

**The ACCC's Draft Decision and Proposed Class Exemption on
Telstra's PSTN Originating Access exemption applications - CBD and Metro areas.**

Submission by Internode

1. Introduction

We refer to the ACCC's *Draft Decision and Proposed Class Exemption on Telstra's PSTN Originating Access exemption applications - CBD and Metro areas*, dated September 2008 ('the draft decision'). Though we consider that the draft decision will not achieve its objectives, we appreciate the opportunity to comment. Our view is that the proposed exemptions make fundamental errors and particularly when combined with the recent WLR/LCS exemptions, will significantly damage the long term interests of end-users of declared services in both voice and broadband markets.

We consider the exemptions should not be granted. In the alternative that the ACCC does proceed with granting the proposed exemption, we urge the ACCC to apply further limitations in order to protect the interests of end-users by ensuring some level of competition remains in the relevant markets affected by the draft decision. These further limitations are as follows:

- The exemption only applies in ESAs where the ACCC has independently verified there are four or more ULLS based competitors (including Telstra) that have the technical ability to provide standard telephone services - we consider the LTIE are not sufficiently protected by relying merely on the existence of four or more ULLS based competitors;
- The exemption will cease immediately in an ESA if the number of ULLS based competitors (including Telstra) in that ESA with the technical ability to provide standard telephone services drops below four;
- The exemption only applies until 31 December 2010;
- The exemption does not apply until after a 12 month transition period commencing from the date that the ACCC accepts that a satisfactory LSS to ULLS transfer and mass migration process is in place - this will encourage rapid development of a migration process and is necessary to ensure the upgrade of infrastructure investment the ACCC envisages can occur before the exemption takes effect;
- Telstra may not avoid the condition relating to queuing simply by rejecting a Queued Access Seeker's Preliminary Study Request;
- The condition relating to queuing provide a reasonable time for migration of services to be performed between completion of exchange builds and commencement of the exemption;
- The exemption does not apply in any ESA where more than 5% of SIOs are affected by any equipment that prevents ULLS based services being provided;
- The exemption does not apply in any ESA where Telstra is granted an exemption from its obligation to provide DTCS;

- The exemption does not apply in any ESA in which the ACCC considers ULLS competitors' ability to obtain competitive transmission services is negatively affected by Telstra having been granted an exemption from its obligation to provide DTCS; and
- The exemption does not apply in any ESA where Telstra is granted an exemption from its obligation to provide any declared services to Optus.

2. Effect on the competitive environment of LSS and broadband services.

As pointed out by the ACCC, the promotion of competition test requires the ACCC to have regard to whether granting Telstra's exemption applications will create the conditions or environment for improving competition from what it would otherwise be.¹ It is important however to note that this test does not refer to competition for fixed voice services alone, but to *all* listed services. As such, the ACCC must consider the effect of granting the exemption upon all carriage services and all services supplied by means of carriage services and not just the effect on fixed voice services.² The clear potential effect of the proposed exemption is its negative effect on the LSS and services provided via the LSS.

Of the competitive offerings provided by means of DSLAM equipment, roughly half are provided by the LSS rather than by the ULLS. To a significant extent, it is the LSS that has driven DSLAM deployment, not ULLS. Though we are aware that the ACCC supports a ladder of investment strategy in which access seekers initially provide LSSs, and climb the ladder to provide ULLS, and perhaps eventually invest in infrastructure to provide full facilities based competition, it remains the fact that a considerable amount of infrastructure based broadband competition is conducted via the LSS. The proposed PSTN OA exemption will remove a vital step from the telecommunications ladder of investment. Of course, as noted by the ACCC, the proposed PSTN OA exemption is closely linked to recent exemptions provided to Telstra in regards to the WLR and LCS. Together the three exemptions remove three important rungs from the frequently discussed ladder of investment towards facilities based competition. New entrants, and existing competitors of Telstra looking to secure new geographic areas or indeed remain in current ESAs, need these services to compete.

The LSS requires an underlying voice service. As the ACCC is aware, Telstra has loudly disputed the ACCC's view that line costs should not be included in LSS monthly charges on the basis that they are recovered via the WLR. Telstra has previously taken active steps to financially discriminate against LSS end-users by ensuring that they do not have access to Telstra's lowest price retail fixed line service, but rather must pay the higher charges of alternative retail plans.³

We consider it highly likely that once relieved from standard access obligations in relation to WLR/LCS and PSTN OA, Telstra will instigate steps that will negatively impact the competitive environment and conditions in which LSS is provided. Telstra could either refuse to supply the WLR/LCS and PSTN OA to competitors on lines with an LSS service or push the price up to uneconomic levels. Similarly, Telstra can push up the price of its retail WLR/LCS and PSTN OA products for

¹ ACCC, *Draft Decision and Proposed Class Exemption on Telstra's PSTN Originating Access exemption applications - CBD and Metro areas*, September 2008, p 29.

