnection Charges; or
- include the Disconnection Charges in the FAD but set them at \$0.

iiNet also wishes to stress that in addition to UXC's findings in relation to the LSS disconnection charge and the WDSL early termination charge, preventing Telstra from recovering those charges is also justified in circumstances where the relevant service is disconnected due to the migration to the NBN.<sup>11</sup>

As regards the LSS Disconnection Charge, iiNet notes that UXC has concluded that the relevant disconnection activities are undertaken as part of contemporaneous connection activities.<sup>12</sup> Given that Telstra imposes a connection charge to recover the cost of the relevant connection activities, it appears to iiNet that the imposition by Telstra of a LSS

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<sup>10</sup> See for example section 6 of the Position Paper Submission.

<sup>11</sup> On this issue please refer to section 6 of the Position Paper Submission.

<sup>12</sup> UXC Consulting - Technical Advice on connection charges for the ULLS, LSS and WADSL services: Initial Report (Public Version) Australian Competition & Consumer Commission – 12 March 2015, at p.ii

disconnection can have no other purpose than to allow Telstra to recover windfall profits. Given that Telstra has also been over recovering on the costs of connection as well, the over recovery by Telstra will be significant. iiNet submits that given that Telstra has been imposing a LSS disconnection charge on access seekers that has no purpose other than to allow Telstra to obtain windfall profits, the ACCC should consider imposing its decision on the LSS disconnection charge from the earliest date possible.<sup>13</sup>

## 7. **THERE IS AN URGENT NEED FOR THE ACCC TO MAKE REGULATED PRICES FOR TEBA RACK AND POWER SERVICES**

The Position Paper raised issues related to regulated access to facilities access services such as TEBA.<sup>14</sup> In the Position Paper Submission, iiNet set out its reasons why the ACCC should set a regulated price for TEBA rack and power charges.<sup>15</sup> The ACCC stated the following in the Discussion Paper:<sup>16</sup>

*The declaration of facilities access has been raised by stakeholders a number of times in previous FADs. Most submissions to the Position Paper addressed issues around the regulation of facilities access and a number supported the declaration of some facilities access services. The issue of pricing facilities access services and the issue of whether further facilities access services should be regulated are being considered by the ACCC and will be addressed in other separate regulatory processes later in 2014/15.*

iiNet notes that the ACCC has made certain adjustments to its fixed line services model methodology to set the primary prices that have been included in the Draft FAD. In deciding to include a charge for the IIC in the Draft FAD the ACCC has had regard to the following:<sup>17</sup>

- The ACCC considers that the IIC service is necessary in order for access seekers to access the ULLS and LSS, and the IIC is therefore used in connection with the supply of a declare services. As the IIC is used in order to provide a carriage services, it relates to an aspect of access.
- Even though the IIC is not part of the ULLS or LSS, access seekers are unable to provide ULLS or LSS based services to end users without the IIC service. Therefore, when determining prices for ULLS and LSS, IIC prices must also be determined.

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<sup>13</sup> In this regard iiNet notes that the previous FAD expired on 30 June 2014 and so it would be open for the ACCC to impose its decision on the LSS disconnection charge from 1 July 2014.

<sup>14</sup> Position Paper, pp. 18-19.

<sup>15</sup> Position Paper Submission, section 8.

<sup>16</sup> Discussion Paper, at p.9.

<sup>17</sup> ACCC Public inquiry into final access determinations for fixed line service — primary price terms, March 2015, at p.174.

- Telstra has not provided sufficient evidence or justification that the IIC service is not essential to the supply of ULLS/LSS services and the supply of ULLS/LSS based services to end users.

iiNet agrees with each of the above points and iiNet agrees that these considerations justify an IIC charge being included in the FADs for ULLS and LSS. However, iiNet notes that Telstra treats the IIC as [c-i-c starts] [c-i-c ends]. In light of this, iiNet believes that the justifications for including a price for the IIC in the ULLS and LSS FADs apply with equal force to TEBA rack and power charges. Just like the IIC, TEBA racks and power are necessary and integral to an access seeker's ability to provide services via the LSS and ULLS. The racks are used solely to accommodate equipment that is used in acquiring the LSS and ULLS. The electricity used is solely to power that equipment. Accordingly, TEBA racks and power are necessary components of accessing the LSS and ULLS. If access seekers did not pay Telstra to house access racks and provide power to those racks, then access seekers would not be able to access the LSS and ULLS.

