

**Optus Submission in Response to the  
Australian Competition and Consumer Commission's**

**Draft Decision**

**on**

**Telstra's Domestic Transmission Capacity Service Exemption  
Applications**

**Public Version**

**October 2008**

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## 1. Executive Summary

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- 1.1 On 24 August 2007, Telstra lodged an application with the Australian Competition and Consumer Commission (ACCC) under the Trade Practices Act for the removal of regulated access to transmission services on 20 capital-regional routes. On 21 December 2007, Telstra lodged four additional exemption applications for the following transmission services:
- inter-exchange transmission in 17 capital city Band 1 Exchange service areas (ESAs) for all declared bandwidths;
  - tail-end transmission in 17 capital city Band 1 ESAs for all declared bandwidths;
  - inter-exchange transmission in 115 metropolitan or regional ESAs for all bandwidths; and
  - tail-end transmission in 128 metropolitan or regional ESAs for bandwidths up to 2 Mbps.
- 1.2 The ACCC has reviewed all the above exemption applications together, and issued a draft decision proposing to grant Telstra exemptions from its obligations to supply the declared domestic transmission capacity service for:
- capital-regional transmission on 9 capital-regional routes;
  - inter-exchange transmission in 16 CBD exchange service areas;
  - inter-exchange transmission in 70 metropolitan exchange service area; and
  - to grant a class exemption to the same extent.
- 1.3 However, the ACCC has proposed to reject Telstra's exemption applications in relation to tail-end transmission in metropolitan and CBD areas.
- 1.4 The draft decision is an example of measured and balanced decision making. Whilst Optus does not take the same view as the ACCC on all issues, it nevertheless appreciates that the ACCC has undertaken a thorough review of the state of competition in the various markets and reached a considered position on the likely results of the proposed exemptions. The limited geographical scope of the exemptions the ACCC proposes to grant reflects the diverse market characteristics of the various transmission routes (and/or markets) under consideration and the fact that in many areas proposed by Telstra for exemption there would have been little constraint on Telstra's pricing of transmission services.
- 1.5 Optus supports in particular the ACCC's proposal to reject Telstra's exemption applications in relation to tail-end transmission. The ACCC has correctly recognised that the ULLS is not a close substitute for tail-end DTCS and that there is not effective competitive supply to the tail-end transmission market in CBD areas. This decision reaffirms a fundamental principle that

underpins effective pro-consumer regulation: that regulation should be relaxed only where to do so would encourage efficient investment and benefit competition and consumers.

- 1.6 In the remainder of this paper and its appendix Optus presents further data relevant to the assessment of Telstra's applications as well as submissions responsive to the draft decision.
- 1.7 In Section 2 Optus submits that the exemptions proposed by Telstra would potentially result in a distinct competitive impact on corporate customers given their particular service requirements.
- 1.8 The inadequacy of the ULLS as a substitute for the DTCS is subjected to further scrutiny in Section 3. In particular, two case studies are presented which provide further evidence that:
  - the presence of RIMS and pair-gain systems as well as distance limitations constrain the availability and capacity of ULL services that can be provided to end-users (as demonstrated in a case study of a single ESA); and
  - the service levels available for the ULLS are significantly different from those available for the DTCS (as demonstrated in a case study of an instance of discriminatory substandard Telstra service in fault restoration relating to a ULLS).
- 1.9 In Section 4 further precedent is set out which supports Optus' contention that the relevant markets for transmission services are point-to-point routes, rather than broad geographic areas.
- 1.10 As the ACCC has rightly recognised, there are high sunk costs involved in building transmission networks potentially making it economically inefficient to duplicate existing transmission network infrastructure. The height of entry barriers to infrastructure competition on transmission routes is examined in Section 5, with reference to Optus infrastructure costings.
- 1.11 In Section 6 Optus takes issue with the ACCC's proposal to allow a phase-in period of only one year which is insufficient given the significant time and resources required for investment in transmission infrastructure.
- 1.12 In Section 7 Optus questions the application of the exemptions to the Roma St ESA.

