

Richard Home
General Manager
Strategic Analysis and Development
Communications Group
Australian and Competition and Consumer Commission
GPO Box 520
Melbourne Vic 3001

By email: richard.home@acc.gov.au

Dear Mr Home,

Primus Telecom (Primus) makes this submission in response to the ACCC's Draft Decision on Telstra's WLR and LCS exemption applications.

Primus submits that before the ACCC reaches a decision to remove regulation of WLR and LCS it should undertake a more rigorous strategic analysis. Given the Commonwealth's current initiative to construct a National Broadband Network (NBN), the industry is heading into a period of extreme uncertainty. Critically, it is not clear that ULL services will continue to be readily available, and in the view of Primus it is not the time to be forcing industry participants to make ULL investments. Particularly given the real prospect that any such infrastructure could likely be stranded. At this time [c-i-c].

Line blocking factors

Primus is also particularly concerned that the ACCC appears to have given insufficient regard to line blocking factors in its draft decision. In some ESA's Primus is experiencing impediments to providing ULLS based services of in excess of 25% of customers. This largely comes about as a consequence of pair gains, rims and long lines. It is not clear to Primus that the ACCC has given sufficient weight to these matters, and a reading of the draft decision suggests the ACCC has not given regard to the impact of long lines.

In the experience of Primus these factors are extremely significant. The following analysis was a consequence of Primus recently conducting service qualification testing for the ULL across 250 exchange sites. The results were [c-i-c]

In its submission to this inquiry Telstra suggests the question of RIM and Pair Gain can be resolved by transpositioning the line. Critically however, as the ACCC will be aware, Telstra refuses to provide line transpositioning for the ULLS.

Put simply, service providers are unable to provide ULL based services to customers affected by line blocking factors and service qualification failures.

Telstra does offer line transpositioning for LSS, however in its submission to this inquiry Telstra notes that this is not always possible because of lack of availability

of spare wires. Although irrelevant to ULLS given line transposition is not available, Primus submits that the lack of spare wires is likely to be an increasing obstacle to line transposition generally.

In the absence of a transposition service for ULL, industry competitors have little choice but to rely upon Telstra's WLR service if they want to continue to provide a ubiquitous service to blocked customers. Accordingly, there is a significant share of the addressable market that will not receive any genuine competing service to Telstra in the event the exemption was granted and Telstra had latitude with the pricing and provision of WLR and LCS services.

Anticompetitive delays

In provisioning services to in-place connection customers Primus, as with other industry participants, relies on Telstra's WLR/LCS to be able to provide an immediate phone service while we wait for the ULLS to be provisioned. This can take 2 weeks or more. The inability to provide an immediate phone service significantly compromises the ability of industry participants to compete with Telstra. This would be a major impediment to competition and we ask the ACCC consider carefully the implications of granting the exemptions sought by Telstra. In this regard we would also caution the ACCC to carefully consider the motivation behind Telstra seeking these exemptions. In the view of Primus the exemption applications are clearly intended to orchestrate an outcome that is likely to compromise retail competition, contrary to the objective of telecommunications regulation to promote a competitive outcome in the interest of end-users.

Transmission routes

In reaching its conclusion the ACCC appears to have given insufficient regard to Telstra's market power in relation to transmission routes. The viability of ULLS based delivery of services is severely compromised in some of the named ESA's because of the high price of transmission and uncertainty around future pricing. In the view of Primus the ACCC should not make any decision on removal of declaration in relation to any of the proposed ESA's until it has finalised its transmission cost model, and determined indicative prices. In the absence of this security, service providers are not in a position to properly assess the sustainable viability of ULLS based services. Significantly, transmission costs make it uneconomic to provide a ULLS based service to ESA's that have been given preliminary approval in the ACCC's draft decision. As an example Primus suggests [c-i-c].