² Refer to TPA, s 152AB(2)

³ On 21 February 2007, Telstra informed LSS access seekers that its cheapest residential WLR service, 'homeline budget', would no longer be available to customer that also have a broadband service using the LSS.

consumers that are obtaining LSS from a competitor. This means an LSS product from one of Telstra's competitors becomes either unavailable or extremely unattractive, because the end-user cannot obtain a WLR/LCS/PSTN OA/LSS bundle or the inflated price of the associated and requisite voice products pushes the price of the combined voice/broadband services to an uncompetitively high level. As such, granting a class exemption on a voice service can have a profound effect on the competitive environment in which another service (LSS) operates, which we consider is contrary to the LTIE.

3. Standard telephone services cannot necessarily be provided via the ULLS

The ACCC appears to assume that all acquirers of the ULLS are able to provide standard telephone services (STS). This fundamental error is crucial to the ACCC's draft decision. In order to provide the features expected of a standard telephone service, the ULLS must be accessed via a Multi Service Access Node (MSAN). Without an expensive voice switching service, DSLAMs are not technically capable of providing features of a standard telephone service. A ULLS provided by a DSLAM is only capable of providing telephony via VoIP as an application on an ADSL service. Though VoIP provides a means to make cheap calls that are acceptable to a lot of customers, it is not widely regarded as a substitute to a fixed telephone service. For instance, the quality of VoIP is dependent on available bandwidth. In contrast, a ULLS provided via an MSAN can be regarded as including a standard telephone service. For instance, unlike a DSLAM enabled service, an MSAN sends a 50v signal down the line, which means that an end-user does not lose their telephone service during a power loss at their premises.

Internode has invested significant amounts to deliver LSS and ULLS via DSLAMs. The cost of purchasing MSAN equipment and retrofitting this into our exchange racks to replace our current DSLAMs would be considerable. The NBN casts doubt on the commercial sense of such an investment. This concern is heightened by the limitations that Telstra places on LSS/ULLS competitors, particularly its network modernisation provisions that allow Telstra to roll out FTTN and disconnect the LSS or ULLS on only 15 weeks notice. Though the ACCC's draft model non-price terms and conditions provide a longer notice period prior to network modernisation, it remains insufficient to ensure a return on investment and of course, as Telstra is not obliged to implement the model terms, this longer period would only be provided to Internode after a lengthy and costly ACCC access dispute.

Some other ULLS acquirers do utilise MSANs or have voice switches. However, it is definitely not all ULLS acquirers and is actually likely to be the minority of companies competing with Telstra. We consider it imperative that the ACCC ascertains whether or not adequate amounts of this equipment exist in each ESA where it is considering Telstra's exemption application. It is all very well to say that the existence of four ULLS-based competitors establishes a sufficient level of competition, but it may not alter the fact that Telstra remains the only one of those companies that is actually capable of providing a standard telephone service without the considerable expense and delay (caused by Telstra's enforced queuing process for exchange access) of competitors having to replace all of their exchange equipment or install expensive switching equipment. If the ACCC wants to achieve an objective of creating an environment that will promote competition in the market for telephony, the exemption must be varied to only apply in ESAs that have four or more ULLS-based competitors (including Telstra) within the ESA *that have the ability to provide the standard telephone service*. As it currently stands, the limitation provides no guarantee that the ULLS-based competitors are capable of providing competitive voice services.

For these reasons, we strongly recommend that the exemption only applies in ESAs where the ACCC has independently verified there are four or more ULLS based competitors (including Telstra) that have the technical ability to provide standard telephone services. As stated, this requires that the ULLS based competitors utilise MSANs.

4. Accuracy of Telstra's data needs independent verification

We consider it absolutely necessary that the ACCC implement an independent audit of the exchanges included in the proposed exemption to ensure that it is relying upon accurate information regarding DSLAMs/MSANs installed in those exchanges. Internode is willing to supply this information to the ACCC. A list of the exchanges in which we have installed DSLAMs or plan to install DSLAMs is available on our website.⁴ This could be as simple an exercise as an ACCC staff member contacting each ULLS access seeker to confirm that they have equipment in the exchanges named by Telstra and included in the ACCC's exemption list. In the longer term, this information can be collected via an amendment to the Telstra CAN RKR. Our assessment of Telstra's statistics in regards to previous matters is that their accuracy was frequently open to question. Given that it is clearly in Telstra's interests to claim higher levels of ULLS based competitors, this information must be verified before it is relied upon by the ACCC in stating the names of ESAs where it considers there to be an adequate level of competition to exempt Telstra from its obligations under the PSTN OA declaration. As verification will be a simple and quick process, this does not seem too much to ask, particularly given the effect that the exemption could have on access seekers' investments and the downstream choices of consumers.