## 2. Corporate Customers

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- 2.1 Optus considers that the exemptions proposed by Telstra would potentially result in a distinct competitive impact on corporate customers, given their particular service requirements.
- 2.2 Optus uses the DTCS as an input into its supply of downstream fixed line services to business, wholesale and mobile customers. The key Telstra product in this regard is the Access Network lease (“AN lease”). Optus uses the AN lease product to provide a transmission link between its POI and the end user’s home or business premises. If the Optus POI is in the same ESA as the end user’s premises, the AN lease product would correspond to tail-end DTCS. If not, then the AN lease would include both IEN and tail-end DTCS.
- 2.3 Optus supports the ACCC’s draft position that the relevant downstream market is “the range of retail services (that can be provided over transmission services) delivered over optical fibre”.<sup>1</sup> The ACCC continues on to list a range of markets that would be encapsulated by the service – including national long distance, international data and so on.
- 2.4 Whilst supporting the ACCC’s draft position, Optus wishes to highlight that the proposed exemptions will impact on both mass market and corporate (business) customers for all of those listed services. In this regard it is important to ensure that ACCC considers the distinct effects upon different types of customers, given that corporate customers and mass market customers require different attributes of a transmission service. In particular, corporate customers have more demanding requirements in relation to service levels than mass market customers.
- 2.5 Since the potential alternatives to the DTCS (such as other wholesale services and technology platforms) have different service levels, it is possible that some of these wholesale services and technology platforms will be an acceptable substitute for the declared DTCS for the purposes of supply to mass market customers, but that the same service will not be an acceptable substitute for supply to corporate customers. It follows that the exemptions proposed by Telstra have the potential to impact on competition in the supply of services to corporate customers that is quite different from the impact on competition in the supply of services to mass market customers. The ACCC should therefore either recognise a distinct market for corporate customers, or analyse the distinct competitive impact on corporate customers separately.
- 2.6 Later in this submission, Optus re-submits that since the service level assurances (SLAs) for ULLS and DTCS are different, these services cannot be considered substitutes – particularly for corporate customers, for whom service levels can be almost always business critical. Optus adds further weight to this argument by submitting on two further matters, namely:
- (a) There is a difference between the ULLS and DTCS services in terms of the ‘onus of responsibility’; and

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<sup>1</sup> ACCC (2008), *Telstra’s transmission capacity service exemption applications*, Draft Decision, September 2008, Public Version, p.35.

- (b) Optus can only sell transmission services in the downstream markets based on the published SLAs.
- 2.7 Optus also submits a case study that illustrates the potential hazard of sole reliance on ULLS. This incident demonstrates the potential unreliability of ULLS as the only method of wholesale access and that ULLS service standards are inadequate for service provision to corporate customers – a key point of distinction compared to mass market customers, for whom the consequences of such service standards are likely to be relatively less severe.
- 2.8 Lastly, Optus notes that it previously submitted that in respect to business customers it purchased the DTCS for “purposes of redundancy only”.<sup>2</sup> Optus wishes to withdraw this statement since it does not present an accurate picture of Optus’ use of the DTCS. Only a very minor number of AN leases used by Optus’ business customers are purchased for redundancy purposes. In correcting this error, Optus re-iterates that AN leases are an extremely important input in the supply of downstream services, in fact more so than we implied in our original submission.

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<sup>2</sup> Optus (2008) *Optus Submission to Australian Competition and Consumer Commission on Telstra’s December 2007 Exemption Applications for Tail End and Inter-Exchange Transmission Capacity Services*, April 2008, Confidential version, p. 4.

### 3. Potential Substitutes for the DTCS

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- 3.1 In this section Optus comments on the ACCC's draft position regarding the substitutability of various potential alternatives for the declared transmission capacity service. In particular the inadequacy of the ULLS as a substitute for the DTCS is subjected to further scrutiny.

#### Lack of alternatives to the DTCS

- 3.2 In the draft decision the ACCC determined that it would confine the examination of substitute transmission technologies to Telstra's tail-end exemption. Optus supports the ACCC's draft decision.
- 3.3 In supporting the ACCC's position Optus highlights that Telstra has not sought for other transmission mediums to be considered in either the First or Second exemption applications. Although Telstra did list a range of services (e.g. microwave, satellite) that may potentially be considered substitutes for fibre transmission, it noted that these were not relevant:
- "...even if transmission over microwave and satellite were deemed not to be perfect substitutes on a particular route, that has no bearing on the case for granting Telstra's application for exemption..."*<sup>3</sup>
- 3.4 Optus considers that the ACCC should therefore maintain the position that it set out in the draft decision:
- "...for the purposes of assessing Telstra's exemption applications, the ACCC does not intend to consider the suitability of optical fibre with other technologies, except for copper at 2 Mbps"*<sup>4</sup>
- 3.5 Whilst noting the ACCC does not intend to examine alternative platforms (except in the tail-end exemption), Optus re-submits that the alternative platforms suggested by Telstra are not direct substitutes for the DTCS. Optus noted that it has previously provided a comprehensive analysis of the characteristics required for a substitute transmission capacity service.<sup>5</sup>
- 3.6 Drawing upon this analysis Optus submits that it is clear that the alternate platforms were not built for the purpose of providing transmission capacity services and are not capable of meeting the typical requirements of Optus' customers (particularly its business customers).<sup>6</sup> Therefore, the alternate services cannot be considered adequate substitutes for fibre transmission.

