IT'S HOW WE CONNECT

TELSTRA CORPORATION LIMITED

Telecommunications Final Access Determination Inquiries — non-price terms and conditions and connection charges for fixed line services

Response to the ACCC's Draft Decision on non-price terms and conditions

8 May 2015

Public version

Executive summary

Telstra welcomes the opportunity to provide feedback to the Australian Competition and Consumer ACCC's (**ACCC**) Draft Decision on "Telecommunications Final Access Determination Inquiries — Non-price terms and conditions and connection charges for fixed line services" (**Draft Decision**).

Non price terms and conditions

Telstra supports the ACCC's approach in the Draft Decision of making a targeted set of non-price terms and conditions (**NPTCs**) in the Final Access Determinations (**FADs**), in which NPTCs focus only on those aspects of access where commercial agreement is less likely to result and where specific competition concerns are likely to arise.

A targeted set of NPTCs is consistent with the ACCC's current approach and reflects that NPTCs are well established and understood by industry, are working effectively in a mature and steady market and that the ACCC "*did not receive evidence of widespread competition concerns significant enough to warrant a more comprehensive approach to setting regulated non-price terms of access*".[1] Telstra also considers that, if the ACCC is to set any NPTCs, a targeted approach better promotes the long term interests of end users (**LTIE**) than a more interventionist approach, such as a comprehensive set of NPTCs.

Telstra also supports the ACCC's approach in the Draft Decision to draft the NPTCs that are considered to be common so that they are consistent. However, Telstra considers that some of the NPTCs included by the ACCC as common terms are only applicable to specific declared services. Where NPTCs are included in a FAD, Telstra considers that they should only apply to the extent they are relevant to the supply of a particular declared service in order to avoid access providers and access seekers facing additional administrative and compliance costs with no accompanying benefit.

As acknowledged by the ACCC, there has been no evidence of widespread competition concerns presented by access seekers as part of the NPTC FAD inquiry. Current NPTCs are well established and understood and access agreements, including the Telstra Wholesale Agreement (**TWA**), have been and continue to be negotiated in a competitive environment. There are a number of triggers in access agreements for negotiation or re-negotiation, which can be initiated by either access seeker or access provider.

In this context, Telstra believes that the ACCC's concerns about access seekers being unable to access regulated terms during the term of an access agreement are unfounded. While it agrees with the ACCC's Draft Decision not to include a "pull through" clause, it does not support the inclusion in the FAD of the schedule of new "review" clauses addressing regulatory recourse during the term of an access agreement. No evidence has been presented in the current inquiry to suggest that this is a major concern or a contentious issue for industry. This is unsurprising, as business as usual processes continue to work effectively between wholesale suppliers and customers to promote efficient and expeditious outcomes and lower transaction costs in relation to the terms of supply of both regulated and non-regulated wholesale services. In fact, it would be unprecedented for a Part XIC regulatory access determination or special access undertaking to contain a review clause of the type proposed in the post-2011 context: NBN Co's special access undertaking does not require pull through of regulated terms into access agreements on foot nor does it include a review clause of the type being proposed.

In Telstra's view, the proposed regulatory review clauses are therefore unnecessary and inappropriate and would, if implemented, add additional regulatory burden and cost to contracting parties without any demonstrable benefits. Telstra also considers that they are inconsistent with the statutory hierarchy and legislative intent of Part XIC of the *Competition and Consumer Act 2010 (Cth)* (**CCA**) which gives primacy to commercially negotiated access agreements. Effective commercial negotiations processes will always be more efficient and more flexible in addressing

[1] ACCC Media Release, 'ACCC releases its draft decision on non-price terms and conditions and fixed line connection charges', 25 March 2015. http://www.accc.gov.au/media-release/accc-releases-its-draft-decision-on-non-price-terms-and-conditions-and-fixed-line-connection-charges

the different concerns of access seekers than regulatory intervention (which is an imperfect proxy for competitive outcomes), thereby delivering better outcomes for end users.

Finally, in addition to the matters discussed above, the ACCC has proposed a number of amendments to the existing NPTCs in the Draft FADs. Telstra has provided comments on these amendments, as well as proposals for additional amendments with accompanying detailed explanation, in Section 2.3.2 of this submission.

Supplementary charges

Telstra agrees with the ACCC's draft decision to not expand the scope of the regulated supplementary charges and considers that the current scope of those regulated charges is largely appropriate. That said, there are aspects of the draft decision that Telstra believes that the ACCC should reconsider, including:

- The ACCC has made a draft decision to set wholesale ADSL connection charges by ULLS band rather than geographic zone. However, Telstra does not have the ability to levy wholesale ADSL connection charges by ULLS band and any requirement to do so would entail billing systems changes and significant expense. Therefore, the current structure of geographically averaged charging should be retained.

- The ACCC's draft decision not to include any LSS disconnection charges in the FAD means that Telstra will not be able to recover the legitimate costs incurred in providing disconnections where a service is being transferred to an access seeker that is not participating in the churn process. LSS disconnection charges should continue to be able to be levied in such circumstances.

- Telstra does not consider that the ACCC's reasoning in relation to setting ULLS disconnection charges is appropriate. There is an increasing discrepancy between the number of ULLS connections and disconnections meaning that there are a number of circumstances in which Telstra will legitimately incur additional costs of disconnection. The ACCC should allow charges for ULLS disconnections in those circumstances.

1. Introduction

This submission provides Telstra's response to the Draft Decision, including the draft NPTCs contained in the draft FADs for the declared services.[2]

This submission is structured as follows:

- Section 2: Response to Draft Decision on NPTCs
    - Approach to regulation of NPTCs.
    - Regulatory Recourse.
    - Submissions on other specific draft FAD NPTCs including Telstra's proposed amendments to the draft NPTCs.
- Section 3: Response to Draft Decision on supplementary charges.

Telstra may make further submissions to the ACCC once it has had an opportunity to review access seekers' responses to the Draft Decision.

