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Copy to
Alison Russell, ACCC
Chris Ratchford, ACCC

Dear Mr Wright,

Further Submission in Response to the Draft Report on Reviewing the Declaration of Domestic Transmission Capacity Service

I refer to Telstra's response to the Commission's Draft Report on Reviewing the Declaration for the Domestic Transmission Capacity Service (**Draft Report**), submitted on 4 March 2009. In light of the Full Federal Court's decision in *Telstra Corporation Limited v Australian Competition Tribunal* [2009 FCAFC] 29 on 11 March 2009 (**FFC Decision**), Telstra wishes to make the following additional submission.

In the Draft Report the Commission states that it is not satisfied that the additional Victorian and Queensland ESAs that meet the Commission's 2008 exemption criteria should be excluded from the declaration. The Commission gives two reasons for this. First, it does not have the relevant empirical information identified by the Australian Competition Tribunal as necessary to deregulate and second the review and report must be concluded by 31 March 2009. The Commission also states that the primary method for removing regulation from competitive transmission routes is through the exemption process.

The FFC Decision provides useful guidance on the application of Part XIC of the Trade Practices Act including the following issues:

- on the use of predictive evidence (rules of thumb) to determine the need for regulation, the FFC stated: "*Section 152ATA complements s 152AT as s 152ASA complements s 152AS. Importantly, s 152AT contemplates that the application which it authorises will assume the applicant may not yet be a carrier or carriage service provider. It also contemplates that no s 152AL declaration may have been made. Section 152ATA is forward looking. It may be impossible for an applicant under that section to adduce any empirical evidence or any hard evidence at all. An applicant may have to rely entirely on expert evidence of a predictive nature. As the section is complementary to s 152AT, the section provides a guide in our opinion to the nature and quality of the evidence that might support a successful application under s 152AT*"¹. This lends support to Telstra's view that the

¹ Para 153

existence of Telstra plus at least two other fibre optic competitors in a particular ESA should be sufficient for the Commission to be satisfied that there is competitive supply of IEN transmission within that particular ESA;

- on the requirement of empirical evidence to decide the LTIE, the FFC stated: *“To impose a requirement of empirical evidence ...as a minimum set of standards for an applicant for exemption to meet is...to apply the wrong test to the objective of competition required to be considered under s 152AB(2)(c).”*²;
- on the function of exemptions, the FFC stated: *“Consistently with s 152AB(1), a declaration is made under s 152AL when the ACCC is satisfied that the making of the declaration will promote the LTIE. The purpose of s 152AT...is to relieve the carrier or carriage service provider who is bound by the 152AL declaration from the consequences of that declaration....Like s152AL, and in conformity with s 152 AB(1), the criterion for making the order exempting the party from the consequences of the s 152AL declaration is the promotion of the LTIE.”*³

Given these statements, it is clear that a declaration enquiry should focus on determining those parts of the service that should be the subject of regulation: that is, the ACCC should ensure that the regulation it is imposing is in the LTIE. Regulating aspects of a particular service which are already competitive rather than granting an exemption from regulation where it would meet the statutory criteria, does not satisfy the LTIE. It is imperative, therefore, that in considering whether to re-declare the domestic transmission service, the ACCC makes the proper inquiries, and considers all of the evidence available to it (including the material already submitted by Telstra on where competition for the service already exists, and the Industry Infrastructure RKR data that is provided to it annually), and only seeks to impose regulation where it is in the LTIE to do so: ie where the service remains a bottleneck. To do otherwise would be contrary to the legislative regime and the objectives that Part XIC is seeking to achieve.

Telstra’s DTCS exemption applications lodged in 2007 were narrowly focussed, and omitted many competitive ESAs, such as those in Victoria and Queensland that Telstra has since brought to the Commission’s attention. Without endorsing the Commission’s criteria as being the correct measure of whether there is sufficient competition in those ESAs, at a minimum, it is clear that the ESAs and routes that meet the Commission’s own established criteria ought to be excluded from the declaration. Further, ESAs that are likely to become competitive during the declaration period should be excluded from the declaration.

The Infrastructure RKR data that the Commission possesses would allow the Commission to assess the number of fibre owners in each ESA and route against the criteria recently established and affirmed in the 2008 DTCS exemptions. Although the expiration of the existing declaration is soon, the Commission has considered the same LTIE issues recently and it has the RKR data it needs to apply the established criteria.

If the Commission considers it requires further information than that provided to it in the Infrastructure RKR, the Commission could immediately initiate a class exemption process to obtain the necessary information from the industry.

² Para 174.

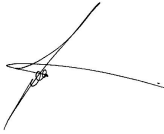
³ Paras 136-138.

Other Matters

Further to Telstra's submission of 4 March 2009, we attach below an email link for another example of where ULL acquired by Telstra's competitors is used for data transport services that are substitutable for DTCS. This is further evidence that demonstrates the competitiveness that exists for the supply of DTCS tail services.

http://www.internode.on.net/business/internet/corporate_internet/extreme_shdsl/

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Tony Warren', written in a cursive style.

Tony Warren
Executive Director Regulatory Affairs
Public Policy and Communications