Optus Submission

in response to the ACCC Draft Access Determination
Explanatory Statement

Inquiry to make a Final Access Determination for the Mobile
Terminating Access Service

October 2011

Public Version

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Section 1. Overview

1.1 Optus welcomes the opportunity to participate in the Australian Competition and Consumer Commission's (ACCC) public inquiry process to make a final access determination (FAD) for the mobile terminating access service (MTAS). This submission is Optus' response to the ACCC's Draft Access Determination Explanatory Statement (Draft Determination).[1]

1.2 In Optus' view, the Draft Determination is a deeply disappointing and flawed decision. There is no evidence that in making the Draft Determination the ACCC has had regard to the submissions made by Optus and other parties in response to the Discussion Paper.[2]

1.3 More importantly, the ACCC has fundamentally failed to demonstrate how its proposal will benefit end-users which is an express requirement under the *Competition and Consumer Act 2010*. Optus submits that the available evidence strongly suggest that the ACCC's proposal will be contrary to consumers' interests. Further, it has made no attempt to address Optus' concerns on this matter which were raised in some detail in its earlier submission.

1.4 Optus submits that the ACCC's proposal will disadvantage low usage mobile consumers, since mobile plans designed for these customers are more reliant on MTAS revenue to be profitable. Further, it will not benefit high usage mobile consumers, who in many cases face very low calling costs already.

1.5 Critically, fixed line consumers will not benefit from the proposed rate reduction because Telstra will not be required to pass through the reduction through the fixed to mobile (FTM) prices paid by its retail customers. The ACCC itself expressed doubts in its Discussion Paper that pass-through would occur, due to 'inherent structural issues in the fixed line market'. Telstra has pocketed previous MTAS rate cuts, as the ACCC is well aware, which is worth over $1 billion.[3] There is no reason to believe that this time will be any different; indeed, as the reported views of financial analysts attest, the proposed rate cut is earnings positive for Telstra. Given the lack of any proposal to ensure the decision will benefit consumers and promote competition, it appears the ACCC is hoping something will turn up. Further, there is clear evidence to suggest that this regulatory 'gift' to Telstra strengthens its armoury to compete more aggressively in competitive markets.

1.6 In this submission, Optus will present evidence that the proposed MTAS rates are not in the long term interests of end-users and that the best course of action for the ACCC is to set a FAD equal to the current rate of 9 cents per minute (cpm). This will best promote stability, competition and investment during a challenging operating environment.

1.7 Optus urges the ACCC to reconsider its proposal.

[1] ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS)*, Draft Access Determination Explanatory Statement, 23 September 2011

[2] ACCC, *Domestic Mobile Terminating Access Service (MTAS): Public Inquiry to make an Access Determination*, Discussion Paper, June 2011.

[3] Optus, *Optus Submission in response to the ACCC Discussion Paper: Public Inquiry to make an Access Determination for the Mobile Terminating Access Service*, July 2011, Appendix B

Section 2. The ACCC's decision will not benefit consumers

2.1 It appears the ACCC has assumed that if it simply lowers the MTAS rate, consumers will automatically benefit. It states that competition is "best promoted by a price associated with the efficient cost of providing the MTAS".[4] No explanation or analysis is provided as to how, in fact, consumers will benefit from such a price.

2.2 The determination would be in the long term interests of end-users if it resulted in a number of key outcomes, as the ACCC has recently explained:

> *In the ACCC's view, particular terms and conditions in an [sic] FAD will promote the long-term interests of end-users if they are likely to contribute towards the provision of:*
>
> - *Goods and services at lower prices*
> - *Goods and services of a high quality, and/or*
> - *A greater diversity of goods and services.*[5]

2.3 Unfortunately there is no analysis in the Draft Determination to determine whether the proposed rate reduction will achieve these goals. Instead the ACCC has simply asserted that "the proposed price reductions are likely to promote competition in the relevant markets".