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<sup>3</sup> Telstra (2008), *Submission to the ACCC – Telstra response to questions from the ACCC Discussion Paper of October 2007*, Public Version, November 2007, p.5.

<sup>4</sup> ACCC (2008), *Telstra's transmission capacity service exemption applications*, Draft Decision, September 2008, Public Version, p. 30.

<sup>5</sup> Optus (2008) *Optus Submission to Australian Competition and Consumer Commission on Telstra's December 2007 Exemption Applications for Tail End and Inter-Exchange Transmission Capacity Services*, April 2008, Confidential version, pp. 9-11.

<sup>6</sup> Optus (2008) *Optus Submission to Australian Competition and Consumer Commission on Telstra's December 2007 Exemption Applications for Tail End and Inter-Exchange Transmission Capacity Services*, April 2008, Confidential version, p.11.

## **ULLS as a substitute for tail-end DTCS**

- 3.7 Optus supports the ACCC's draft decision to reject all of Telstra's exemptions regarding tail-end transmission services. In this section Optus adds to its previous submissions regarding the physical and operational constraints that mean that the services are not substitutable.

### *Physical and operational constraints*

- 3.8 The ACCC has made a draft decision that the proposed tail-end exemptions would harm competition in metropolitan and CBD areas since the ULLS is not a close substitute for the DTCS at capacities up to 2MB. Optus strongly supports this position.
- 3.9 Optus' concerns regarding the substitutability of the ULLS and DTCS can be summarised into the following key points:
- The presence of RIMs and pair gain systems mean that a copper line may not be DSL enabled;
  - The ULLS has distance limitations which impact the capacity achievable;
  - The ULLS cannot be extended physically to new termination points;
  - Exchange capping means that ULLS may not be deployable in some ESAs;
  - ULLS orders often face provisioning issues (e.g. address verification); and
  - There are significant SLA variations between the ULLS and DTCS services.
- 3.10 In its first submission Optus provided detailed information explaining each these issues.

### *Case study of Castle Hill ESA*

- 3.11 In this section Optus submits a case study of the Castle Hill ESA to further demonstrate that tail-end transmission provided using ULLS could not be used as a substitute for the DTCS.
- 3.12 Optus refers the ACCC to the map of the Castle Hill ESA provided at Appendix A to this submission. This map highlights a number of key issues that demonstrate the ULLS is not an adequate substitute for the DTCS, namely:
- The existence of RIMS and pair-gain systems;
  - Distance limitations that reduce speed of service that can be provided to an end-user; and
  - The location of business addresses.



- 3.13 The presence of pair gain systems or RIMs on a copper line mean that a line cannot be DSL enabled.<sup>7</sup> Optus notes that RIMs are particularly prevalent in business parks and near office buildings, which means that these issues are proportionately greater for business services. **CiC begins CiC ends**
- 3.14 The ULLS cannot necessarily provide equivalent bandwidth to the DTCS, which provides a guaranteed speed of at least 2 Mbps. This is because ULLS quality/speed of service for data deteriorates as the copper line travels further from the exchange. In general, only 60% of Band 2 services are close enough to the exchange to receive a 2Mbps service (and this is assuming away issues with copper pairs, copper quality, exchange capacity and pair gain). The remaining 40% of Band 2 services are restricted by distance limitation from receiving a service with DTCS-equivalent bandwidth.
- 3.15 **CiC begins CiC ends**
- 3.16 Optus considers that this case study of the Castle Hill ESA demonstrates that tail-end transmission provided using ULLS could not be used as a substitute for the DTCS.