[2] Unconditioned local loop service (**ULLS**); line sharing service (**LSS**); wholesale line rental (**WLR**); local carriage service (**LCS**); fixed terminating access service (**FTAS**); fixed terminating originating service (**FTOS**); wholesale ADSL service (**WDSL**); mobile terminating access service (**MTAS**); and the domestic transmission capacity service (**DTCS**).

2. Non price terms and conditions

2.1. Approach to regulation of NPTCs

As noted by the ACCC in the Draft Decision, Telstra has previously submitted that including NPTCs was not necessary for the FADs. This was on the basis that:

- The CCA does not mandate that NPTCs be included in a FAD.
- The NPTCs currently operating in the market are well understood and accepted by industry and there is no evidence of any significant ongoing industry concerns in respect of NPTCs.
- Commercial negotiations of NPTCs have produced competitive, efficient and expeditious outcomes, and access seekers and access providers have sufficient and adequate bargaining power to negotiate mutually agreeable access agreements.

However, Telstra accepts and supports that where the ACCC is minded to include NPTCs in the FADs for declared services, making a targeted set of NPTCs is the appropriate approach.

This is because a targeted set of NPTCs would be more likely to promote the LTIE as it would best promote stability and certainty for access providers, access seekers and end users. This is in the context where, over the next five years, the primary focus of industry, the ACCC and the Government must be the effective rollout of the NBN and the efficient transition of end users from the legacy fixed line network to the NBN.

The stability of NPTCs will ensure that this transition is supported in the most efficient, least disruptive manner possible. The transition to the NBN also creates further commercial competitive incentives for access providers such as Telstra to negotiate terms and conditions which are simple, transparent and reasonable – as wholesale customers and potential wholesale customers enjoy the benefits of increasing choice of supply and types of services going forward.

A targeted approach to NPTCs is also more appropriate than a reference offer or comprehensive set of NPTCs in a FAD in circumstances where:

- As noted by the ACCC in the Draft Decision, "…*the evidence to date has been varied and does not suggest a widespread problem of such magnitude to warrant an industry wide response and significant increase in regulation*…".[3]
- A comprehensive FAD would increase the costs of compliance for access providers, access seekers and the ACCC, and would require significant resources in terms of drafting, consultation and review.
- The (very limited number of) access seekers[4] who have made submissions to the ACCC's NPTC FAD inquiry have not submitted any evidence to support the inclusion of additional NPTCs.

The only additional terms proposed by the ACCC – relating to review and recourse to regulated terms – are, in Telstra's view, unnecessary and not appropriate. Telstra notes that these were proposed by the ACCC itself, and not by any industry participants. Telstra's position on the ACCC proposal with regard to review and recourse to regulated terms is detailed further in section 2.2 below.

Any new NPTCs, including those relating to regulatory review and recourse, should only be introduced if it can be shown that they will promote the LTIE.

[3] ACCC, Draft Decision, p.7.
[4] Telstra Wholesale has over [C-i-C] wholesale customers. In contrast there have been between six and eight submissions made to the ACCC's various consultations.

2.2. Regulatory recourse

The ACCC's Draft Decision includes a schedule of proposed new clauses addressing regulatory recourse during the term of an access agreement, which includes the following "review" clauses:

- A clause obliging parties to negotiate in good faith, where the ACCC varies or makes a regulated term and one party proposes to the other party to vary an access agreement to reflect that new or varied regulated term.

- A clause allowing either party to terminate an access agreement with eight weeks' notice where the ACCC makes or varies a regulated term in relation to the service, and the new regulatory determination deals with a matter other than price.

These regulatory recourse clauses have been included as the ACCC appears to be concerned (based on its review of access agreements lodged with it under s152BEA) that commercially negotiated access agreements may have clauses which "…*have the potential to prevent regulated terms applying to 'fill the gaps' in commercial agreements during the life of the agreements and are at odds with the underlying premise behind the Part XIC telecommunications access regime*."[5] As a result, the ACCC is concerned that such clauses may "oust" the role of the ACCC in specifying terms of access. The ACCC also noted a small number of submissions that suggested that some parties might find it difficult to incorporate new or varied regulated terms during the term of their access agreements.

Telstra welcomes and agrees with the ACCC's Draft decision not to include a regulatory "pull through" clause in the FADs. However, Telstra does not agree with the ACCC's Draft Decision to include the "review" clauses in the FAD terms. Telstra's position is based on the following:

- The current set of NPTCs is well established and working well and there is no evidence of market failure which justifies the need for the recourse to regulated terms.

- The regulatory recourse terms are not consistent with the Part XIC hierarchy which establishes the primacy of commercially negotiated access agreements as more efficient than regulated terms of access.

- The regulatory recourse terms are not necessary or appropriate in circumstances where there are a number of practical opportunities for negotiation and re-negotiation in relation to wholesale access agreements.

- The regulatory recourse terms as drafted are not commercially appropriate.

These are discussed in more detail below.

2.2.1 Current NPTCs are working effectively with no issues raised

The current set of regulated NPTCs have evolved from an initial 'model' set (primarily based on Telstra NPTCs that were in place at the time) supplemented by terms developed largely in response to access disputes or newly declared services. There have been no formal disputes in relation to NPTCs since 2009. The current set of NPTCs in access agreements – some of which are based on regulated NPTCs (either as standard or through negotiation) – have developed in a largely competitive environment and are working effectively. The lack of issues raised in submissions to the NPTC FAD Inquiry clearly supports this position.

In Telstra's view, the ACCC in its draft decision has placed insufficient weight on the fact that the legacy declared services in the current NPTC FAD Inquiry have been in place for nearly 20 years under Part XIC – either as commercially supplied or declared services. The NPTCs covering contentious facets of supply of these services have been negotiated, determined, settled and implemented by access seekers and access providers over this period, at times against the backdrop of direct and indirect intervention by the regulator. The terms and conditions of supply in

[5] ACCC, Draft Decision, p.8

relation to these services are now in a mature and steady state. No new substantive issues have been identified as part of the current NPTC FAD Inquiry. The only new clauses proposed by the ACCC in its Draft Decision are in relation to regulatory recourse, which is a theoretical or technical issue rather than a substantive issue that is in dispute or has been raised as a significant issue by access seekers.