We recommend that the ACCC independently verify the reliability of exchange data prior to granting the proposed exemptions.

5. Capacity and level of competition

Further to this, the basis of the ACCC's proposed limitation that the exemption will be provided in ESAs with the presence of at least 4 ULLS based competitors (including Telstra) does not in many cases provide any indication of the degree of competition. The existence of an alternative to Telstra does not mean that the alternative has the capacity to actually offer any competition if Telstra pushes its prices up. For instance, if 3 ISPs have one rack each in an exchange and Telstra has the rest, the ISPs simply will not have any excess capacity or available ports to offer services to customers or resale service providers wanting to avoid a Telstra price hike. The ACCC's assessment of ULLS based competition must also assess the capacity of the competitors and their ability to offer further services, both on a retail and wholesale basis. We anticipate that the ACCC could be disappointed with the results, as the reality is that competition in ULLS based services and products, particularly on a wholesale basis, remains immature.

We recommend that at the same time as verifying the number of ULLS based competitors in each ESA, that the ACCC obtain data regarding the competitors' current available capacity and ability to increase capacity if faced with additional demand. This would involve details of whether the competitor had lodged an application to install further equipment in the exchange and if so, its place in Telstra's queue.

⁴ <https://secure.internode.on.net/webtools/dsl-coverage-table?carrier=Agile>

6. Reduction in number of ULLS providers in an ESA

The proposed exemption provides no explanation regarding the following situations:

- A ULLS-based competitor in an ESA goes out of business, reducing the number of ULLS-based competitors (including Telstra) in the ESA to below four; or
- Two or more ULLS access seekers with DSLAM/MSANs in an ESA merge, bringing the number of ULLS-based competitors (including Telstra) in the ESA to below four.

Either of these occurrences would reduce the level of competition in the ESA. Based upon the reasoning detailed by the ACCC in its draft decision, we consider that if either of these situations occurs the ESA should immediately be removed from the list of ESAs in which Telstra has exemptions. This would need to be specified as a condition in the ACCC's decision.

7. Period of exemption

The ACCC has proposed that the exemption commence after a 12 month transition period and that it remain in place until 31 December 2012. As such, if the ACCC's final decision is made in late October 2008, the exemption would come into effect in late October 2009 and would run for just over 3 years.

We agree that a reasonable time period is required to assess the effect of the exemption on the market and the interests of end-users, however, we consider that 3 years is so long that if the exemption has a negative effect, it will be profoundly irreversible. We consider that the ACCC should closely monitor the effect of the exemption and that this should be ensured by reducing the exemption period until 31 December 2010. During this time period relevant parties that remain in the industry would have implemented any necessary changes to their business plans and the effect of these changes would be evident. Further, current regulatory matters concerning the ULLS (discussed later in this submission) would have been finalised by this time and the subsequent effects realised. Prior to the expiry of the exemption, in mid-2010, the ACCC could request submissions from interested parties in regards to whether the exemption should be revoked or extended, with a decision being made before the end of that year. We consider that the extended time period proposed by the ACCC is unnecessarily long and will not provide any degree of protection in the event that the exemption proves detrimental to the long term interests of end-users.

8. ULLS wholesale market

Wholesaling is not the core business of any of the ULLS based competitors in Telstra's exchanges. Though the 12 month transition period may provide adequate time to implement wholesale arrangements, it does not take into account capacity constraints. Our normal business practice is to install sufficient DSLAMs for our current requirements and anticipated requirements for a 12-month period. Our experience has been that we use the additional capacity well within the 12-month time frame and do not have any available excess capacity. We do not have sufficient capacity to provide wholesale access to other service providers seeking to acquire voice services on the ULLS. It would take considerably more than 12 months to assess the potential wholesale market that results from the current WLR/LCS exemption and proposed PSTN OA exemption, to then raise funds for

further installations to provide increased capacity in appropriate exchanges, and to apply for and commence installation of additional DSLAMs through Telstra's one at a time queuing system.

Though the draft decision refers to the existence of ULLS based wholesalers, the ACCC does not give any indication that it has contacted these companies to discuss and assess their capacity (or capability to increase capacity) to address additional ULLS demand. Again this would be a simple task and does not seem too much to ask.