2.4 This faith in the efficacy of the proposal is inconsistent with the ACCC's stated concerns about the "structural issues" in the fixed-line market and its acknowledgement (in the Discussion Paper) that competition in one of the relevant markets was *incapable* of delivering the benefits of lower MTAS rates to consumers.[6]

2.5 Optus therefore questions the ability of the fixed-line market to deliver any of the above benefits in the current circumstances where Telstra is the dominant supplier. Should Telstra's competitors pass-through the entire savings, only a fraction of the market will benefit. It therefore stands that consumers, on the whole, will not benefit, especially given the likely implications of lower revenues in the mobile market (as set out in Optus' submission in response to the discussion paper). This decision will simply result in a transfer from mobile and fixed consumers to Telstra's pockets.[7] It is not in the long term interests of end-users.

A lower MTAS will result in higher margins for Telstra with no benefit to consumers

2.6 Optus submits that the proposed lower MTAS rates (and any lower rates for that matter) will simply result in higher margins for Telstra and not benefit the consumers which the ACCC is attempting to protect.

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[4] ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS)*, Draft Access Determination Explanatory Statement, 23 September 2011, p.12

[5] ACCC, *Inquiry into varying the exemption provisions in the final access determinations for the WLR, LCS and PSTN OA services*, Issues Paper, September 2011, p.19

[6] ACCC, *Domestic Mobile Terminating Access Service (MTAS): Public Inquiry to make an Access Determination*, Discussion Paper, June 2011, p.8

[7] Covec, *Mobile Termination Welfare Analysis*, March 2011

2.7 This is because Telstra will be able to maintain its existing FTM retail call prices whilst paying *less* to terminate on its competitors' mobile networks, resulting in a net gain. The lack of competitiveness in the fixed line market[8] was recognised by the Government in the Explanatory Memorandum to the NBN legislation:

> *The Australian telecommunications market is characterised by a very strong and highly integrated incumbent, Telstra. Telstra owns the only copper network connecting almost every house, the largest cable and mobile networks, and a 50 per cent stake in Foxtel, Australia's largest subscription television provider.*
>
> *Partly because of this integration, Telstra has been able to maintain a dominant position in virtually all aspects of the market, despite more than 10 years of open competition. It is the Government's view that Telstra's high level of integration has hindered the development of effective competition in the sector.*[9]

2.8 As the result of these 'inherent structural issues' in the fixed line market, which were recognised by the ACCC, Telstra will be able to maintain its existing FTM call prices. Due to the lack of competitiveness, there will be limited pressure on Telstra to reduce its highly profitable FTM call prices; a similar pattern was observed after previous reductions in the MTAS.[10]

2.9 Moreover, Telstra will benefit from a lower MTAS rate, and the benefit will be at the expense of its mobile competitors, as has been recognised by an industry financial analyst.[11]

2.10 From previous statements it appears that the ACCC is in agreement with the financial analyst. It does not appear that the ACCC expects a further round of MTAS reductions to benefit consumers given its statement that:

> *…input cost reductions are likely to be retained by providers in the form of increased margins with further detrimental impacts on consumer welfare.*[12]

2.11 This is consistent with the ACCC's view that although it had previously expected 'competitive forces' to ensure that consumers benefit from lower FTM call prices, it recently acknowledged in the Discussion Paper that:

> *…evidence suggests decreases in the MTAS rate has not lead to improved retail pricing for end users of FTM services.*[13]

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[8] Optus has reported some of the difficulties encountered by fixed line operators seeking to compete with Telstra: Optus, *Optus Submission: Regulating the National Broadband Network*, June 2008 (see section 4 for an overview of how the regulatory regime has failed to constrain Telstra from exercising its market power); Optus, *Optus Submission: Regulatory Reform for the 21st Century*, June 2009 (see section 2 for an overview on market structure and the need for reform).

[9] Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010: Explanatory Memorandum

[10] ACCC, *Domestic Mobile Terminating Access Service (MTAS): Public Inquiry to make an Access Determination*, Discussion Paper, June 2011, p.8

[11] **[CiC]**

[12] ACCC, *Domestic Mobile Terminating Access Service (MTAS): Public Inquiry to make an Access Determination*, Discussion Paper, June 2011, p.6.