### **Service Level Assurances**

- 3.17 Optus can only sell transmission services in the downstream markets based on these published standards. Regardless of how quickly Telstra actually responds to service requests (e.g. faults and outages), which may be better (or worse) than the SLA, Optus can only sell services to other parties based on the SLAs that have been agreed to. Regardless of whether Telstra were able to report that, for example, it met most of its ULLS service requests within the 1 business day in the SLA - downstream markets rely on 'published' SLAs.
- 3.18 The precise terms and conditions contained in SLAs are critical when services are being sold in the corporate market. Business customers in particular require high standards (e.g. minimal disruption in the case of outages) for their SLAs. Optus supports the ACCC's recognition of this issue in the draft decision when it specifically noted that for business customers "a guaranteed service is of critical importance".<sup>8</sup>
- 3.19 The types of SLAs Optus can offer in the market are important when it is attempting to source new customers. In corporate markets, large contracts are generally acquired through tender processes. This means that a client will detail the service standards it requires. Optus, as a potential supplier, then puts together a proposal that responds to the customer's requirements and guarantees certain service standards at (or above) the level that has been requested.

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<sup>7</sup> Optus submitted evidence on pair gain affected ESAs in its March 2008 submission on Telstra's exemption application in respect of Optus' HFC area including a map illustrating the extent of pair gain affected premises in the Miller ESA. Optus refers the ACCC to this material.

<sup>8</sup> ACCC (2008), *Telstra's transmission capacity service exemption applications*, Draft Decision, September 2008, Public Version, p.33.

*SLAs provided by the ULLS and DTCS*

- 3.20 Optus has previously submitted that the service level assurances (SLAs) provided by the ULLS and DTCS are significantly different.<sup>9</sup> **CiC begins CiC ends**
- 3.21 Optus would like to expand on this issue further, submitting that there is also a difference in terms of the onus of responsibility.
- 3.22 Apart from the differing SLA standards between the ULLS and DTCS, there is a difference in regards to the onus of responsibility. **CiC begins CiC ends**
- 3.23 The following case study illustrates the potential hazard of sole reliance on ULLS **CiC begins CiC ends**
- 3.24 Optus therefore re-submits that the fact that the SLAs for ULLS and DTCS are significantly different means that they cannot be considered substitute services. Further, to grant the exemption would significantly weaken competition in the business market.

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<sup>9</sup> Optus (2008) *Optus Submission to Australian Competition and Consumer Commission on Telstra's December 2007 Exemption Applications for Tail End and Inter-Exchange Transmission Capacity Services*, April 2008, Confidential version, pp. 14-15.

#### **4. Market Definition: Geographic Aspect**

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- 4.1 In this section Optus considers and responds to the ACCC's draft determinations in regards to the geographic market definitions that have been proposed for the first and second exemption applications. Further precedent is set out which supports Optus' contention that the relevant markets for transmission services are point-to-point routes, rather than broad geographic areas, and further costings for transmission infrastructure are provided.

#### **Rejection of the CLA concept and the 5 per cent rule**

- 4.2 The ACCC has proposed to reject Telstra's proposal to set market boundaries by applying 'critical loss analysis' (CLA) and its proposed '5 per cent rule'. Optus strongly supports this decision and maintains its previous submission that the application of CLA and 5 per cent rule should not be used to determine geographic markets.
- 4.3 The ACCC raised three main concerns with Telstra's methodology which were that:
- (a) The proposed (theoretical) cost model was mis-specified<sup>10</sup>;
  - (b) The CLA model is a demand-side concept and has been incorrectly applied<sup>11</sup>, and
  - (c) The analysis neglected important decision criteria that new entrants would consider when deciding whether to invest in a route<sup>12</sup>.
- 4.4 Optus supports the ACCC's concerns with the above issues.
- 4.5 The ACCC has applied a "1 km criterion" for market definition on capital-regional routes.<sup>13</sup> Optus considers from the perspective of usual business practice, a network is generally regarded as capable of serving a town if it reaches the built-up area of town, within which existing networks are likely to exist which can provide last mile capability. Viewed in this way, the ACCC's 1 km rule of thumb is reasonable.
- 4.6 However, Optus wishes to highlight that a carrier must make a significant and irreversible investment in infrastructure to construct a spur line – even a one km spur line. Optus develops this point in the next section of the submission by providing examples that highlight the magnitude of investment costs for spur line construction and the DSLAM installation.

