TELSTRA CORPORATION LIMITED

Submission to the Australian Competition and Consumer Commission

PSTN OA Exemption Applications

Response to ACCC Draft Decision

September 2008

PUBLIC VERSION

Overview

Telstra welcomes the Commission's draft decision of 5 September 2008 (**"Draft Decision"**) to grant Telstra exemptions ("**Proposed Exemptions**") from the standard access obligations ("**SAOs**") in respect of the supply of the PSTN originating access service ("**PSTN OA**") within 15 CBD and 248 metropolitan Exchange Service Areas ("**ESAs**") ("**Exemption Area**").

However, Telstra is concerned that the Proposed Exemptions are subject to conditions which will dampen, rather than promote, efficient competition. In particular, the Commission's proposal to continue regulation in two CBD ESAs - Pitt (NSW) and Roma Street (Queensland) where there is a plethora of fibre, fixed wireless and digital subscriber line access multiplexer ("**DSLAM**") deployment is of great concern.

This proposal is contrary to the principle that regulated access should be removed where effective competition already exists. Furthermore, the Commission appears to have overlooked the point that, in the two ESAs already approaching saturation from competitive network deployment, exemption could still encourage more efficient *use* of infrastructure - that is, it could encourage access seekers to place increased (and more efficient) reliance on the extensive networks they have already built.

Given the prevalence of alternative networks in CBDs, exemption in these ESAs should not be subject to conditions. In relation to metropolitan ESAs, Telstra makes detailed comments about the appropriateness of the Commission's proposed conditions. Perhaps most importantly, Telstra considers there is no case for a condition mandating a LSS to ULLS Migration Process, in respect of either CBD or metropolitan ESAs.

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1 The Commission's exemption threshold

Telstra welcomes the Commission's adoption of an entry-based decision rule, as initially suggested by Dr Paul Paterson in his statement of 12 October 2007. Telstra also welcomes the Commission's decision to conduct its analysis of competitive conditions at the ESA level, in order to obtain a more granular view of the development of competition within Australian fixed line and broadband markets.

However, Telstra considers that the Commission's proposed threshold for granting exemption of four ULLS providers or 14,000 addressable services in operation ("**SIOs**") is unduly high.

Rather, and as consistently stated by Dr Paterson in his expert reports, exemption is warranted (and will promote the long-term interests of end-users ("**LTIE**")) in every ESA in which Telstra's competitors have installed at least one DSLAM.

Dr Paterson stated in his 12 October 2007 report (in relation to his proposed "one-DSLAM rule"):

> *"I come to this conclusion for two reasons:*
>
> - *the existence of at least one ULLS-based competitor clearly demonstrates that there are not material barriers to competitive entry by ULLS-based operators; and*
> - *economic analysis leads me to the reasoned conclusion that there are no material barriers to further ULLS-based entry/expansion (consistent with the empirical observation that entry has actually occurred)."*[1]

In his most recent expert report, Dr Paterson has re-emphasised the continuing validity of his original assessment:

> *"In short, I consider the Commission's threshold, which requires three ULLS-based competitors to Telstra or a corresponding addressable market, to be*

[1] Paterson Statement, 12 October 2007, pp. 44-45.

overly conservative. In my view this threshold is likely to exclude a number of ESAs where barriers to ULLS-based competition are low and hence unnecessarily limit the benefits of exemption."[2]

The reasons for the correctness of the one-DSLAM rule are plain. The entry of a single DSLAM-based competitor into an ESA provides concrete and sufficient evidence that any barriers to entry within that ESA are surmountable. From that point in time onwards there is no longer a need for access seekers to obtain regulated access to PSTN OA, since any attempt by Telstra to impose a small but significant non-transitory increase in price on its retail or wholesale customers within that ESA could be defeated by a competitive, facilities-based response.

Evidence of additional DSLAM-based entry is not necessary, since the surmountable nature of entry barriers has been established upon the installation of the first competitor DSLAM. Furthermore, granting exemption based on the presence of a single competitor DSLAM will encourage access seekers to ascend the "ladder of investment" to greater reliance on facilities-based competition. Absent such action from the regulator, access seekers may choose to rely on resale services, even in circumstances where additional investment in DSLAM/multiservice access node ("**MSAN**") infrastructure was efficient.[3] Indeed, (and especially in CBD ESAs) exemption may encourage access seekers to "leap off the ladder" by increasing their reliance on rival fibre, fixed wireless and HFC networks.[4] In this regard, it should be noted that recent statistics released by the Australian Bureau of Statistics reveal that one in nine Internet connections is now accessed wirelessly, and that wireless access numbers increased 90% in the last six months.[5]

Moreover, careful analysis of potential barriers to entry within the PSTN OA Exemption Area reveals that none is material in scope.[6]