2.12 Optus has also submitted evidence to the ACCC that Telstra has not passed through savings in the MTAS to either FTM call prices or other services.[14] It is therefore curious that the ACCC has stated in the Draft Determination that it considers "a reduction in the price of the MTAS towards the underlying cost of production will promote competition in the market within which FTM services are provided."[15] This conclusion is unsupported by any factual evidence.

2.13 Optus submits it is far more likely that the opposite will occur: reductions in the MTAS will further entrench Telstra's market dominance and erode competition before the NBN can even be fully rolled out. This is because Telstra will be able to utilise the savings in FTM calls to plough into customer retention activities.

2.14 The ACCC has recognised and described this possibility in the Discussion Paper as follows:

> *The lack of competitive pressure means that integrated operators have little incentive to pass through savings from reductions in the MTAS directly to consumers in the FTM price. Integrated providers also have the ability to use their savings from the regulated reductions in the MTAS rate to subsidise price reductions in services or geographic areas where competition does exist.*[16]

2.15 Moreover, it is clear from Telstra's own submissions that this outcome is likely. Telstra states that by using savings to make bundled offerings more competitive, it is simply responding to 'customer preferences'.[17] Even if this assertion can be taken at face value, it would mean that the high income households which can afford to take-up Telstra bundles such as HomeLine Reach and Ultimate (which range from $49.90 to $89.90) may benefit but the lower income households that rely mainly on fixed-line services (see the submission from ACCAN[18]) do not benefit from the 'subsidies' as they are more likely to take-up lower valued plans (such as the Budget, Complete and Plus all for under $32 per month). As a result, the most vulnerable consumers who are most likely to rely solely on a fixed-line service will not benefit, as they will continue to pay the same price for their bundle and the same high margin retail FTM call rates.

2.16 This type of strategic behaviour is exactly what Telstra is referring to when it tells the ACCC that forcing FTM pass-through would "inhibit commercial flexibility and the availability of competitive solutions to meet customer preferences in the fixed voice services market".[19] That

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[13] ACCC, *Domestic Mobile Terminating Access Service (MTAS): Public Inquiry to make an Access Determination*, Discussion Paper, June 2011, p.6.

[14] Optus, *Optus Submission in response to the ACCC Discussion Paper: Public Inquiry to make an Access Determination for the Mobile Terminating Access Service*, July 2011, Appendix B

[15] ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS)*, Draft Access Determination Explanatory Statement, 23 September 2011, p.11

[16] ACCC, *Mobile Terminating Access Service (MTAS): Public Inquiry to make an Access Determination*, Discussion Paper, June 2011, p.8.

[17] Telstra, *Supplementary submission in response to the Commission Discussion Paper on Domestic Mobile Terminating Access Service (MTAS)*, 19 September 2011, p.4

[18] ACCAN, *Domestic Mobile Terminating Access Service*, Submission to the ACCC, 27 July 2011.

[19] Telstra, *Supplementary submission in response to the Commission Discussion Paper on Domestic Mobile Terminating Access Service (MTAS)*, 19 September 2011, p.4

is, mandated pass-through would make it more difficult for Telstra to overcharge customers on FTM calls and funnel the proceeds into reducing competition.[20]

2.17 The ACCC has noted that the Government will be separately reviewing Telstra's retail price controls. There is, however, no significant information regarding the timing nor contents of the review. The relevant statement on the Department's website does not engender confidence in the promptness or comprehensiveness of any such review.[21] It therefore appears that the ACCC is simply hoping for the best rather than having a clear solution to benefit end-users.

The current rate will promote competition and benefit consumers

2.18 Given that a lower MTAS rate will not benefit consumers, and potentially damage competition, Optus submits that keeping the existing rate will promote competition. It will do so by allowing the fixed market to develop on its merits as the NBN is rolled out, rather than handing Telstra a further windfall gain to fund its marketing efforts and weaken its competitors.[22] Optus maintains that once the NBN is fully operational, competition in the fixed-line services market will be capable of delivering the benefits of any reductions in the MTAS to end-users.