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<sup>10</sup> ACCC (2008), *Telstra's transmission capacity service exemption applications*, Draft Decision, September 2008, Public Version, p.37.

<sup>11</sup> ACCC (2008), *Telstra's transmission capacity service exemption applications*, Draft Decision, September 2008, Public Version, p.37.

<sup>12</sup> ACCC (2008), *Telstra's transmission capacity service exemption applications*, Draft Decision, September 2008, Public Version, p.38.

<sup>13</sup> ACCC decision, p. 50.

## Point to point definition

- 4.7 In its draft decision the ACCC came to the view that it would define the geographic market for capital-regional routes in between that which was suggested by either Optus or Telstra. The ACCC stated that:
- “In this regard, the ACCC takes a much narrower view of the relevant geographic market compared to Telstra’s definition but considers the relevant geographic market to be wider in scope than Optus’ proposed definition of the relevant geographic market for tail-end transmission services.”*<sup>14</sup>
- 4.8 Telstra’s market definition is too broad, since it ignores the reality that transmission capacity services are provided from one point to another. The choice of the ESA to define the geographical boundaries of the market is arbitrary. In contrast, Optus submits that each market for tail-end transmission capacity must be limited (geographically) to a single route between two points on the network (e.g. a POI to a single end user’s home or business premises).
- 4.9 Optus still considers the ‘narrow’ definition that it proposed previously to the ACCC is the one that best reflects the nature of the transmission services.
- 4.10 Optus submits that a narrower, point-to-point style definition is supported by:
- The terms of the ACCC’s transmission declaration;
  - The terms of Optus’ agreement with Telstra for transmission services, and
  - Decisions by the ACT in regards to similar services.
- 4.11 Optus also submits that although this market definition is being applied to the exemption application regarding capital-regional routes, a point-to-point definition is equally relevant for describing all transmission services. The point-to-point definition is the one which most accurately describes the transmission service with the inference being that the ACCC should assess each route on its merits.

### *The terms of the ACCC’s transmission declaration*

- 4.12 Optus submits that the terms of the ACCC declaration of transmission services support a ‘point-to-point’ definition of the service. In this enquiry, the ACCC has described the service boundaries of transmission as:

*“...Intercapital transmission refers to transmission between transmission points located in different capital cities...  
... ‘Other’ transmission refers to transmission between transmission points located in different call charge areas, except for those between the capital cities listed in the previous paragraph....*

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<sup>14</sup> ACCC (2008), *Telstra’s transmission capacity service exemption applications*, Draft Decision, September 2008, Public Version, p. 41.

*...Inter-exchange local transmission refers to transmission between transmission points located at or virtually co-located with an access provider's local exchanges, that are within a single call charge area....*  
*...Tail-end transmission refers to transmission between a point at a customer location and some point on the access seeker's network (such as a point of interconnection or "POI")..."<sup>15</sup> [emphasis added]*

- 4.13 Optus therefore considers this strong evidence to support its contention that a similar, point-to-point, definition should be applied by the ACCC in these transmission exemption enquiries.

*The terms of Optus' agreement with Telstra for transmission services*

**CiC begins**

**CiC ends**

- 4.14 Optus therefore considers this strong evidence to support its contention that a similar, point-to-point, definition should be applied by the ACCC in these transmission exemption enquiries.

*Decisions by the ACT in regards to similar services*

- 4.15 Optus considers that the Tribunal has previously provided guidance on how end to end transmission services should be defined. In 2004 the Tribunal was tasked with reviewing a decision by the National Competition Council (NCC) in regards to regulating access to the Duke Eastern Gas Pipeline (EGP).
- 4.16 In regards this decision, the Tribunal came to the following conclusions:  
*"NCC, in its Final Recommendation, noted that there were two possible approaches to the definition of the relevant services, namely the identification of the services with respect to the markets they serve, or definition of the services in terms of both the start and end points of the service. NCC said that it preferred the second approach, for a number of reasons which it gave. We have come to the same conclusion, but because of the view which we take as the proper construction of criterion (b)."*<sup>16</sup> [emphasis added]<sup>17</sup>
- 4.17 The comparison of the gas and telecommunications industries is reasonable in this respect as both services involve transmission. It is clear from the Tribunal's judgement that when one is to compare the substitutability of competing 'transmission' services, the start and end points are a crucial consideration for regulators.
- 4.18 Optus also highlights that the decisions made by the NCC and ACT in the Duke EGP case were also applied by the High Court in the recent hearing of

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<sup>15</sup> ACCC (2004), *Transmission Capacity Service - Review of the declaration for the domestic transmission capacity service*, Final Report, April 2004, p. 7.

