

27 March 2009

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Dear Mr. Home

Submission on Fixed Services Review, Declaration inquiry for ULLS, LSS, PSTN OA, PSTN TA, LCS and WLR

1. Executive summary

Netspace appreciates the opportunity to provide comments in response to the ACCC's Fixed Services Review. Netspace agrees with the ACCC's preliminary view that continued declaration of each of the declared fixed services is required to promote the long term interests of end-users (**LTIE**) in telecommunications markets and accordingly, that the existing declarations should be extended. Netspace notes the ACCC's view that the declaration extension should be limited to a relatively short 12-month period to allow consideration of matters arising out of the NBN process. It is Netspace's view that the extension should be for a period of at least 24-months.

2. Relationship between exemptions and fixed services declarations

In Netspace's view, excluding the exchange service areas (**ESAs**) subject to exemption orders from any extension of the declarations for PSTN OA, LCS and WLR, or any other services, would be contrary to the LTIE and should not be done. As the ACCC said in granting exemptions to Telstra in regards to these services, Telstra has imposed many impediments to access seekers utilising the ULLS, such that the ACCC considered conditions and limitations were required to safeguard the LTIE in ESAs subject to exemptions.

Netspace has become all too familiar over recent months with the extent to which Telstra works to impede Access Seekers entering exchanges, even where there are already others established. It is our strong view that exemptions should not be granted until the ACCC is satisfied that Access Seekers have achieved equivalence with Telstra itself and then that this exemption be periodically reviewed based on Telstra's ongoing performance at maintaining this equivalence. Though the ACCC's exemptions are the subject of ongoing appeal proceedings in the Federal Court, it remains the case that promotion of the LTIE requires continued declaration of the PSTN OA, LCS, WLR and all other fixed services in all ESAs and that excluding any ESAs at this time would be detrimental to competition and consumers.

3. Variation of ULLS service description

Netspace considers that the ULLS service description should be varied to ensure sub-loop access is available to access seekers on reasonable terms. The current ULLS service description has an unsatisfactory level of certainty regarding access seekers' ability to interconnect at a point between a Telstra exchange and an end-user. The importance of this problem will magnify as we move closer to an FTTN environment, when access seekers will require increased levels of access closer to the end-user. This issue and explanations of how access seekers perceived the problem have been previously detailed in submissions made to the ACCC as part of the 2007 inquiry regarding variation of the ULLS service description, which were referred to in the ACCC's November 2008 discussion paper concerning the current review. Beyond Telstra's exclusion from the NBN process, the issues largely remain the same so there appears to be little value in repeating arguments that the ACCC is aware of and has taken into account in its preliminary decision not to vary the ULLS service description. Netspace has little doubt that Telstra will utilise uncertainties in the current ULLS service description to prevent sub-loop access and hinder a FTTN roll-out as well as any access seeker efforts to prepare for FTTN access. This was foreshadowed in Telstra's ULLS Band 2 Undertaking, where Telstra proposed a ULLS service description that differed from the actual service description. Telstra's ULLS service description provided that a point of interconnection could only be at a *Telstra* Customer Access Module (**CAM**), rather than a more generic CAM, which could potentially be operated by another carrier. If accepted, this service description would greatly assist Telstra's denial of sub-loop access.

4. Relevant markets

Substitution for each of the declared fixed services remains limited. Though the number of ULL services in operation has increased since the last fixed services review, with some limited potential to provide a substitute for the WLR, LCS and PSTN OA services, substitution is weak, costly and impeded by inadequate or nonexistent migration processes. Though the ACCC's WLR, LCS and PSTN OA exemption decisions concluded that specific ESAs with a level of ULLS based competition could deliver competition for voice services, Netspace considers this result is doubtful. Though this question has subsequently been considered on appeal by the Australian Competition Tribunal (*Tribunal*) and the Federal Court, it remains the case that the ACCC only gave these exemptions to Telstra on the basis of several conditions, which have never been met by Telstra. For instance, Telstra has failed to implement an efficient LSS to ULLS migration process as required under the exemption conditions and continued to say there is insufficient demand for such a process despite increasing access seeker requests. The question of whether these exemptions should be reinstated is a matter that has now been returned to the Tribunal. Apart from being contrary to the LTIE, it is not appropriate for geographic exemptions to be part of the ACCC's consideration in redeclaring these services.

In regards to both supply side and demand side substitution, there is little prospect in the foreseeable future and prior to a substantial NBN rollout that customers or suppliers will switch products or services in any sufficient degree to come anywhere close to challenging the dominant position of Telstra's network in providing access to fixed services.