2.19 The current rate will also promote competition in the mobile market by avoiding the revenue reduction shock that will impact Optus and Vodafone. Stability in the industry is currently particularly important given the significant and well documented challenges facing the mobile industry. Optus provided a comprehensive overview of these challenges in its submission to the Discussion Paper, including:[23]

(a) Increasing demand driven primarily by data utilisation on internet browsing capable handsets (smartphones) and tablet devices which is increasing the pressure to invest in capacity;

(b) Decreasing margins and average revenue per user (ARPU) leading to lower returns, which compromises the investment case; and

(c) Network investment requirements coinciding with significant capital outlays for spectrum acquisition (renewals and digital dividend auctions).

2.20 The view that the current rate will support competition in the mobile market in particular can be supported by reference to the views of an industry financial analyst.

2.21 **[CiC]**

2.22 Therefore, should the MTAS rate remain at the current rate it is likely that both Optus and Vodafone would be in a better position than otherwise to compete with Telstra in the mobile space. This is because the forward revenue certainty would not only be able to support

[20] However, Optus believes that Telstra would nevertheless be able to circumvent any mandated pass-through by increasing other prices to prevent consumers from fully benefiting from a reduced MTAS, a concern which was shared by the ACCC.

[21] DBCDE website, Telstra retail price controls, http://www.dbcde.gov.au/telephone_services/telstra_retail_price_controls, accessed 17 October 2011

[22] Vodafone has expressed interest in entering the fixed-line market given the advent of the NBN.

[23] Optus, *Optus Submission in response to the ACCC Discussion Paper: Public Inquiry to make an Access Determination for the Mobile Terminating Access Service*, July 2011, section 2.

attractive consumer offers, but would help to create the revenue certainty required to make network investments (as set out in Optus' previous submission).

Section 3. The proposed rates will not promote network use and investment

3.1 The ACCC has made the claim that a reduced MTAS rate will encourage the efficient use of and investment in carriers' networks. Specifically, it stated that:

> *The ACCC considers this is the case because it is expected that lower MTAS prices, a key wholesale input for network providers, is more likely in the long run to **encourage** rather than discourage **investment** and reduce any associated risks for any potential and existing infrastructure owners. In general the ACCC considers that pricing aligned to the efficient cost of supply of the MTAS will **increase demand** and expand the economically efficient use of, and economically efficient investment in, infrastructure.[24] [emphasis added]*

3.2 Below Optus will argue that, notwithstanding the ACCC's (unsubstantiated) claims, a reduced MTAS will not increase demand nor will it increase investment.

A reduced MTAS will not increase demand for voice services on mobile networks

3.3 The ACCC appears to believe that lowering the MTAS rate (or aligning it with its view of the 'efficient cost of supply') will encourage greater usage of carriers' networks. However, this is misconceived, since most consumers do not face marginal prices for their network usage due to the prevalence of 'bucket' plans. Although bucket (or 'cap') plans are more common in the postpay segment, they are becoming increasingly popular in the prepay segment as well.

3.4 **[CiC]**

3.5 However, the profitability of some consumer groups (namely infrequent prepay users) will be affected by a lower MTAS and so a likely outcome is that the plans targeted to that group will be reduced or the unit prices will increase. After the last mobile termination rate (MTR) cut in the United Kingdom (UK), that is exactly what happened: the three mobile carriers increased prepay tariffs. Specifically, a report for the Guardian stated that:

> *Prices for Vodafone's pay-as-you-go service will **rise by a third** next month as it becomes the latest operator to try to **claw back some of the revenues lost** through increased regulation.[25] [emphasis added]*

3.6 The author also noted that Vodafone's price rises also affected contract customers and followed rises by its market rivals O2 and T-Mobile.[26]

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[24] ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS)*, Draft Access Determination Explanatory Statement, 23 September 2011, p.13

[25] Wray, Richard, "Mobile phones: Vodafone lifts charges to recoup lost earnings", *The Guardian*, 19 August 2008.