In determining whether an additional NPTC is required, the ACCC must demonstrate that it would be in the LTIE. Telstra believes that where there is no evidence of industry contention on a particular non price issue, this is evidence that commercial negotiations remain effective. In this situation, it the inclusion of regulated terms in a FAD would not promote competition and would not be in the LTIE. Effective commercial negotiations processes will always be more efficient and more flexible in addressing the different concerns of access seekers than regulatory intervention (which is an imperfect proxy for competitive outcomes), thereby delivering better outcomes for end users.

The Draft Decision does not refer to any evidence that commercial agreements are not working effectively to reflect regulatory changes – whether through specific clauses in access agreements or alternative arrangements.

In contrast, Telstra has provided evidence that regulatory changes can be (and are in practice) reflected in access agreements where this is desired by either access seeker or access provider. All contracts have negotiation triggers and/or other commercial mechanisms that enable an existing access agreement to be reconsidered in good faith if (among other things) there are relevant regulatory developments. In these circumstances, regulated terms relating to regulatory recourse are unnecessary.

The critical role of a regulated NPTC is to provide regulatory fallback where an issue of substance (for example, terms relating to billing and notification) cannot be agreed commercially. A review clause relating to regulatory recourse is not, of itself, a "fall back" term that is required to provide guidance under such circumstances.

2.2.2. Part XIC hierarchy establishes primacy of commercial access agreements

The ACCC appears to be concerned that clauses in access agreements that appear to preclude the inclusion of regulated terms while an agreement is in place *"…are at odds with the underlying premise behind the Part XIC telecommunications access regime*."[6]

Part XIC of the CCA sets out a regime whereby terms and conditions in certain regulatory instruments have no effect to the extent they are inconsistent with terms and conditions set out in other "instruments" that sit higher in the statutory hierarchy. Commercially negotiated access agreements sit at the top of the statutory hierarchy, giving primacy to commercially negotiated outcomes. This is clear on the face of the legislation and the Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (**Explanatory Memorandum**).

The Explanatory Memorandum recognises that the commercial negotiation process will always be more efficient and more flexible in addressing the different concerns of access seekers than regulatory intervention:

> *"Access agreements will enable access providers and access seekers to negotiate and agree alternative access arrangements that are mutually beneficial and provide more efficient outcomes than access determinations."*[7]

Therefore, the inclusion of commercially negotiated terms in an access agreement, whether they limit recourse to regulated terms or not, is not at odds with the underlying premise of the Part XIC telecommunications access regime. In fact, it is entirely consistent with (and was anticipated by)

[6] ACCC, Draft Decision, p.8.
[7] Explanatory Memorandum, p.199

the regime, which specifically allows for the negotiation and agreement of terms of access to declared services and recognises that such terms take precedence over regulated terms.

The regulatory recourse review terms proposed by the ACCC are therefore inconsistent with the operation and intent of the Part XIC hierarchy which establishes the primacy of commercially negotiated access agreements as more efficient than regulated terms of access. The proposed inclusion of such terms also goes beyond the scope of the proper role of FAD NPTCs to include NPTCS which seek to provide for a fallback when commercially negotiated terms are not agreed. Where commercial access agreements are negotiated for the exchange of value, these arrangements should take precedence without the risk of being overturned by a new regulated term that the parties were unaware of at the time of negotiating a deal and which, if adopted, would potentially and significantly change the value of the deal negotiated between the parties.

2.2.3. Commercial opportunities to negotiate amendments to access agreements

Telstra considers that the ACCC's concern with what are commonly referred to as entire agreement clauses is misplaced. Such clauses are common practice across all sectors and provide benefits to both parties – most significantly certainty of *all* of the terms and conditions upon which services are acquired and supplied. This is particularly important in the telecommunications context given that the majority of (if not all) commercially negotiated access agreements relate to declared and non-declared services.

Telstra also does not consider that these clauses usurp the role of the ACCC in Part XIC of the CCA, nor are they inconsistent with the operation and intent of Part XIC. The ACCC is still able to set *ex ante* regulated terms and parties are able to negotiate their own bilateral terms – and have been doing so (in a competitive environment) successfully for a lengthy period. The entire agreement clause is itself agreed between the parties and Part XIC provides for the primacy of commercial outcomes, including outcomes on specific clauses such as the entire agreement clause.

As set out in Telstra's previous submissions, there are a number of commercial opportunities or triggers in access agreements for negotiation or re-negotiation which can be initiated by either access seeker or access provider. Notably, these triggers extend beyond recourse to regulated terms. In Telstra's experience, the following have proven to be effective points of negotiation or re-negotiation of both regulated and non-regulated terms: [**C-i-C**]

However, the competitiveness of the wholesale market (almost 90% of the types of wholesale services on offer are not declared and are offered in a competitive environment) and Telstra's strategic priorities around customer advocacy mean that this risk is extremely low, if not negligible. Telstra Wholesale will actively and constructively negotiate with wholesale customers [**C-i-C**], or risk being uncompetitive in the wholesale market. Failure to engage with wholesale customers on this basis is likely to result in a loss of business given the availability of alternate supply of wholesale services. Further this competitive pressure will only increase as the industry transitions to the NBN.

2.2.4. ACCC draft term is inappropriate in a commercial context

If the ACCC continues to be minded to include terms relating to regulatory recourse, Telstra considers that the review clauses as proposed in the Draft Decision are not appropriate in a commercial context.

The Draft Decision includes a clause allowing either party to terminate an access agreement with eight weeks' notice where the ACCC makes or varies a regulated term in relation to the service, and the new regulatory determination deals with a matter other than price. In a commercial context, eight weeks is a very short period of time for an access seeker to either (a) re-negotiate terms of access in relation to a declared service or (b) obtain service from another wholesale provider if appropriate.