If the opportunity exists, as the ACCC hopes it does, for ULLS based wholesale competition in WLR/LCS/PSTN OA services, then service providers will move into the market as soon as they can in order to capitalise on the opportunity. At this stage, however, this wholesale market simply does not exist and a decision that assumes it will exist in 12 months is unrealistically optimistic. ULLS access seekers will not achieve that time frame, and if they do not, the end-users unable to be placed onto an existing service will be absorbed by Telstra, as the only provider with additional capacity, and possibly tied into fixed contract periods. This combined with the recognised high level of churn inertia amongst fixed telephony consumers will subsequently make it extremely difficult for ULLS based competitors to make inroads into the market after any delays in increasing their capacity. We consider that the 12 month transition period should commence from the time that alternative wholesale ULLS providers with sufficient and established capacity are shown to exist in each ESA. The importance of this is emphasised by the incredible difficulties that access seekers have experienced in attempting to negotiate commercial agreements with Telstra. Telstra simply does not want to provide wholesale services in most instances as it eats into its retail profits. This is demonstrated by the massive number of access disputes that the ACCC has had to arbitrate to set reasonable terms of access. We do not expect that Telstra will offer reasonable WLR/LCS/PSTN OA terms when relieved of its SAOs in the exempt ESAs. On the contrary, we consider that Telstra will simply stop wholesaling these services, or if does supply the services will do so on terms that are commercially unacceptable and include harsh exclusive dealing conditions. In our opinion, any calculation of likely WLR/LCS/PSTN OA wholesalers in the relevant ESAs once the exemptions come into effect, should not realistically include Telstra.

The ACCC has recently investigated Telstra's offers to wholesale ADSL2+. We request that the ACCC fully assess the information gathered during this investigation on the course of finalising its views on the PSTN OA exemptions, as the exclusive dealing requirements of Telstra's ADSL2+ offers have potential ramifications on competition via the ULLS. Fast broadband is attractive to the market, and considered increasingly vital by many consumers. If the only way that a service provider can obtain ADSL2+ in a large number of ESAs is to agree to an offer by Telstra that prohibits DSLAM rollout or buying services from competitors, the likelihood that wholesale ULLS will provide a platform to compete with Telstra is significantly diminished.

Currently, Internode has an arrangement to buy wholesale voice and/or ADSL2+ delivered via ULLS from Optus, however it is clear from previous discussions with Telstra that connecting interconnect cables between different racks within the TEBA area to support Internode buying a wholesale voice service from another carrier would be pretty much impossible in as much as Telstra imposes various processes, fees and charges for such cables and argues that the service is only to support the sales of Telstra services.

9. Migration/transfer costs

There are considerable costs, such as ULLS connection charges, involved in migrating WLR/LCS/PSTN OA customers to the ULLS. As it stands at present this cost will be incurred by ULLS based competitors. The ACCC's ULLS indicative prices set ULLS single connection charges in 2008/09 at \$50.40 (Band 1), \$53.10 (Band 2), and \$57.70 (Band 3). Of course, access seekers would have to run an access dispute to even obtain these charges from Telstra or be forced to pay significantly higher connection charges. End-users, particularly those with only a telephone service, will be extremely reluctant to pay the cost of a ULLS transfer simply to obtain a service that they already have, so to compete access seekers would most likely have to pay this cost. This will be a considerable impediment to keeping a customer if Telstra refuses to continue to supply WLR/LCS/PSTN OA services or increases its charges to uneconomic levels. This is a strong argument against granting the proposed exemptions.

10. DSLAM to MSAN conversion process

The ACCC recognises that providing equivalent voice services via ULLS requires access seekers with DSLAMs to either acquire voice switching services or to replace the DSLAMs with MSANs⁵. As Internode utilises DSLAMs, and the cost of voice switching services is prohibitive, to provide voice services we would need to retrofit MSANs into the exchange racks currently housing our DSLAM equipment, which again involves considerable expense and requires that we get into the same queue as a new ULLS installation in order to perform this work. This sort of swap over is not simple maintenance, and requires the approval of construction plans, installation of new cables, jumpering, and new air-conditioning. As such it would take between 6 to 24 months to commence the work based on Telstra current queuing process. These time frames are likely to blow out considerably if several access seekers require access in order to retrofit MSANs, which we consider likely. Though to an extent, this is covered by the limitation on the exemption relating to queuing, we would be required to commit to the build and equipment purchase and when this is combined with the looming NBN, the return on this considerable investment is increasingly uncertain

11. LSS to ULLS migration

Internode welcomes the ACCC's proposal to limit the exemption in this regard until an LSS-ULLS migration process has been implemented in relation to the relevant ESAs. However, Internode submits that some refinements to this particular condition need to be made in order to ensure the process is truly robust and in the LTIE.