[26] Wray, Richard, "Mobile phones: Vodafone lifts charges to recoup lost earnings", *The Guardian*, 19 August 2008.

3.7 In response to the proposals to cut the rates again in 2010 (which were finalised earlier this year), a report for the Guardian quoted an industry analyst commenting about the effect on prepay customers:

> *Morten Singleton, analyst at Collins Stewart, said: "one of the consequences of this move is the **decreasing profitability of the prepaid customer**.*
>
> *"For years it has hardly matter how many calls such customers made so long as they were on your mobile network. As a receiver of calls, prepaid customers generated quite decent revenue (and profitability) from the mobile termination rates alone. With these rate finally coming down to a level more commensurate with the cost of providing the service, **operators will have to reassess the profitability of their prepaid customer base**."[27] [emphasis added]*

3.8 Therefore, since it is far more likely that prices will *rise* for this segment of consumers, and not affect the other segment (postpaid and high use pre-pay), it is improbable that network usage will increase. It is actually more likely that network use (for voice services) will *decline*, since the marginal users (prepay customers which generally pay per minute used) will face higher prices.

A reduced MTAS will not increase investment in mobile network infrastructure

3.9 Investment decisions are made based on a forward-looking assessment of the revenues that can be earned against expenditure required for the new (or improved) product or service. It is therefore curious that the ACCC is reducing revenues on the one hand, and stating that investment will increase as a result on the other, especially given the operating environment of declining margins.

3.10 Indeed, in other decisions the ACCC has referred to the need for *price stability* in order to promote investment. This was an overarching theme in its fixed-line services decision, specifically stating that:

> *…the ACCC was guided by its view that pricing stability is desirable to the extent that it supports past investments and promotes industry confidence in making future investment decisions.*[28]

3.11 In order to give effect to its price stability arguments the ACCC chose to maintain current headline product prices (the metropolitan ULLS rate) despite evidence that the 'efficient cost of service' was lower. This was achieved by the ACCC arbitrarily increasing the asset base in order to support the current price.

3.12 Optus submits that it is inconsistent for the ACCC to place a high value on stability for one set of services and disregard stability for another part of *the same industry*.

3.13 Moreover, it is implausible that a transfer of value from the majority of the mobile industry to the dominant fixed-line player will lead to an increase in mobile network investment.

[27] Wray, Richard, "Landline-to-mobile phone call costs set to fall under Ofcom plans", *The Guardian*, 1 April 2010.

[28] ACCC, *Inquiry to make final access determinations for the declared fixed line services*, Final Report, July 2011, p.38

Section 4. The determined prices are not robust

4.1 The ACCC has proposed to significantly cut MTAS rates. To support its determination on pricing it refers to a mixture of other regulators' decisions, industry developments and a cost model that it recognises is unreliable to declare that it has taken a 'measured approach'.[29] Below Optus will submit that the bounds the ACCC has chosen are not representative of the costs currently incurred by mobile network operators (MNOs). As a result the prices cannot be consistent with the legislative criteria.

A lower bound price of zero is unsubstantiated

4.2 The ACCC views the lower bound as 'approaching' zero. Whether this implies a price of zero or very close to zero, the ACCC's view of a lower bound 'approaching' zero relies on an inappropriate technological assumption and unsubstantiated views of industry realities. This is because:

(a) a LTE network does not represent "in use" technology; and

(b) a price of zero overlooks opportunity costs, significant ongoing operational costs as well as substantial expected costs for spectrum acquisition.

4.3 Although the ACCC recognises that the industry in Australia may not reach a position of LTE adoption during the period of the FAD, it states that:

> *IP mobile networks do represent what a hypothetical efficient new operator would implement in the market today and therefore establish the lower bound estimate of the efficient cost of providing the MTAS.*[30]

4.4 Optus submits that this is entirely inconsistent with the principle of 'best in use technology' since LTE can hardly be considered 'in use'. It can hardly be considered ubiquitous given the limited number of networks globally that have rolled out LTE technology[31], moreover there is still very limited availability of compatible handsets.[32] **[CiC]** It is therefore simply wrong to view LTE as being able to represent all costs to provide voice termination services.