Telstra's Rate Card includes the following prices for TEBA:<sup>18</sup>

- Double sided rack – CBD - \$14,856 per rack per annum.
- Double sided rack - Built Up - \$10,197 per annum.
- DC power charge per Amp - \$566 per annum.

iiNet respectfully submits that there is an urgent need for the ACCC to make regulated prices for TEBA rack and power because [c-i-c starts] [c-i-c ends]. On the basis of Telstra's Rate Card prices, an access seeker that has 100 double sided racks in CBD areas and 1000 double sided racks in Built Up areas would be charged by Telstra \$11,682,600 for TEBA racks.<sup>19</sup> If it is assumed that each rack uses 15 Amps of DC power per annum, there would be an additional annual power charge of \$9,339,000, making a combined total of \$21,021,600 in TEBA rack and power charges per annum. [c-i-c starts] [c-i-c ends]. It should also be noted that these illustrative rack figures only represent one larger access seeker and that when extrapolated to include the rack and power charges paid by all access seekers, it is clear that Telstra's over-recovery on these two TEBA charges must be well in excess of [c-i-c starts] [c-i-c ends]. Allowing Telstra to continue to over-recover its costs to this magnitude clearly does not promote the LTIE, especially when the ACCC already has the financial data on hand to expedite a decision. The astounding over-recovery of costs that Telstra enjoys on rack and power charges are obvious monopoly rents and impediments to the ability of access seekers to compete with Telstra. If the ACCC does not take the opportunity to address these issues, the interests of end-users will suffer as they will continue to pay higher prices than they should for retail broadband services. Accordingly, iiNet urges the ACCC to set regulated prices for TEBA rack and power services as soon as possible.

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<sup>18</sup> Telstra Wholesale Rate Card for Reference Services – Version 6.0 – 19-12-2014 – available at: <https://www.telstrawholesale.com.au/download/document/tw-rate-card.pdf>

<sup>19</sup> This example is for illustrative purposes. iiNet is happy to provide the ACCC with information about iiNet's specific TEBA charges if required

**8. THE ACCC SHOULD RECONSIDER ITS DRAFT DECISION NOT TO SET A CONNECTION CHARGE FOR WLR**

In response to the Position Paper, concerns were raised about the connection charge for WLR. These concerns were based on the fact that Telstra's Economic Model (**TEM**) report showed that WLR connection charges for Telstra's retail business units are significantly lower than for Telstra's wholesale customers, with the variance being 200.63%.<sup>20</sup> This suggests that Telstra's WLR connection charges are considerably above costs.

The ACCC has considered these concerns and formed the following view:<sup>21</sup>

*The ACCC considers there are limitations in drawing definitive conclusions from Telstra's TEM report. Telstra's internal costs are calculated using recent historical information about actual costs and allocation rules from Telstra's accounting system, while its commercial wholesale prices reflect negotiated outcomes.*

*The ACCC notes that only one submitter raised concerns over WLR connection charges. The ACCC has no evidence that WLR connection charges create a significant barrier to entry and cause competition concerns in the supply of the regulated service. Therefore, the ACCC considers that, on the evidence available to it, the benefits of setting a regulated WLR connection charge are not likely to outweigh the regulatory costs.*

*The ACCC's draft decision is not to set connection charges for the WLR service.*

The ACCC's draft decision not to set a regulated price for WLR appears to have been taken on the basis of a cost benefit analysis which compares the cost of regulation to the benefits to competition. iiNet respectfully submits that this is not the appropriate test. iiNet submits that the ACCC must consider whether regulation would promote the LTIE. Specifically, the ACCC must consider whether setting a regulated price for WLR connections would better promote the LTIE than not doing so. This question must be considered in the context of WLR being a declared service due to its bottleneck characteristics. In this context it is hard to see how the ACCC can give any weight to the fact that 'negotiated' prices for WLR connections appear to be, on the basis of Telstra's own TEM reports, considerably above cost.

iiNet submits that where, as in this case, there is prima facie evidence that the connection charge for a declared service is above cost, it is likely that end users will be paying more than they should for the connection of downstream services that use the declared service

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<sup>20</sup> Draft Decision, at p.56.

<sup>21</sup> *ibid*, at p.64.

as an input. iiNet submits that even if a cost benefit analysis is undertaken, the benefit to end users of reducing WLR connection charges to reflect the cost of connection would outweigh any costs of regulation which, given the fact that other PSTN connection charges are already regulated, is likely to be incremental and relatively modest.

**iiNet Limited**

**8 May 2015**