(a) Ordering and provisioning timeframes

Internode notes the ACCC has failed to address the timeframes for an LSS to ULLS migration and submits that the exemptions should not commence until at least 12 months (or other period as set by an independent consultation process) after the date on which the ACCC publishes a Prescribed LSS to ULLS Migration Process on its website. This grace period will enable access seekers time within which to integrate and interface their systems prior to the exemption actually applying, to ensure a smooth transition (without any 'gap' between when the end user is being supplied telephony to when the LSS-ULLS cutover occurs) and so the

⁵ ACCC, *Draft Decision and Proposed Class Exemption on Telstra's PSTN Originating Access exemption applications - CBD and Metro areas*, September 2008, p 66

access seeker will not be caught on the 'backfoot' by a less-than scrupulous incumbent. Notwithstanding this, Internode submits that these concerns could be eliminated if the LSS-ULLS migration process were developed by an independent regulator who consulted with *all* interested parties, not just Telstra.

Internode requests these precautions because without any certainty it places doubt upon Internode's decisions on whether to invest in any further DSLAMs or other ULLS-associated infrastructure. This is because these facilities will only have a short lifespan before being effectively 'stranded' at the exchange when the Government's National Broadband Network is rolled out⁶, which deprives Internode of a reasonable return on its investment. Despite this, the ACCC still expects investors to commit to further DSLAMs even while the NBN process is well underway. This directly impacts the statutory requirement of encouraging "incentives for investment" in s.152AB (6)(c) of the TPA, to which the ACCC must have regard when considering the LTIE. As the explanatory memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005* explains:

considering the long-term interests of end-users also requires consideration of the risk of investing in new network infrastructure as well as existing infrastructure...the incentives for investment in new infrastructure by which services under consideration may be supplied, and the risk of making such an investment, is one of the matters to which regard should be had for the purposes of paragraph 152AB(2)(e).

Until the LSS - ULLS migration process is developed, tested and offered to access seekers, Internode is largely limited to only offering the ULLS to new customers rather than encouraging existing LSS customers to take a ULLS-based service. There is insufficient certainty as to when this process will be operational for access seekers to actively market the ULLS to customers and as a result, there is a high likelihood that we will be left in a mad rush to firstly offer the service to our customers and then undertake mass network migrations between the LSS and ULLS. This is a clear deficiency in the current condition placed upon the exemption and will lead to considerable problems.

(b) **Distinction between mass network migrations and single transfers**

Currently the Prescribed LSS to ULLS Process makes no distinction between single user transfers and mass migrations. This clearly needs to be clarified, because if left to the discretion of the incumbent it will see access seekers forced to comply with a single user transfer process that hampers their ability to migrate large numbers of SIOs to the ULLS, which unnecessarily creates obstacles for end-users of broadband via the LSS to gain access to broadband via the ULLS. This is in direct contravention of s.152AB(4) of the TPA and ultimately works against the LTIE.

Internode submits that the definition of "Prescribed LSS to ULLS Migration Process" be amended to include a process for mass migrations, as well as single user transfers.

⁶ if rolled-out as fibre-to-the-node, which is currently seen as the preferred technology to meet the Government's broadband objectives

Further, as raised in ULLS access disputes considered by the ACCC⁷, the ability of access seekers to migrate large numbers of services to the ULLS is hampered by Telstra's mass network migration timeframes and rules. Often access seekers are contractually bound to give either 56 or 84 days advance notice to Telstra, and can only schedule a migration in one exchange per State per day. Internode submits that if Telstra is entitled to apply these arbitrary timeframes with respect to a LSS-ULLS transfer, it shall effectively delay any cutovers to the ULLS for a matter of months, whilst reaping the rewards of a commercially-negotiated replacement voice service in the interim. Internode submits that a reasonable ordering and provisioning timeframe of 20 days be included as an additional sub-item under Item 5.3 of the Draft Order. This is considered to be a reasonable period, because in ULLS and LSS mass network migrations it is widely understood that contractor labour to perform pre-jumpering work is only organised within 20 days of the cutover date, and as such a similar timeframe could apply here.

Internode also considers that the nominated three hour limit for service interruption during an LSS to ULLS transfer is a conservatively long time period figure and that the outage period for a single user transfer be reduced to one hour, and sub-item (a) of Item 5.3 be amended accordingly.

(c) **Multi-platform transfers**

Currently the definition of "Prescribed LSS to ULLS Migration Process" is limited to only those migrations by *Telstra*, as opposed to the more generic term of "access provider" (as that term is used in the TPA) to allow for multi-platform transfers between different service providers. The absence of a multi-platform LSS-ULLS migration process will act as an impediment to the ACCC's stated objective of developing a greater wholesale market amongst ULLS-based competitors as an alternative to the incumbent. Internode suggests amending the definition to ensure the migration process allows for transfers between ULLS wholesalers.