4.5 Furthermore, such an extreme position is inconsistent with the ACCC's previous views. The ACCC's own cost model (WIK) was based on 2G technology despite the fact that the Australian networks had commenced rolling out 3G technology. That is, at that time 3G was a far more

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[29] ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS),* Draft Access Determination Explanatory Statement, 23 September 2011, p.7

[30] ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS),* Draft Access Determination Explanatory Statement, 23 September 2011, p.10

[31] The GSA reports that 35 networks are launched in 21 countries (see: GSMA, "GSA raises forecast for LTE networks", Media Release, 13 October 2011, http://www.gsacom.com/news/gsa_340.php4)

[32] Maher, William, "LTE phones could arrive next year, says Telstra", *PC&Tech Authority*, 8 March 2011, http://www.pcauthority.com.au/News/250517,lte-phones-could-arrive-next-year-says-telstra.aspx

advanced technology compared to the current position of LTE, and the ACCC viewed the fact that operators had to operate two networks (2G and 3G) simultaneously as contributing to *higher* – albeit efficiently incurred – costs.[33] In the current situation operators will be forced to operate networks with three technologies simultaneously.

4.6 A lower bound price of zero also fails to acknowledge that despite the ACCC's views on the specific costs to provide the MTAS there *are* costs. That is, the cost of providing the MTAS with LTE is not zero. This is particularly the case given the ACCC's preference for a pricing principle based on TSLRIC+, which includes an allocation of common costs. Furthermore, coverage plays a key role in driving cost and in an environment of increasing capacity constraints the opportunity cost of providing voice termination services *increases*. Optus described these views in substantial detail in its submission to the Discussion Paper.[34, 35]

Assumptions supporting the WIK upper bound price are weak

4.7 The ACCC lists a number of industry developments that would be expected to lower the inputs to the 2007 WIK modelling.[36] No further information is presented by the ACCC to support those assumptions but for a brief discussion regarding the likely relative costs of IP-based mobile networks (LTE). Further, the ACCC does not present the materiality of the combined effect of those assumptions on the WIK model outcomes. This is an insufficient analysis to support such a material proposed change to a regulated price.

4.8 Moreover, there are reasons to believe that the assumptions listed by the ACCC will not necessarily lead to a lower MTAS rate because:

(a) whilst spectrum *utilisation* has improved with 3G migration, the advent of mobile data usage has increased spectrum *requirements*, which increases actual capital costs for acquisition as well as increasing the opportunity cost of providing voice termination services;

(b) similarly, although voice minutes have increased (decreasing the share of costs apportioned to each minute of use compared to previously), the opportunity cost of voice minutes has increased. When 3G networks were rolled out there was significant excess capacity in the network whereas if and when LTE is rolled out, it will be in areas of capacity constraint, this imposes very real costs on network providers;

(c) the increase in mobile penetration is not necessarily linked with higher ownership rates, nor is it likely to be sustainable if the MTAS rate is cut. This is because the interconnection arrangements in Australia (CPP) compared to other countries (RPP) tends to encourage second sims for personal use. Likewise, a reduction in the MTAS rate is associated with a decline in profitability in low usage prepay customers (as discussed in section 2 above). It is therefore likely that a decline in the MTAS will

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[33] ACCC, *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011,* March 2009, p.18

[34] Optus, *Optus Sumission in response to the ACCC Discussion Paper: Public Inquiry to make an Access Determination for the Mobile Terminating Access Service*, July 2011, section 3.