No evidence of a more efficient outcome

In reaching its decision the ACCC has mistakenly concluded that removal of access to the WLR/LCS would lead to a more efficient outcome. Indeed, the ACCC has made a finding that the on-going regulation of WLR/LCS may hinder the extent and speed of transition to ULLS based services. This finding is erroneous. Whilst removing the declaration as proposed may force some additional migration to ULLS, there is no evidence to suggest that this artificial

construct would be a more efficient outcome. The ACCC should be mindful that sufficiently strong incentives to encourage efficient migration to ULLS already exist, and these incentives have over the last 4 to 5 years driven service providers to make substantial investments in ULLS. Some of the strongest incentives are the desire to reduce dependency on Telstra's infrastructure (thereby reducing the scope for anticompetitive interference) and the prospect of earning the necessary cash flows to further invest in, and market, retail services. Neither Telstra nor the ACCC has sufficiently demonstrated that removal of the declaration in the proposed ESA's would lead to a more efficient outcome. Indeed, Primus is not aware of any compelling evidence put forward by the ACCC in its draft decision to demonstrate that granting the exemptions would lead to infrastructure investment that could be considered a more efficient outcome than what has presently evolved. Relevantly, the question of efficient infrastructure investment is also deserving of more analysis given the present uncertainty in relation to the Commonwealth's NBN tender process.

Impediments to migration to the ULLS

Primus notes that in the context of service providers wishing to migrate to ULLS, the migration process continues to be fraught by Telstra's tactics in delaying the deployment of competitive infrastructure through imposing time consuming and blatantly anticompetitive deployment processes, and through blocking access to exchanges (capping). In regard to this, it is notable that the exchange access process will need to be revised before the ACCC could place any reliance on access seekers achieving fair, reasonable and timely access to deploy exchange based infrastructure. In the absence of access to a WLR /LCS service, industry participants could have to wait up to 2 years to deploy their own DSLAM equipment in exchanges in seeking to increase competitive capacity.

Safeguards / Transitional measures

It is not clear to Primus that users of the ULL are always in a position to share capacity on their DSLAM's. Indeed, aggressive and targeted marketing often accompanies DSLAM rollout such that service providers maintain ambitious customer targets and tend to be reluctant to compromise their capacity through making it available to other service providers. It is not clear that the industry has embraced a ULL based wholesale market, and there are sound commercial reasons for this.

Primus notes that the ACCC is proposing that the exemption be subject to a condition so that it would not apply to capped exchanges. While in principle this could have merit, there are some flaws and inconsistencies to such an approach. For example, there are various shades of "capped" exchanges such that through the use of external cables Telstra may make access to an exchange available, however it may be that the cost involved in constructing off-site facilities to expand DSLAM capacity are prohibitive. Further, it may be that an exchange is capped in respect only to rack space, and although there is no space for new racks there could be plenty of available capacity on the current equipment. This creates

a particularly artificial outcome if the exemption was lifted in such circumstances. Also, Primus notes it would seem that the condition is activated by advice from Telstra than an exchange is capped. Given Telstra has little incentive to publish this information in a timely manner, Primus anticipates it could take some time for Telstra to decide to properly evaluate the circumstances and make that necessary notification. In the meantime industry participants would be struggling to maintain good relations with potential new customers. The proposal appears to provide Telstra with plenty of scope to game the exemption conditions. Granting an exemption on such conditions also creates unnecessary uncertainty for the industry given the means and costs of providing a service become subject to the vagaries of decisions about whether or not an exchange is capped.

Conclusion

It is the view of Primus that the draft decision is unsafe, both in terms of its ability to be justified or defended legally, and in terms of whether it is based on sound economic policy.

It is inconceivable to Primus that granting the exemptions as proposed could lead to a more competitive wholesale or retail market. It is clearly apparent the ACCC has unduly belittled competition based on accessing the WLR service. While the environment for competition could obviously be improved, neither Telstra nor the ACCC have demonstrated any evidence that the granting of the exemptions would promote competition and be in the long term interests of end users. Indeed, it is quite clear from the reasons above that granting the exemptions would be detrimental to the interests of end-users.

For the compelling reasons set out above Primus submits the ACCC should not grant the exemptions sought by Telstra. In the view of Primus, a decision to grant the exemptions would be detrimental to competition, and contrary to the long term interests of end-users.

Primus Telecom
June 2008