Any proposals to vary an agreement (which may be initiated by either access seeker or access provider) will need to be considered in the context of the whole of an access agreement as it relates to both declared and non-declared services. Telstra does not consider that an eight week termination period provides adequate time for this to take place.

Further, although Telstra appreciates that the ACCC is attempting to ensure that access seekers (or access providers) have ready recourse to regulated terms, the brevity of the termination period proposed exposes both parties to greater risk of cessation of service than the termination rights that currently apply to Telstra's access arrangements.

[**C-i-C**] This period of time is more commercially appropriate as it allows for negotiations and alternative terms to be reached before termination (or variation in lieu of termination). In Telstra's experience, this usually provides sufficient time for negotiation of access agreements. However, in some circumstances – [**C-i-C**] – negotiations can take significantly longer. [**C-i-C**]

In Telstra's view, the proposed clauses are unnecessary and inappropriate and would, if implemented, add additional regulatory burden and cost to contracting parties without any demonstrable benefits.

2.3 Other specific NPTCs

2.3.1 Telstra's previously proposed changes to the NPTCs

In making an access determination, the ACCC must take into account the legitimate business interests of a carrier or carriage service provider who supplies a declared service (section 152BCA(1)(b) of the CCA). Throughout the NPTC consultation process, Telstra has been careful to limit its requested changes to the NPTCs to those matters that genuinely reflect the legitimate business interests of Telstra as an access provider and not to 'over-reach' by requesting unreasonable changes or changes that would be unfair to access seekers.

While the ACCC has adopted some of the changes proposed by Telstra in the Draft Decision, the vast majority have not been adopted and in some cases the ACCC has adjusted the wording proposed by Telstra in such a way that it 'undoes' the effect of Telstra's requested change.

In the interests of brevity, Telstra will not repeat each comment and suggestion about the NPTCs in this response. However, specific drafting proposed by Telstra previously which Telstra considers the ACCC should give further consideration to is referenced briefly below:

- ***(access seekers taking responsibility for their resellers)*** Telstra proposed a new clause 11.3 (this would now be a new clause 12.3) which would require access seekers who provide services to resellers to ensure compliance with FAD terms by their resellers and to be liable for non-compliance by their resellers. The ACCC has rejected this proposal on the basis that it would "impose significant costs on access seekers if they choose to supply the wholesale ADSL service to resellers". Telstra disagrees with this assessment. It is a legitimate expectation of an access provider that an access seeker who provides services to another carriage service provider would ensure that the service provider comply with relevant terms of supply of those services. The alternative is to leave the access provider potentially exposed where the non-compliance is a result of the reseller's actions, rather than the access seeker's actions. A requirement to ensure reseller compliance with FAD terms should not impose additional costs on an access seeker who would generally "back to back" the relevant obligations in any event to ensure actions of its reseller do not put the access seeker at risk of a breach of FAD terms that would expose it to liability directly.

- ***(protection for an access seeker against risk of insolvency or non-performance)*** Telstra proposed drafting in a number of clauses to provide protection against the risk of access seeker insolvency or non-performance. These were not outlandish or extravagant suggestions. Rather, they were provisions that would be usual in a supply arrangement of this nature. In particular, Telstra proposed changes to:

- the definition of "Billing Dispute" to clarify the scope of what can reasonably be disputed, thereby protecting the access seeker's legitimate interest to be paid for services provided and not be subject to arbitrary withholding of payment;

- clause 2.12 (now clause 3.12) to ensure payments are not able to be withheld indefinitely where a dispute resolution process may be terminated for a reason other than it being "resolved";

- clause 2.31 (now clause 3.31) to include a new paragraph (d) to discourage vexatious Billing Disputes by charging higher interest where the access seeker has consistently been shown to be incorrectly disputing bills and withholding payment;

- clause 2.7 (now clause 3.7) to allow an access provider to take prompt action against an access seeker who has failed to pay, rather than prejudicing the access provider's ability to recover debts due by waiting for a further 20 Business Days after there has been a failure to pay;

- clauses 3.1, 3.5 (by adding a new paragraph (c)) and 3.8(a) (now all in clause 4), and corresponding changes to clause 6.1 (now clause 7.1), to ensure the FAD is not inconsistent with the protections in sections 152AR(9) and (10) of the CCA which provide that an access seeker is not required to comply with the standard access obligations to supply declared services in circumstances where there is evidence that the access seeker is not creditworthy;

- clause 3.8 by adding a new paragraph (e), to provide that Ongoing Creditworthiness Information included a limb for "*any other information reasonably required by the Access Provider to assess the Access Seeker's creditworthiness*". In the Draft Decision, the ACCC adopted the new limb, but with additional words as follows (additional wording is shown as underlined text):

  any other information reasonably required by the Access Provider to assess the Access Seeker's creditworthiness, as agreed between the parties before the request under clause 4.5 is made.

  The result of that change is that the clause will have no effect as it would require agreement on the specific information up front, whereas the purpose of including the clause was to ensure that credit information other than that set out could be requested, provided it was "reasonably required" in the particular circumstances;

- clause 6.5(b), (d) and (e) (now all in clause 7.5) to ensure that an access seeker is not obliged to continue to supply services where it is not reasonable to do so and will be exposed to growing debt that is unlikely to be repaid; and

- the definition of "Confidential Information" to ensure that what is considered to be information that is in the public domain is subject to the usual exceptions such as where it has come into the public domain as a result of a breach of an obligation of confidence.

In Telstra's view, all of the above changes are reasonable and reflect the legitimate business interests of an access provider. On that basis they must be given serious consideration for inclusion in the NPTCs.

2.3.2 Comments on the amendments made to the NPTCs in the Draft Decision

Telstra has reviewed the ACCC's changes to the NPTCs in the Draft Decision and, although Telstra does not necessarily agree that all the changes are necessary or appropriate, Telstra has limited its comments on the drafting only to matters that Telstra considers are of significant concern as follows:

- (***implementing suggested changes to operational documents***) Telstra is concerned about the proposed changes to clause 11.1(a)(ii) which would require Telstra to "reasonably implement" any comments which an access seeker has made about operational documents.