(d) **Multi-platform bundled services**

Item 5.1 is currently drafted so that until the ACCC publishes the Prescribed LSS-ULLS Migration Process on its website the exemption will not apply:

in respect of supply by Telstra of PSTN OA to an Access Seeker in respect of any End User that, immediately prior to the Commencement Date, was supplied with a Bundled Fixed Voice and Broadband Service by the Access Seeker using the LSS, WLR, LCS and PSTN OA supplied by Telstra

(emphasis added).

This does not appear to encompass situations where an End User is supplied by two different service providers for their telephony and

⁷ See ACCC, *Unconditioned Local Loop Service Access Dispute Between Telstra Corporation Limited (access provider) and Chime Communications Pty Ltd (access seeker) Statement of Reasons for Final Determination*, March 2008, p. 266, available on the ACCC's website at <http://www.accc.gov.au/content/item.phtml?itemId=829232&nodeId=4ef7dbf66c9f6d54a794577e377ef539&fn=Chime-Telstra%20ULLS%20final%20determination%E2%80%94Statement%20of%20Reasons%20-%20March%202008.pdf>

broadband using the LSS, WLR, LCS and PSTN OA (e.g. Optus provides the retail telephony service, whilst Internode provides retail broadband). As one of the ACCC's stated objectives is also to develop a greater wholesale market amongst ULLS-based competitors as an alternative to the incumbent, the exemption should not apply to multi-platform bundled services until a robust LSS-ULLS migration process has been implemented.

The requirement that the end-user be supplied a bundled package by the access seeker is unexplainably limiting. For instance, though a significant number of our LSS customers are likely to acquire their voice services from Telstra, this does not mean that we are providing them a bundled voice and broadband package. On the whole, we are unaware who provides voice services to our LSS customers. We consider it very likely that this situation is across the board with most ISPs that provide broadband services via the LSS. Internode's core business is broadband, not voice. As a result, this condition will have only a very small effect if any and is very unlikely to achieve the ACCC's clear intention of ensuring that there is a path for LSS SIOs to be migrated to the ULLS.

(e) **Development of the LSS to ULLS migration path by independent consultation**

Whilst Internode does not question the two key benchmarks set by the ACCC in Item 5.3 of the Draft Order will go some way towards ensuring the LSS to ULLS migration process is robust, Internode considers it unfortunate that the development and implementation of such a process is left to the incumbent. This is the perfect opportunity for an independent regulator to develop a code for universal application, thus taking into account the interests of all concerned parties and not just the interests of Telstra. As previously stated, if the ACCC wants access seekers to exploit unused capacity on their ULLS-based networks by developing an alternative wholesale market, it must not ignore the needs of access seekers by ultimately approving yet another Telstra-dictated migration process. Further, it is somewhat curious that Telstra is left to certify itself that it meets the requirements of Item 5.3. We consider that this should be performed by the ACCC, or at the very least, an independent industry body.

Additionally or in the alternative, Internode contends that an additional step prior to publication of the finalised process on the ACCC's website be included in Item 5, whereby the ACCC publishes a draft of the process and invites comments from interested parties. This will ensure input has been sought from all relevant interests, and will also give access seekers an opportunity to garner some idea as to the technical and administrative procedures so as to further their own internal preparations in advance of final publication (and the exemption applying).

Further, Internode fails to understand why the process should be limited in application to only those relevant ESAs that are on the exempted list, and not apply universally to *all* access providers and *all* LSS-ULLS transfers? Why should the Prescribed LSS-ULLS Migration Process be limited in this regard, when the lack of such a process has been the subject of many ULLS access disputes in the past, and will continue to be if it is only to have application to some, but not all, ESAs? If the migration process is to be developed via independent consultation it should have universal

application. Internode recommends amending the definition of “Prescribed LSS to ULLS Migration Process” in this respect.

12. Exchange queuing

As the ACCC is aware, Telstra has imposed a serialised queuing system whereby access seekers may only access exchanges one at a time to construct or expand DSLAM infrastructure. This is combined with an excruciatingly slow process for approving access seekers’ plans for the installation of equipment in Telstra exchanges. In Internode’s direct experience this is causing delays that are routinely in the order of 6 - 12 months and often up to 24 months before we are able to access key exchanges in order to install equipment and provide competitive services. There is no substantive reason for this process and delay except to create barriers to competition. All access seekers must use the same contractors as Telstra, so its arguments that the queuing process is for OH&S reasons is nonsense.

The vast majority of delays to our construction are in the design and construct process. We are frequently asked by Telstra to undertake power and air conditioning audits which require dealing with third party contractors approved by Telstra. These processes cause significant delays as we can only use one Telstra approved contractor, SILCAR, and they can take months to respond. We currently have cases where delays for this work are in excess of 3 months.