<sup>16</sup> Re Duke Eastern Gas Pipeline Pty Ltd [2001] ACompT 2 (4 May 2001), para 70, p. 19.

<sup>17</sup> The "criterion (b)" to which the Tribunal is referring to is defined as: "Criterion (b) – that access (or increased access) to the Services provided by means of the pipeline would not be contrary to the public interest.". Re Duke Eastern Gas Pipeline Pty Ltd [2001] ACompT 2 (4 May 2001), page 40.

*BHP Billiton Iron Ore Pty Ltd v NCC.*<sup>18</sup> In the initial declaration inquiry BHP Billiton had proposed that other rail lines were substitutes because they had origination and destination points ‘similar’ to the line in question. However, the NCC has ruled decisively that the lines were not equivalent because they did not specifically provide an equivalent point-to-point service:

*“Given that the Mt Newman and Hamersley lines do not share origin and destination points, they do not provide the same service. The Hamersley line is therefore not relevant to criterion (b).”*<sup>19</sup> [emphasis added]

- 4.19 Optus notes that by up-holding the decision of the NCC, the High Court implicitly supported the NCC’s previous ruling that services which BHP Billiton proposed as substitute were not equivalent.
- 4.20 Optus submits that the rulings presented above in regards to other jurisdictions are relevant, and support Optus’ view that transmission services should be considered with reference to a narrow, point-to-point, definition.

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<sup>18</sup> *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45.

<sup>19</sup> NCC (2006), *Application for declaration of a service provided by the Mt Newman railway line under section 44F(1) of the Trade Practices Act 1974*, Final recommendation, 23 March, p.34.

## 5. Competition Analysis

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- 5.1 In this section Optus considers the ACCC's competition analysis, including the height of entry barriers to infrastructure competition in transmission markets.

### Approach to assessing competitor numbers

- 5.2 Optus generally accepts the ACCC's approach with regard to competitor numbers for the various exemption areas. Optus supports the ACCC's use of RKR data as the basis for reviewing the state of competition in various areas.<sup>20</sup>
- 5.3 Regardless of the significant difficulties that all parties have had in analysing the Market Clarity reports, Optus considers that the data contained in the RKR infrastructure report is both reliable and independent and therefore highly applicable to this review. Furthermore, considering the ACCC has also requested that carriers re-confirm any information that will be applicable to the exemptions, Optus considers that the ACCC has undertaken a thorough and reasonable review.

### Barriers to entry

- 5.4 Optus supports the ACCC's draft view that the barriers to entry in the CBD and metropolitan tail-end transmission markets are high.
- 5.5 Optus submits that the key barriers to infrastructure-based entry into transmission markets include the following:
- The lack of customer demand for services; and
  - Significant entry costs, including (in metropolitan tail end transmission markets) DSLAM installation costs.<sup>21</sup>

### *Customer demand*

- 5.6 Optus continues to hold the view that there is a high cost involved in building access fibre infrastructure and that the cost estimates provided by Telstra are flawed and should not be relied upon.
- 5.7 Optus continues to believe that Telstra's costing does not take into account many important factors that Optus discussed in its submission to the ACCC in April 2008.<sup>22</sup> The capital costs required to build access fibre to CBD buildings are highly variable, as are projected revenues. As a result there are many buildings to which it will not be economically feasible for multiple operators

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<sup>20</sup> ACCC (2008), *Telstra's transmission capacity service exemption applications*, Draft Decision, September 2008, Public Version, p.46 and p.51.

<sup>21</sup> This is assuming, for the moment, that it is possible to provide transmission services using the ULLS. As already submitted, Optus considers the ULLS is not an adequate substitute for the DTCS.