  An access seeker may make comments about amendments proposed by Telstra that suggest amendments that would suit that particular access seeker. Although it may be possible for Telstra to implement those comments, it is not necessarily the case that implementation would be in the interests of all other access seekers, or in Telstra's interests. The proposed change may involve costly systems changes or have negative effects on other access seekers. In this case, it is not clear what the caveat "reasonably" applies to. That is, is the requirement to implement the change, and do so in a reasonable manner? That would create an unworkable situation where Telstra must potentially act on the comments from [**C-i-C**] wholesale customers by "reasonably implementing" those comments. Telstra may also need to re-notify wholesale customers of the additional changes if the changes fall within the scope of clause 11.1(a). This may have the effect of delaying the introduction of the original change to address comments raised by access seekers. The process of then considering further comments and "reasonably implementing" them would recommence (with no obvious end point).

  Telstra welcomes receiving feedback from its customers about improvements to its operational documents and does give reasonable consideration to comments that are provided. However, Telstra does not believe it is appropriate to impose an obligation on access providers to implement changes except where the access seeker considers it reasonable to do so (having regard to matters such as whether a further delay in implementing the original changes is justified having regard to any need to re-notify customers of additional changes). Telstra suggests the drafting in clause 11.1(a)(ii) should be amended as follows to clarify the obligation:

  > *…allowing the Access Seeker to provide comments during the notice period on the proposed amendments, ~~and~~ giving reasonable consideration to ~~reasonably implementing~~ any comments which the Access Seeker has made on the proposed amendments, and implementing any such comments where the Access Provider considers it is reasonable to do so in the circumstances; and…*

- (***refunding charges for suspended services)*** Telstra believes that the ACCC's changes to the NPTCs in clause 7.10(b) do not reflect the ACCC's reasons for the change in the Draft Decision.

  Section 5.6.3.4 of the Draft Decision provides:

  > *The ACCC has adopted VHA's proposal requiring an access provider to refund sums paid for services which have been suspended but has subjected this to a time period of suspension for 10 or more business days. This provides for the efficient use of a telecommunications network because access seekers will not be paying (and an access provider will not be over-recovering) for suspended services. The ACCC considers that the related compliance costs for access providers is balanced by only requiring refunds where suspension has continued for a material period of 10 days or more.*

  To give effect to the ACCC's intentions and to clarify that the refund only applies to the suspended service to the extent it is affected for more than 10 days, Telstra suggests amending clause 7.10(b) of the Draft FAD as follows:

  > *Without prejudice to the parties' rights upon termination of the supply of the Service under this FAD, or expiry or revocation of this FAD, the Access Provider must refund to the Access Seeker a fair and equitable proportion of those sums paid under this FAD by the Access Seeker which are periodic in nature and have been paid for a Service:*

…

(b) in respect of a Service which has been suspended for a period of 10 days or more under Schedule 7 of this FAD, for the period extending beyond that 10 day suspension period to the extent the Service remains ~~for a period of no less than 10 days commencing on the date on which the service is~~ suspended under Schedule 7 of this FAD,

subject to any invoices or other amounts outstanding from the Access Seeker to the Access Provider…

In addition to the above substantive points Telstra notes that the formatting in clause 7.5(e) of the Draft FAD should be amended to add a return after the words "three Months or more,". The words at the end of 7.5(e) should apply to all of clauses 7.5(a) to (e) and appear as follows:

(e) the supply of the Service(s) to the Access Seeker has been suspended pursuant to the terms and conditions of this FAD for a period of three Months or more,

the Access Provider may cease supply of the Service under this FAD by written notice given to the first-mentioned party at any time after becoming aware of the cessation, reasonable grounds or expiry of the Remedy Period specified in the Breach Notice (as the case may be).

2.3.3 Application of Schedules to FADs for certain services

As Telstra has previously submitted, Telstra believes that network modernisation and upgrade notice periods (Schedule 10 of the draft FAD) should only apply to the fixed line services and WDSL service and has provided a thorough explanation for this view.[8]

In short, the basis on which those clauses were included in the fixed line services and ADSL FADs simply does not apply to MTAS or DTCS. Telstra reiterates its view that extension of these provisions to MTAS or DTCS creates unnecessary and unduly onerous obligations on access providers and is contrary to their legitimate business interests. The provisions should accordingly be limited to their current application.

[8] Telstra Corporation Limited, Response to the ACCC's Discussion Paper on NPTCs, 15 July 2014, p.9.

3 Supplementary charges

Telstra agrees with the ACCC's draft decision to not expand the scope of the regulated supplementary charges and considers that the current scope of those regulated charges is largely appropriate. That said, there are aspects of the draft decision that Telstra believes that the ACCC should reconsider, including:

- **Wholesale ADSL connection charges:** The ACCC has made a draft decision to set wholesale ADSL connection charges by ULLS band rather than geographic zone. However, Telstra does not have the ability to levy wholesale ADSL connection charges by ULLS band and any requirement to do so would entail billing systems changes and significant expense. Therefore, Telstra considers that the current structure of geographically averaged charging should be retained.

- **LSS disconnection charges:** there are a limited number of circumstances where Telstra currently levies a LSS disconnection charge. The ACCC's draft decision not to include LSS disconnection charges in the FAD means that Telstra will not be able to recover the legitimate costs incurred in providing such disconnections. Accordingly, Telstra considers that the ACCC should reconsider its approach and include LSS disconnection charges in the FAD for those limited circumstances.

- **ULLS connection and disconnection charges:** Telstra agrees with the principles that the ACCC has stated should apply to the calculation of a VULL connection. However, Telstra does not consider that the ACCC's reasoning in relation to setting ULLS disconnection charges is appropriate. This is because Telstra's data shows that there is an increasing discrepancy between the number of ULLS connections and disconnections meaning that there are a number of circumstances in which Telstra will legitimately incur additional costs of disconnection. Telstra therefore considers that the ACCC should allow charges for ULLS disconnections in those circumstances.