Accordingly, Telstra considers that granting its applications for exemption in respect of all 404 ESAs would be in the LTIE, and that there is no compelling reason to reduce

2 Paterson Statement, 26 September 2008, p. 10.
3 See Cave Statement, 30 May 2008.
4 See Cave Statement, 25 September 2008.
5 Graeme Lynch, "Shock ABS findings: wireless net connections surge, national data downloads fall", *Communications Day*, 23 September 2008, p. 2.
6 Paterson Statement, 12 October 2007, pp. 35-40 (regarding ULLS expansion) and pp. 40-42

the list of ESAs for which exemption is granted in the manner proposed by the Commission in the Draft Decision.

1.1 The alternative criterion for exemption of 14,000 SIOs should be refreshed

Telstra queries whether the Telstra Customer Access Network Record Keeping and Reporting Rules ("**CAN RKR**") data relied on by the Commission to formulate the second limb (14,000 or more SIOs) of its proposed exemption threshold is now outdated. As a result, it may no longer accurately reflect the inter-relationship between addressable market size and the current scope of DSLAM deployment.

The Commission's exemption threshold was outlined in its final decision on Telstra's Local carriage service ("**LCS**") and Wholesale line rental ("**WLR**") exemption applications ("**WLR/LCS Final Decision**").[7] On the basis of Telstra's September 2007 and December 2007 responses to the CAN RKR, the Commission observed that four or more unconditioned local loop ("**ULLS**")-based competitors (including Telstra) could generally be observed in ESAs that on average had greater than 14,000 addressable SIOs.[8]

The same reasoning was employed in the Draft Decision, where the Commission found that

> "*In this regard it is important to note that competition is drawn to ESAs where there are more potential customers. For example in Telstra's 387 nominated metropolitan ESAs, where there are two ULLS competitor (including Telstra) the average number of SIOs is above 10,000. Where there are four or more ULLS competitors (including Telstra), there is on average greater than 14,000 SIOs in the ESA. Where there are six or more ULLS competitors (including Telstra), there is on average greater than 20,000 SIOs in the ESA.*"[9]

(regarding alternative network expansion).

7 Commission, *Draft Decision on Telstra's local carriage service and wholesale line rental exemption applications,* April 2008, pp. 101 - 102; Commission, *Final Decision on Telstra's local carriage service and wholesale line rental exemption applications*, August 2008, p. 169.

8 Telstra continues to hold the view that pair gain systems do not pose a significant barrier to DSLAM-based entry within the PSTN OA Exemption Area, and that the calculation of addressable SIOs should not be reduced in this way.

Since the Commission's exemption threshold was first devised, the Commission has been provided with more recent CAN RKR data relating to the March 2008 and June 2008 periods. The periodic nature of the Telstra CAN RKR obligations on Telstra are intended to ensure that the Commission is provided with up-to-date information on network deployment developments. Accordingly it is difficult to envisage a reason for not applying on such data in the current regulatory context.

Further, the [C-I-C].

Telstra endorses the Commission's reliance on CAN RKR data. However as a general principle, Telstra considers that in reaching its decision, the Commission should rely on the most recent RKR data which is available. This includes in setting the alternative exemption threshold.

As the Commission observes, ULLS take-up "appears to be in a dynamic growth phase".[10] Since ULLS take-up is intimately linked with DSLAM deployment, it is of paramount importance that the Commission periodically revisit the information available to it on DSLAM deployment. Accordingly, the Commission should refresh its alternative threshold for exemption on the basis of the most up-to-date CAN RKR data available to it. Use of this data will ensure that the threshold for exemption is better able to reflect current (and future) market conditions within the Exemption Area.

2 The threshold for exemption in CBD ESAs

2.1 There are additional grounds for exemption in CBD ESAs

In its Draft Decision, the Commission appears to have adopted the same rationale as in its WLR/LCS Final Decision:

> *"A key caveat to the above is that the ACCC considers granting exemptions will only promote the LTIE where ULLS is a readily available substitute to PSTN OA and the Fixed Voice Bundle. To this end, issues impeding access seekers' access into*

[9] Draft Decision, p. 164.
[10] Draft Decision, p. 161.

exchanges (such as, exchange capping and queuing) are, in some cases, significant barriers to entry to ULLS-based competition. The ACCC considers that exemptions will only promote the LTIE to the extent that access to exchanges is not impeded by such issues."[11]

However, while this rationale may well remain appropriate in metropolitan ESAs, it is not appropriate to adopt it without modification in respect of CBD ESAs.