5. State of competition

Even though there has been growth in facilities-based and quasi facilities-based competition in fixed services, the relative level of competition remains insufficient to argue that the incumbent's domination of telecommunications markets has been removed or even particularly diminished. In such market circumstances, it remains an imperative for the ACCC to ensure that a robust regulatory environment exists to encourage investment via strong competition. Netspace agrees with the ACCC's position that continued regulation and an extension of the declaration of fixed services is required. Any relaxation of regulation could quickly remove the benefits that end-users in downstream markets have

experienced as a result of the established competition that has developed via declared fixed services.

The Commission's stated principle, that where it is economically efficient, facilities-based competition is more likely to promote the LTIE may be sound, however the clear problem is that the considerable capital investment required to install a competing fixed network has to date put such a rollout beyond the reach of the industry. This will not change prior to the NBN. Though Optus and TransACT operate fixed HFC networks that compete with Telstra, each is geographically limited and on a macro level there exist many black spots where these alternative technologies cannot economically be used to compete with Telstra's legacy CAN. It is also reasonable to say that even in the areas where these networks do operate, the current levels of competition would not exist without regulation under Part XIC of the *Trade Practices Act*, as other carriers do not have access to the HFC networks.

The implication of this is that Telstra's CAN will remain as the primary means that fixed voice and Internet services are provided in the foreseeable future. Without regulated access to Telstra's services, even in areas where there is full-facilities based competition such as Canberra, Ballarat and metro areas within Optus's HFC footprint, access seekers would face considerable competitive difficulties and most likely be pushed out of the market. Just because alternative delivery methods exist does not necessarily mean that there is a sufficient level of competition to encourage diverse service providers and promote the LTIE through lower prices and better service. When there are such obstacles to access, a duopoly in limited geographic areas is little better than a monopoly.

Access to infrastructure on reasonable terms remains paramount in encouraging new entrants, increasing efficiency and improving competitive conditions. In the foreseeable future, fair access to fixed service networks will not occur except via firm regulation. The removal of regulation, whether in geographic areas such as ESAs or at a national level in relation to particular services will in both the short and long term diminish competition, reduce effective use of infrastructure and push up prices, all at the detriment to the LTIE and the industry in general.

The large number of access disputes that the ACCC has arbitrated and continues to arbitrate demonstrates Telstra's unwillingness to negotiate reasonable terms of access with its competitors. The outcomes of these access disputes, which we understand have largely recognised access seeker concerns, give a clear indication of whether the ACCC is satisfied that the terms Telstra imposes on its competitors are reasonable. Put simply, they are not. Telstra sets unreasonable conditions and excessive charges for access to its network. If left solely to commercial negotiation, without regulation, Telstra would probably simply refuse to provide any access at all except to services that are truly subject to full facilities-based competition. This is no surprise, as a privately owned incumbent which controls the vast majority of network facilities, Telstra wants to maintain and grow its dominant market share. It is not in Telstra's interests to allow competitors to access its services at prices or terms that will allow them to compete on their merits and by differentiation of services provided to end-users. Telstra's industry dominance and its threat to competition has the potential to halt progress in telecommunications markets and is detrimental to the LTIE as Telstra will have little incentive to improve the services it offers.

Australia's telecommunications industry requires a robust regulatory environment if competition in the provision of fixed services is to survive and grow. The current degree of competition in the fixed services market reflects the ACCC's work to date. Without regulation imposed through fixed services declaration, competition and the consumer benefits it has brought to the Australian people would not have occurred. Without continued declaration of services, these benefits will be lost. Netspace supports the ACCC's decision to extend the declaration of each of the fixed services.

6. Period of declaration extension

Netspace acknowledges the ACCC's concerns that the NBN may require significant legislative and regulatory amendments and that a short declaration extension will avoid regulatory uncertainty or interference with the Federal Government's decisions on the NBN. Netspace considers that the impact of the NBN rollout will not be felt until well after 31 July 2010, and the ACCC's decision to make only a 12-month extension will result in the ACCC and all interested parties being in exactly the same position as we are now in a year's time, i.e. having to again extend the declarations of fixed services. To avoid an unfortunate duplication of resources being focused on the same task, Netspace considers that the ACCC should extend the fixed



service declarations until at least 31 July 2011, by which time a more informed assessment of the required regulatory arrangements resulting from the NBN could be made.

Yours sincerely,

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