Further detail on each of the above issues is set out below, as are Telstra's comments on the ACCC's modelling of the connection charges set out in the Draft Decision.

3.1 The ACCC's cost model

Telstra has reviewed the Draft Decision and the UXC Technical Advice[9] for connection charges. In the UXC Technical Advice, UXC Consulting updates the connection charges model used in the 2011 FAD. The updated model is referred to in this submission as the UXC Model.

As set out in its July 2014 submission[10], Telstra considers that the approach adopted by the ACCC to determine connection charges by updating its previous modelling is generally appropriate. Telstra continues to believe that it is appropriate to utilise Telstra's third party contractor rates as inputs to the model as these provide a good proxy for the efficient costs incurred in carrying out work related to connections and disconnections. Telstra further notes that in updating the previous connection charges model, UXC Consulting has largely relied upon the information provided by Telstra in its 9 January and 4 February 2015 letters to the ACCC relating to those third party contractor rates.

3.1.1. Errors in the cost model

Telstra has identified minor errors in the UXC Technical Advice and the UXC Model, as follows.

[9] Technical Advice on connection charges for the ULLS, LSS and WADSL services: Initial Report (12 March 2015).
[10] Telstra, Response to ACCC Position Paper, Final Access Determination inquiry on supplementary pricing, 15 July 2014.

(a) Formula errors to calculate single connection charges

Telstra notes that, in its modeling, the formula used by UXC Consulting to calculate the FY2019 LSS, ULLS single and Wholesale ADSL Type B (and all other wholesale ADSL) connection charges were incorrectly linked to FY 2018 Data Activation Centre (**DAC**) and Integrated Deployment Service (**IDS**) unit costs instead of to FY2019 DAC and IDS unit costs. The tables below sets out the connection charges in the UXC Model (without amendment) compared to the connection charges when the formula is updated.

Table 1: LSS Single Connection Cost - FY2019

	Band 1	Band 2	Band 3	Band 4
UXC Model	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Formula corrected	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]

Table 2: ULLS Single Connection Cost - FY2019

	Band 1	Band 2	Band 3	Band 4
UXC Model	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Formula corrected	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]

Table 3: Wholesale ADSL Type B Connection Cost - FY2019

	Band 1	Band 2	Band 3	Band 4
UXC Model	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Formula corrected	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]

(b) Sub-contractor rate reduction applied by UXC Consulting in its model

In its letter of 4 February 2015, Telstra outlined a number of additional activity costs associated with the connection and disconnection of ULLS, LSS and wholesale ADSL services. UXC Consulting considers that it is not appropriate to include these costs in the calculation of those connection and disconnection charges and has therefore decided to reduce the third party subcontractor rates provided by Telstra by [C-i-C] to reflect the removal of these additional activity costs.

Telstra disagrees with this approach. First, Telstra considers that the additional activities that are required in making connections and disconnections should be accounted for in determining the costs of making ULL, LSS and wholesale ADSL connections and disconnections given that these are directly incurred by Telstra.

However, to the extent these are excluded, Telstra notes that the approach adopted by UXC Consulting (specifically applying a [C-i-C] mark-down to the third party subcontractor rates) is an inaccurate method of adjustment. In Telstra's letter of 4 February 2015, Telstra stated that for the 2014 calendar year, the *total* costs associated with additional tasks comprised less than [C-i-C] of the total rates paid for the list of sub-contractor tasks. This does not however correctly equate to a [C-i-C] reduction of costs across each task before applying the [C-i-C] mark up for indirect costs paid [C-i-C] (which the ACCC has applied, and which Telstra agrees with). Telstra has undertaken

an accurate assessment of the costs if the additional activities are not accounted for in the UXC Model. For this purpose, it has recalculated the Schedule of Rates for third party sub-contractors without the costs associated with the additional work for each cost category. The results are set out in Table 4 below ([C-i-C]). The results with the [C-i-C] are set out in Table 5 below.

Table 4: Direct third party sub-contractor rates (2014) – with additional activities excluded [C-i-C]

2008 SOR	2014 SOR equivalent	SOR Code	Band 1	Band 2	Band 3	Band 4
Run Jumper Exchange MDF (Non Associated)	Run Jumper Exchange MDF (Non Associated)	II-12a1	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Multiple TOW in designated exchanges for PSTN	Programmed multiple Tickets of Work in designated exchanges for PSTN	II-12b3	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Run Jumpers Exchange MDF for ADSL (Simplex)	II-13a1	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Run Jumpers Exchange MDF for ADSL (Complex)	II-13a2	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Programmed multiple Ticket of Works in designated exchanges for Simplex ADSL	II-13a6	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Programmed multiple Ticket of Works in designated exchanges for Complex ADSL	II-13a9	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Vacant ULL Line	Vacant Unconditional Local Loop (VULL) Line Build	II-14a1	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Single Ticket of Work for ULL Jumper (TULLS/IULLS)	Single Ticket of Work for ULL	II-14b1	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Programmed multiple Ticket of Works in designated exchanges for ULL jumpers (TULLS/IULLS)	Programmed multiple Ticket of Works in designated exchanges for ULL	II-14b2	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
ULL MNM Jumper in One Visit only to exchange (Pre-jumper and cutover completed on the same day)	Bulk - ULL Jumper Task completed in single visit	II-15a1	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
ULL MNM Jumper in two visits to exchange (Pre-jumper and cutover completed on two separate days)	Bulk - ULL Jumper Task completed in two visits	II-15a2	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Bulk - SSS Jumper Task completed in single visit	II-15a3	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Bulk - SSS Jumper Task completed in two visits	II-15a4	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]

Table 5: Direct third party sub-contractor rates (2014) – with additional activities excluded [C-i-C]