[35] **[CiC]**

[36] ACCC, *Inquiry to make a final access determination for the Domestic Mobile Terminating Access Service (MTAS)*, Draft Access Determination Explanatory Statement, 23 September 2011, pp.7-8

actually *decrease* sim penetration. A more useful measure, ownership, is likely to have remained reasonably steady since 2007 since Australia had very high early growth rates;

(d) although network equipment has declined in real terms consumers' expectations of network performance has increased. In particular, coverage requirements are greater which is a substantial driver of network costs and so it is not necessarily the case that lower individual equipment prices will reduce the cost of providing the MTAS since more equipment is required for greater coverage;

(e) the merger of Vodafone and Hutchison will not necessarily lead to near term economies of scale. Although some corporate cost savings may have been immediately realisable, Hutchison customers are not due to migrate onto Vodafone's network until next year. This means that the merged entity has been operating two networks, which *increases* costs (not to mention the very public network problems Vodafone has been experiencing). Further, in order to fully integrate the two networks (and entities) significant costs will be required to manage the migration process, which is expected to raise its own difficulties (see the analyst's comments in section 2 above);

(f) rapid data growth is not necessarily linked with rapid revenue growth. In fact, average revenue per user (ARPU) for mobile broadband products has been *declining*.[37] So whilst the voice proportion of relative traffic is declining, voice services are still carrying a higher proportion of revenues because it is a more inelastic service; and

(g) a transition to an IP-based network will not occur cheaply nor quickly, further it will not necessarily be rolled out over the entire network footprint. Moreover, as discussed in the preceding section, IP-based networks hardly represent 'best in use' and so should not be considered in a current price decision.

4.9 Given these reasons, it is not necessarily the case that the ACCC's assumptions will result in a lower rate. If it were the case that network costs had declined since the model was built, one would observe:

(a) Margin increases in the presence of constant real prices; or

(b) Constant margins if prices were declining at the same rate of costs.

4.10 However, the industry has experienced declining margins in the presence of price reductions. This means that costs are either constant or increasing; not decreasing. The ACCC has observed material price reductions in the mobile services index AND Optus has previously submitted to the ACCC that margins are declining. It is therefore not the case that costs have been declining and in fact, network costs are increasing and are expected to continue to increase.[38]

4.11 Furthermore, Optus submits that it is inappropriate to continue to rely on the use of a cost model which was already outdated two years ago. Indeed, the ACCC itself stated in 2009 that:

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[37] Optus, *Optus Submission in response to the ACCC Discussion Paper: Public Inquiry to make an Access Determination for the Mobile Terminating Access Service*, July 2011, section 2

[38] Optus, *Optus Submission in response to the ACCC Discussion Paper: Public Inquiry to make an Access Determination for the Mobile Terminating Access Service*, July 2011, section 2

… *[*the WIK model's*] application as a tool to estimate the efficient costs of supplying the MTAS in the Australian context may become increasingly weak.*[39]

[39] ACCC, *Domestic Mobile Terminating Access Service Pricing Principles Determination and indicative prices for the period 1 January 2009 to 31 December 2011,* March 2009, p.19

Section 5. Non-price terms and conditions

5.1 In this section Optus contends that the ACCC should include NPTCs in its FAD relating to network conditioning for mobile numbers and facilities access for mobile, and provides comments on the proposed non-price terms and conditions (NPTC).

5.2 The ACCC has included the following NPTCs in the draft FAD:

(a) billing and notification;

(b) creditworthiness and security;

(c) general dispute resolution procedures;

(d) confidentiality provisions; and

(e) suspension and termination.[40]

5.3 The ACCC has made amendments to each of these NPTCs. Optus' comments in response to some of these NPTCs are outlined below.

5.4 The ACCC however has decided not to include NPTCs that it considers are not relevant to the MTAS. This includes liability (risk allocation) provisions, communications with end users, network modernisation and upgrade provisions, changes to operating manuals, ordering and provisioning and facilities access.[41]

5.5 Optus agrees that some of these terms may not be relevant to MTAS. However, the ACCC should include additional NPTC provisions in the FAD, in particular, network conditioning for mobile numbers and facilities access for mobile. These two provisions are important in promoting competition in the relevant markets and encouraging the efficient use of, and investment in infrastructure as outlined in Optus' previous submission to the ACCC.