We appreciate that the ACCC has recognised the impediment to competition presented by exchange capping and queuing. We completely agree that PSTN OA exemptions should never be granted in ESAs subject to capping or queuing. However, we consider that the condition is insufficiently broad to achieve the ACCC’s intention of ensuring a level of competition via the ULLS. In particular, the condition:

- Allows Telstra to avoid the condition simply by rejecting a Queued Access Seeker’s Preliminary Study Request;
- Fails to provide any time for migration of services to be performed between completion of exchange builds and commencement of the exemption

13. Technical constraints on providing the ULLS

As recognised by the ACCC in its draft decision, technological impediments to the provision of services via the ULLS include fibred greenfield developments, line length, sub-exchanges, RIMS, pair gains and poor cable quality. We are only informed about the existence of this equipment when we place an order to connect a service and do not know what percentage of SIOs are affected by these impediments. Earlier this year, *The Age* suggested that as many as 1 million people may be connected via pair gain or RIM/CMUX systems.⁸ This represents a significant percentage of consumers that can obtain fixed line services from Telstra and as such is a substantial impediment to competition.

Given Telstra’s existing massive market share, we recommend that the PSTN OA exemption should not be granted in ESAs where more than 5% of SIOs are affected by equipment that prevents ULLS based services being provided.

⁸ Helen Meredith, *The Age*, 20 May 2008, p. 7

14. Regulatory and judicial decisions affecting the ULLS

There are several undecided regulatory matters and court proceedings closely relevant to the ULLS, these include:

- Telstra's applications to the Federal Court for review of several ACCC final determinations in ULLS arbitrations;
- The ACCC's assessment of Telstra's TEA model for evaluating ULLS network costs in Band 2;
- Telstra's revised ULLS undertaking, lodged on 3 March 2008 for the provision of the ULLS in Band 2 ESAs; and
- The ACCC's development of its own ULLS network costs model.

Each of these matters has the potential to significantly impact the ULLS and adds to the level of uncertainty faced by ULLS access seekers considering expansion in order to provide WLR/LCS and PSTN OA services. We consider that this is a strong argument that the PSTN OA exemption should not be granted or that it should be subject to tighter limitations and a shorter time frame to assess its impact in light of further legal and regulatory developments in the market.

15: Telstra's other exemption applications

The ACCC is currently considering several other applications from Telstra for exemptions from its SAOs in relation to other declared services, as follows:

- On 24 August 2007, Telstra lodged an exemption application from the SAOs of the domestic transmission capacity service ('DTCS') in 20 capital-regional routes.
- Telstra lodged four exemption applications on 21 December 2007 from the standard access obligations for the DTCS. These applications relate to Telstra's supply of:
 - inter-exchange DTCS in CBD areas of each capital city
 - tail-end transmission in CBD areas of each capital city
 - inter-exchange transmission in metropolitan areas and certain regional centres for DTCS
 - tail-end transmission in metropolitan areas and certain regional centres for DTCS up to 2 Mbps only.
- On 18 December 2007, Telstra provided the ACCC with an application for exemption from the standard access obligations in respect of supply of the ULLS, LSS, LCS, WLR, and PSTN OA to Optus in a defined geographic area of any customer premises within 75 metres of Optus' currently deployed HFC cable network in Sydney, Melbourne and Brisbane.

Each of these exemptions, if granted, is extremely relevant to a PSTN OA exemption, for instance:

- DTCS exemptions impact ULLS based competitors' ability to obtain backhaul on regional, inter exchange and tail-end routes. If the PSTN OA exemption is granted as proposed, there will be significantly increased pressure on transmission services as ULLS use rises as hoped for by the ACCC. In this situation, it is imperative to ensure that sufficient competitive backhaul is available to meet any increased capacity requirements. We consider DTCS exemptions and PSTN OA exemptions should not be granted in the same ESA. Further, to ensure ULLS based competitors can continue to obtain transmission, a PSTN OA exemption should not be granted in ESAs next to an ESA where a DTCS exemption is (or may) be granted or in which inter-exchange and tail-end transmission is affected by the granting of a DTCS exemption. To do so will place untested limitations on the ability of ULLS based competitors' provision of services within those ESAs.
- If Telstra does not have to provide ULLS services to Optus within the footprint of its HFC network, Optus will be forced to remove its DSLAMs from those exchanges and no longer be able to provide wholesale services via the ULLS. This will have the result of both reducing the number of ULLS based competitors in an ESA and removing Telstra's largest competitor from the potential market for wholesale PSTN OA services. Given that the ACCC's draft decision on the PSTN OA exemption clearly contemplates Optus' continued existence as a major ULLS based competitor, we are concerned that the ACCC has proceeded to making a draft decision in the PSTN OA exemption application before finalisation of the Optus exemption.