2008 SOR's	2014 SOR equivalent	SOR Code	Band 1	Band 2	Band 3	Band 4
Run Jumper Exchange MDF (Non Associated)	Run Jumper Exchange MDF (Non Associated)	II-12a1	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Multiple TOW in designated exchanges for PSTN	Programmed multiple Tickets of Work in designated exchanges for PSTN	II-12b3	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]

2008 SOR's	2014 SOR equivalent	SOR Code	Band 1	Band 2	Band 3	Band 4
	Run Jumpers Exchange MDF for ADSL (Simplex)	II-13a1	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Run Jumpers Exchange MDF for ADSL (Complex)	II-13a2	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Programmed multiple Ticket of Works in designated exchanges for Simplex ADSL	II-13a6	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Programmed multiple Ticket of Works in designated exchanges for Complex ADSL	II-13a9	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Vacant ULL Line	Vacant Unconditional Local Loop (VULL) Line Build	II-14a1	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Single Ticket of Work for ULL Jumper (TULLS/IULLS)	Single Ticket of Work for ULL	II-14b1	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Programmed multiple Ticket of Works in designated exchanges for ULL jumpers (TULLS/IULLS)	Programmed multiple Ticket of Works in designated exchanges for ULL	II-14b2	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
ULL MNM Jumper in One Visit only to exchange (Pre-jumper and cutover completed on the same day)	Bulk - ULL Jumper Task completed in single visit	II-15a1	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
ULL MNM Jumper in two visits to exchange (Pre-jumper and cutover completed on two separate days)	Bulk - ULL Jumper Task completed in two visits	II-15a2	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Bulk - SSS Jumper Task completed in single visit	II-15a3	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
	Bulk - SSS Jumper Task completed in two visits	II-15a4	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]

(c) Geographic distribution for estimating average single LSS/ULLS connection charges

For the purposes of estimating average single LSS and ULLS connection charges across Bands 1 to 4, the ACCC's geographic distribution of Copper lines is based on the number of Copper lines that were in place at the time of the 2011 FAD. However, more up-to-date geographic distribution information (based on 2014 CAN RKR data) is available and should be used. This information is set out in Table 6 below.

Table 6: Geographic distribution — ACCC Model using 2011 data cf to 2014 CAN RKR data

	Band 1	Band 2	Band 3	Band 4
ACCC Model	5.0%	69.0%	18.0%	8.0%
2014 CAN RKR Information	2.6%	68.5%	19.8%	9.1%

Source: Telstra's CAN RKR Information (December 2014), Public. Submitted to the ACCC in February 2015.

(d) Proportion of single and multiple jumpering for ULLS single connections

For the purposes of its modeling, UXC Consulting uses the estimate of the proportion of single and multiple tasks undertaken for ULLS single connection that were in place at the time of the 2011 FAD in the UXC model. However, more up-to-date information on the proportion of single and multiple tasks undertaken is available while Telstra undertook the assessment of the costs to calculate the Schedule of Rates for third party [C-i-C] for each cost category. For the 2014 calendar year, the proportion of Single Ticket of Work for ULLS for Band 1 was [C-i-C]of the total Single and Programmed Multiple Ticket of Works for ULLS in Band 1. The results for Bands 1 to 4 are set out in Table 7 below.

Table 7: Proportion of single jumpering for ULLS single connections

	Band 1	Band 2	Band 3	Band 4
UXC Model	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]
Telstra	[C-i-C]	[C-i-C]	[C-i-C]	[C-i-C]

3.2 Wholesale ADSL connection and early termination charges

Telstra notes that UXC Consulting updated and extended the cost model to enable the model to be used to estimate connection charges for wholesale ADSL. Telstra agrees that the ACCC should continue to distinguish between 'Type A' connections and 'Type B' or 'All other' connections for Wholesale ADSL as the work involved in these types of connections is quite different. Further, Telstra accepts UXC's reasoning with respect to 'Type B' and 'All other' wholesale ADSL connections being analogous to single LSS connections.

However, Telstra is surprised by the ACCC's draft decision to set 'Type B' and 'All other' connections by ULLS band. As the ACCC is aware, Telstra does not bill wholesale ADSL by ULLS band, but rather applies monthly port charges on a Zone basis. Telstra's billing systems are not able to bill wholesale ADSL connection charges by ULLS band and to make changes to the billing system would be a time consuming and costly exercise. Indeed, Telstra currently has a single, geographically averaged charge for each of the wholesale ADSL connection types and its strong preference is for this structure to be retained as any change in the charge structure will entail changes to the billing system.

Telstra notes the ACCC's view that early termination charges do not recover additional costs which are not already recovered through either the connection charges or the monthly recurring charges. Telstra is concerned however that a regulated term that provides for the removal of early termination charges (particularly the concept of a 'minimum term' for wholesale ADSL services) could lead to disruptive changes to end user or access seeker behaviour. Without the concept of a minimum term it is feasible that, in certain circumstances, end users will churn and port between providers on an increased basis leading to the requirement for more billing adjustments and additional resourcing requirements for both Telstra and access seekers to accommodate this increased switching.

It is Telstra's view that early termination charges are a contractual issue to be agreed by the parties. Parties execute agreements to obtain mutual benefit including the number of services that will be acquired for a specific period of time. If these benefits are removed, then these circumstances may need to be addressed during commercial negotiations.

LSS disconnection charges

Telstra strongly disagrees with the ACCC's draft decision not to set disconnection charges for the LSS. In its July 2011 decision[11], the ACCC explicitly accepted Telstra's submission that *"it should be able to recoup its direct costs incurred in disconnections"*. At that time, the ACCC clarified that LSS disconnection charges should only be levied where a service was being transferred to an access seeker that was not participating in the churn process. The intent of this clarification was to ensure that charges were not levied twice for the same process, i.e. the connection and disconnection of a service as part of the churn process. Telstra is of the view that the same principle should continue to apply and is surprised that the ACCC does not appear to be adhering to the principle of allowing Telstra to recover its direct costs.