<sup>22</sup> Optus (2008), *Optus submission to the ACCC on Telstra's second DTCS exemption application*, April 2008, pp. 19-20.

to build access fibre. Furthermore, Optus supports the ACCC's view that Telstra's costing fails to take into account the forecasts of demand and that increased competition would likely to have an effect of lowering prices in the future and thus extending the period of recoupment for the investment.<sup>23</sup>

- 5.8 In many cases, it will not be feasible to build access fibre, either because the cost for building fibre to the building is high or because the expected revenue is low. However, in these circumstances it might be economically feasible for Optus to purchase the DTCS in order to serve the customer. Access to the declared service would be consistent with the principles of promoting efficient investment in infrastructure. By contrast the proposed tail-end exemption application will harm competition in the downstream markets in which services are supplied to the customer in question.
- 5.9 Further, in such instances the proposed exemption could reduce investment in infrastructure. It may very often be the case that after Optus has secured a customer using a Telstra transmission service, it will subsequently become feasible to build access fibre, for example if a second customer in the same building is acquired. Alternatively, in a case where capacity is exhausted in a particular building and a particular customer demands extra services, it may take time to build the necessary infrastructure. In this case, Optus may find it necessary to use the DTCS on a temporary basis. These opportunities for access seekers to build scale before investing in infrastructure will be lost if the proposed exemption is granted, with severe implications for investment and competition.
- 5.10 Optus again notes that because Telstra's network is already connected to every (or almost every) CBD building, it generally does not face the above problems faced by other carriers. As the incumbent, Telstra enjoys a significant first mover advantage over other carriers in accessing buildings.
- 5.11 Further, Optus notes that in metropolitan areas the barriers to entry are even greater, since greater distances and lower expected revenues mean that it is likely to be less economic to build fibre access infrastructure compared to CBD areas.
- 5.12 Optus therefore submits the forecast of demand is an important factor to consider when carriers have to decide whether they should buy or build the infrastructure. There is a high sunk cost involved in building a tail-end transmission route and so carriers often have to enter a market via buying access services from Telstra before reaching a certain level of demand that allows them to build their own infrastructure. Optus therefore submits that any analysis of entry barriers will become a meaningless exercise if a forecast of demand is not taken into account.

#### *DSLAM installation costs*

- 5.13 Optus further rejects Telstra's argument that based on the extent of DSLAM based entry, the costs for DSLAM installation are not significant. Optus

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<sup>23</sup> ACCC (2008), *Telstra's transmission capacity service exemption applications*, Draft Decision, September 2008, Public Version, p.63



submits the high number of DSLAM based entry does not necessarily mean the costs for DSLAM installation are low.

#### 5.14 **CiC begins CiC ends**

##### *The construction of spur lines*

- 5.15 Optus wishes to highlight that when the ACCC assumes carriers can simply construct spur line (e.g. when applying the “1km criterion”) this still represents a significant investment in infrastructure and is no fate accompli.
- 5.16 For example Optus estimates that a 1km fibre spur in a metropolitan region costs at least **CiC begins CiC ends** to construct and install. This estimate does include “lighting” the fibre or additional access costs such as building entry. Therefore in assessing the state of competition in various regions, the Commission must come to a decision about whether carriers would actually invest this amount of money on a spur line, not forgetting a low level of demand on that line will result in a long (and unpalatable) payback period.

## **6. Timing Matters**

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### **Phase-in period**

- 6.1 Optus considers that the proposed phase-in period of one year is insufficient given the significant time and resources required for investment in transmission infrastructure.
- 6.2 Optus re-submits that if any of the applications are granted, there should be a phase-in period before the exemptions come into effect. The phase-in period should last until at least 24 months after the ACCC's final decision. This period would be necessary to allow access seekers to consider build opportunities (limited though they may be) and to provide customer transition.
- 6.3 This timeframe would also be necessary to allow an effective wholesale market to form for services that will be substitutes for the declared DTCS, and to allow access seekers a reasonable period of time to adjust their business plans to the new environment and transition customers away from the DTCS.

### **Duration of exemptions**

- 6.4 Optus considers that if any of the applications are granted, the exemption should apply for a limited initial period, to allow assessment of the impact of exemptions on Telstra's supply of transmission capacity services and on competition in downstream markets. Optus proposes that any exemptions be granted for a period of two years only, and that during that period the ACCC should monitor Telstra's conduct and pricing of transmission capacity services.

## **7. Scope of Proposed Exemption: Roma St Exchange**

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- 7.1 Optus is concerned that Roma Street ESA is listed as an exemption area and submits that it should be removed from the application. **CiC begins CiC ends**
- 7.2 Optus therefore submits that the Roma Street ESA should not be listed for exemption until this situation is resolved.

**Appendix A: Map of Optus Castle Hill Exchange DSL coverage**

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**CiC**