5.6 Optus submits that specifying the maximum time allowed for network conditioning for mobile numbers promotes industry certainty and ensures MNOs are competing on a level playing field. **[CiC]** Optus refers to and repeats its previous submission.[42]

5.7 With respect to the provision about mobile facilities access, Optus submits that a minimum notice period and appropriate notification is important in ensuring minimal disruption to end users in the event a site (where Optus has installed mobile facilities) is transferred, sold off or decommissioned by Telstra.

5.8 As outlined in Optus' previous submission, **[CiC]** This outcome is not in the LTIE. Optus repeats and refers the ACCC to its previous submission.[43]

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[40] ACCC, Inquiry to make a final access determination for the MTAS, Draft Access Determination Explanatory Statement, 23 September 2011, p.16

[41] ACCC, Inquiry to make a final access determination for the MTAS, Draft Access Determination Explanatory Statement, 23 September 2011, p.16

[42] Optus, Submission in response to the ACCC discussion paper on public inquiry to make an Access Determination for MTAS, July 2011, pp 66-68

General dispute resolution procedures

5.9 Optus notes that the ACCC has amended clause 4.2:

> *[t]he Access Provider may seek a determination from an independent or third party on whether a dispute initiated by the Access Seeker as a Billing Dispute is a Non-Billing Dispute. If the independent or third party deems the dispute to be a Non-Billing Dispute, the Access Provider may provide written notice to the Access Seeker to pay any withheld amount to the Access Provider on the due date for the disputed invoice or if the due date has passed, immediately on notification being given by the Access provider*.

5.10 The ACCC however has not defined what “an independent or third party” is. Optus considers that an appropriate independent or third party would be either ACMA or the Court. The ACCC therefore should include in the FAD a definition of “an independent or third party”.

Suspension and termination

5.11 The ACCC has amended a number of clauses under the suspension and termination schedule.

5.12 Under clause 6.1(e) the Access Provider has to provide a suspension notice to the Access Seeker *“as soon as reasonably practicable after becoming aware of the Suspension Event*”. Whereas under the 2008 Model Terms, the Access Provider has to provide a suspension notice *“within 20 business days after becoming aware of the Suspension Event*”.

5.13 Optus considers the amendment brings uncertainty to the Access Seeker as the phase “as soon as reasonably practicable” does not provide a precise timeframe when the Access Provider may provide a suspension notice. It may mean that the Access Provider may raise a suspension notice after 6 months of becoming aware of the Suspension Event.

5.14 Similarly, under clause 6.1(f) the ACCC has amended the clause so that the Access Provider may suspend the service by giving written notice to the Access Seekers “*as soon as reasonably practicable*” after the expiry of the Remedy Period instead of “within *20 business days”* after the expiry of the remedy period.

5.15 Again this amendment brings uncertainty to the Access Seeker. Without a precise timeframe as to when the Access Seeker may suspend the service, it may mean that the Access Provider may reserve its power to suspend the Access Seeker’s service until such time as it sees fit.

5.16 The ACCC has further shortened the time allowed for Access Seekers to institute remedial actions from 20 business days to 10 business days under clause 6.1(f). As outlined in Optus’ previous submission, Optus considers the ACCC should indeed allow the 20 business days to be extended in circumstance where reasonably required.

5.17 It is important that the Access Seeker is provided with appropriate time to institute remedial action before the Access Provider can suspend or terminate the service. Depending on the nature of the matter, it may take longer than 10 business days to investigate the breach and come up with a workable solution. Implementing a strict timeframe of 10 business days is therefore unreasonable and not in the LTIE. This is particularly the case when the suspension

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[43] Optus, Submission in response to the ACCC discussion paper on public inquiry to make an Access Determination for MTAS, July 2011, pp.66-68

will cause a significant disruption to end users, ie end users will no longer be able to call end users who are on the Access Provider's mobile network.

5.18 Further, Optus repeats and relies on its previous submission about its concerns that:

(a) the proposed termination provisions do not address circumstances in which an access seeker would be entitled to terminate part, or all of, the services or agreement as a result of contractual breaches of the access provider; and

(b) the proposed termination provisions provide the Access Provider the right to terminate the service in the event that there is a billing dispute on hand.