Telstra is already taking active steps to put in place measures in contemplation of being granted exemptions from its current SAOs in relation to these services. It has provided access seekers with variations to its General Access Service Terms that allow Telstra to terminate supply of a declared service covered by an exemption. Though it would be pleasant to think that Telstra will enter into good faith negotiations to continue to supply these services on reasonable commercial terms, we consider that this would be naive. Our experience to date, gained through years of attempting to negotiate access terms with Telstra along with being involved in several access disputes and Telstra instigated court proceedings appealing ACCC decisions, is that Telstra resents having a wholesale business and will do everything it can to limit its wholesale customers from taking a slice of Telstra's massive retail market pie.

Given the substantial amount of telecommunications work currently before the ACCC, which goes beyond access disputes and consideration of Telstra's raft of exemption applications, we are concerned that the ACCC's resources are stretched such that there may not be sufficient synergy between different teams working on different exemption applications. If this is correct, the effect of each exemption on another will not be fully addressed. This could lead to a significant adverse effect on competition, as it provides Telstra with the opportunity to leverage its exemption in one area against its obligations in another.

In light of the above, we recommend that:

- The PSTN OA exemption does not apply in any ESA where Telstra is granted an exemption from its obligation to provide DTCS;
- The PSTN OA exemption does not apply in any ESA in which the ACCC considers ULLS competitors' ability to obtain competitive transmission services is negatively affected by Telstra having been granted an exemption from its obligation to provide DTCS (e.g. where a neighbouring ESA has a DTCS exemption); and
- The exemption does not apply in any ESA where Telstra is granted an exemption from its obligation to provide any declared services to Optus.

16. Relevance of submissions made in relation to Telstra's WLR and LCS exemption applications

As the ACCC clearly recognises in its draft decision, the WLR and LCS are extrinsically linked to the PSTN OA. As such, we consider it important that the ACCC ensure proper regard is had to the submissions it received from interested parties in response to the public consultation on the WLR and LCS exemptions. The following parties provided reasons and other material as to why the WLR and LCS exemptions should not be granted and/or addressed the issue of conditions and limitations in the event that the Commission decided to make an exemption order:

- AAPT and PowerTel;
- Adam Internet;
- the Australian Telecommunications Users Group;
- the Competitive Carriers Coalition;
- Chime;
- Frontier Economics;
- Nicholls Legal;
- Primus; and
- Optus.

Public versions of these submissions are attached to this submission. We request that the ACCC also have regard to the confidential versions that it has been supplied.

17. Conclusion

Though we consider that these exemptions should not be granted for the reasons outlined in this submission, we are also aware that the ACCC is unlikely to substantially change its position at this stage. The ACCC is clearly aware that market realities exist, such as exchange capping and fibre rollout, which have the potential to mean that the proposed exemptions will damage the LTIE. We have

used this submission to point out that there are other important market realities that may have the same impact. With this in mind, we urge the ACCC to place the following additional limitations on any PSTN OA exemption that it grants to Telstra:

- The exemption only applies in ESAs where the ACCC has independently verified there are four or more ULLS based competitors (including Telstra) that have the technical ability to provide standard telephone services;
- The exemption will cease immediately in an ESA if the number of ULLS based competitors (including Telstra) in that ESA with the technical ability to provide standard telephone services drops below four;
- The exemption only applies until 31 December 2010;
- The exemption does not apply until after a 12 month transition period commencing from the date that the ACCC accepts that a satisfactory LSS to ULLS transfer and mass migration process is in place - this will encourage rapid development of a migration process and is necessary to ensure the upgrade of infrastructure investment the ACCC envisages can occur before the exemption takes effect;
- Telstra may not avoid the condition relating to queuing simply by rejecting a Queued Access Seeker's Preliminary Study Request;
- The condition relating to queuing provide a reasonable time for migration of services to be performed between completion of exchange builds and commencement of the exemption;
- The exemption does not apply in any ESA where more than 5% of SIOs are affected by any equipment that prevents ULLS based services being provided;
- The exemption does not apply in any ESA where Telstra is granted an exemption from its obligation to provide DTCS;
- The exemption does not apply in any ESA in which the ACCC considers ULLS competitors' ability to obtain competitive transmission services is negatively affected by Telstra having been granted an exemption from its obligation to provide DTCS; and
- The exemption does not apply in any ESA where Telstra is granted an exemption from its obligation to provide any declared services to Optus.

Internode is happy to discuss any aspect of this submission further or provide the ACCC with further information to assist its decision.

Internode
26 September 2008