Telstra also notes that the ACCC has taken account of arguments by access seekers that a LSS disconnection charge should not be levied where a service is migrating to the NBN. Telstra agrees with this principle and notes that it does not currently levy disconnection charges in those circumstances. Telstra also wishes to remind the ACCC that it discussed this issue with ACCC staff in 2013 and at the time, no concerns were raised regarding Telstra's approach. Taking all of this into account, Telstra considers that the ACCC's reliance on the arguments around the levying of a LSS disconnection charge when a customer is migrating to the NBN is erroneous.

For clarity, Table 8 sets out Telstra's practice in charging for LSS disconnections. As shown in the table, there are a limited number of circumstances where Telstra does levy a LSS disconnection charge and without the ability to continue such charges, Telstra considers that it will not be able to recover its legitimate costs.

Table 8: Telstra's policy with respect to levying disconnection charges

Situation	Charge Y / N
Customer cancels LSS	Y
Customer cancels LSS and connects to TWI	Y
Customer transfers to another Wholesale provider using DSL/LSS Transfer process as a DSL service	N
Customer transfers to another Wholesale provider using DSL/LSS Transfer process as a Spectrum service	N
Customer has a Change of Number / Change of Lessee / Change of Class of Service	N
Cancellation of PSTN service	Y
Customer transfers to BigPond	N
Relocate to a new address (may maintain same number)	Y
Customer migrates to ULLS	N
Customer migrates to Fibre access, e.g. Point Cook	N
Customer premises is NBN Serviceable at the time the disconnection order is received	N

4 ULLS connection and disconnection charges

Telstra has reviewed the Draft Decision with respect to ULLS connection and disconnection charges and has a number of observations to make.

[11] p122 of 2011 FAD.

First, Telstra notes that the ACCC has not set charges for VULL connections and that it has observed that this is the only ULLS connection process that requires an element of field work. The ACCC further observed that charges for VULL connections would likely comprise the standard ULLS single connection charge plus a mark-up to cover the additional costs associated with the field work, although it acknowledged that it would be difficult to establish a mark-up that is cost reflective in all circumstances. As a result, the ACCC's draft decision is to not set a single VULL connection charge but that Telstra should provide additional transparency to access seekers about how these charges are calculated.

Although the ACCC has not explicitly set a charge for VULL connections, Telstra welcomes the clarity around the pricing principles that the ACCC should apply to such connections. As shown in Table 9 the number of VULL and eVULL connections has increased since 2008, both in absolute terms and as a proportion of the total number of ULLS connections and it is appropriate that Telstra be allowed to recover the direct costs that it incurs.

With respect to ULLS disconnection charges, the ACCC appears to be relying on the reasoning set out in the 2008 Pricing Principles for the ULLS[12], which the ACCC references in its Draft Decision[13]. In addition, Telstra notes that this reasoning was carried over to the ACCC's April 2010 Final Determination related to a ULLS dispute between Telstra and Chime:

> *The ACCC considers that where a ULLS disconnection takes place as a result of an end-user churning their downstream services to another service provider, there is the potential for the removal of the existing jumpers to be combined with installing the new jumpers on the relevant line. Overall costs can be significantly reduced by combining the two processes and the costs of removing the jumpers would be subsumed into the relevant connection charge.* [14]

Telstra considers that while the ACCC's reasoning may have been valid in 2008 and in 2010, this is no longer the case. Table 9 sets out data from 2008, 2010 and 2015, which shows that today, there are nearly four times as many ULLS disconnections as there are in-place connections.

Table 9: ULLS connections and disconnections

	12 months to March 2008	12 months to March 2010	12 months to March 2015*
ULLS Connections: New e/VULL	[C-i-C]	[C-i-C]	[C-i-C]
ULLS Connections: 'In place' I/D/TULL	[C-i-C]	[C-i-C]	[C-i-C]
ULLS MNM	[C-i-C]	[C-i-C]	[C-i-C]
ULLS Disconnections	[C-i-C]	[C-i-C]	[C-i-C]

** Excludes [C-i-C]change of lessee service "connections" and cancellation associated with a substantial merger that involved no jumpering or removal of jumpers*

Telstra expects that this trend is likely to continue for some time and, similar to LSS disconnection charges, there are likely to be some circumstances where Telstra is entitled to recover the direct costs associated with a disconnection.

Telstra also notes that there have been no Managed Network Migrations (**MNMs**) [C-i-C] for ULLS and [C-i-C] for LSS. Telstra does not anticipate that there will be any significant demand for MNMs over the life of the FAD. As such, Telstra considers that it is not necessary for the ACCC to determine charges for an exercise that is unlikely to occur at material levels of demand.

[12] ACCC, *Unconditioned Local Loop Service Pricing Principles and Indicative Prices,* June 2008.
[13] Draft decision, p63.
[14] ACCC, *ULLS Access Dispute, Telstra / Chime, Reasons for Final Determination,* April 2010, pp95.

5 Correction to 4 February letter

Finally, Telstra wishes to point out an error in its 4 February 2015 letter. In Table 3 of that letter, there was an error made in reference to the VULL connection charge. The error and correction is shown in the Schedule of Rates Mapping Table below.

Table 10: Corrected Schedule of Rates Mapping Table

Connection/Disconnection Type	Reference SORs – refer to Attachment E for detailed description
LSS Single Connections	II-13a1 or II-13a2.
LSS Single Disconnections	II-12a1 or II-12b3
LSS Managed Network Migration (MNM) connection charges	II-15a3 or II-15a4
ULLS single connection charges : a. In use ULLS (IULL) b. Transfer ULLS (TULL) c. ~~Vacant ULLS (TULL)~~ Vacant ULLS (VULL) and d. Enhanced Vacant ULL (eVULL)	For all ULLS single connection types: • II-14b1 or II-14b2 For IULL, TULL and eVULL single connection types: • II-14b1 or II-14b2 For VULL single connection types : • II-14a1
ULLS MNM connection charges	II-15a1 or II-15a2
ULLS cancellation charges	II-14b2