Telstra has submitted separate applications for CBD and metropolitan ESAs in recognition of the enhanced competitive conditions within CBDs. As Dr Paterson outlines in his most recent statement:

"Finally, I remain of the view that the CBD exchanges are qualitatively different to the other ESAs in Telstra's exemption area due to the very substantial fibre-based infrastructure overbuild that exists. For these ESAs in particular I believe there is no plausible case for refusing exemption, and including exemption rejection on the grounds of the Commission's proposed conditions."[12]

Telstra remains concerned that the Commission has not given sufficient weight to these important differences. As a result, the Commission has:

- denied exemption to two ESAs - Pitt (New South Wales) and Roma Street (Queensland) - in respect of which exemption is clearly warranted; and
- imposed unnecessary conditions in respect of all CBD ESAs.

As detailed in previous reports by Dr Paterson and Market Clarity, there is extensive deployment of rival fibre networks in CBD ESAs.[13] This conclusion is reinforced by data contained in a number of expert reports filed by Telstra in support of its DTCS exemption applications and annexed to this submission.[14] For example, there are currently [C-I-C] fibre-based infrastructure owners (including Telstra) within the Pitt

11 Draft Decision, p. 136.
12 Paterson Statement, 26 September 2008, p. 4.
13 See Paterson Statement, 12 October 2007, pp. 22-25; see also Market Clarity Report, 26 September 2007, especially p. 6. http://www.accc.gov.au/content/item.phtml?itemId=800827&nodeId=cf7420f7332794449d492719f6c9274f&fn=Telstra%20PSTN%20OA%20exemption%20applications%20-%20annex%20N%20-%20Market%20Clarity%20report.pdf
14 See Annexures 3-11 to this submission.

ESA,[15] and [C-I-C] in Roma Street.[16] This is in addition to the [C-I-C] DSLAM-based and [C-I-C] wireless broadband operators in Pitt, and [C-I-C] DSLAM-based and [C-I-C] wireless broadband operators in Roma Street. The following table summarises current deployment of competitor networks within CBD ESAs:

[C-I-C]

The existence of rival networks in CBD ESAs constitutes a compelling basis for exemption in CBD areas, irrespective of whether ESAs are "capped" as regards further ULLS-based deployment, as alternative networks provide a credible substitute to ULLS (and PSTN OA) for the provision of fixed voice and bundled fixed voice and broadband services. As Dr Paul Paterson observes:

> "*The presence of both fibre-based and DSLAM-based operators across all CBD areas is important for two reasons. First, it provides evidence of a strong competitive constraint on Telstra's behaviour in these areas both at the retail and wholesale levels. Second, it demonstrates that in CBD areas, barriers to market entry are low not only for DSLAM-based operators, but also for operators of alternative infrastructure. In this respect CBD areas are clearly distinguishable from metropolitan areas where barriers to DSLAM-based entry have been shown to be low, but material barriers to competition based on alternative fixed infrastructure may still exist.*" [17]

2.2 It is in the LTIE to encourage competition based on alternative infrastructure in CBD ESAs

It is puzzling that the Commission has decided to exclude the Pitt and Roma Street exchanges from exemption on the basis of its concerns about exchange capping. These ESAs appear to be approaching saturation point in terms of fibre, fixed wireless and DSLAM-based deployment, engendering effective competition within them. Indeed, it is likely that these conditions of heightened competition based on competing networks extend to the entire CBDs of Sydney, Melbourne, Brisbane, Adelaide and Perth.

15 [C-I-C]
16 [C-I-C]

The Commission acknowledges the existence of significant alternative infrastructure in the 15 CBD ESAs to which the Proposed Exemptions apply:

> "*Information received from carriers in 2008 pursuant to the ACCC's Infrastructure Audit RKR indicated that* ***[C-I-C].*** *There is also the potential to offer competing voice services as carriers who are understood to have voice switching capability are present. All exchanges have* ***[C-I-C]*** *present and nearly all have* ***[C-I-C]*** *present. In addition, other fibre network operators are present in one, two or three city CBD areas. In relation to fixed and mobile wireless networks, the ACCC's Infrastructure Audit found* ***[C-I-C].****"*

It also expresses the view that:

> "*…there is significant alternative infrastructure in the CBD ESAs, either fibre-based networks or wireless networks. The ACCC's draft view is that removing PSTN OA regulation in the CBD areas would encourage efficient use of, and investment in, ULLS-based* ***and alternative infrastructure*** *[emphasis added] so as to satisfy the ACCC that such an exemption would promote the LTIE."*[18]

This view is hard to reconcile with the Commission's draft decision not to grant exemption in the Pitt and Roma Street ESAs, as it appears to overlook the fact that exemption can also promote fibre and fixed-wireless based competition in these ESAs - in addition to encouraging existing DSLAM-based competitors to roll out their networks to new customers.

Such considerations also impact on the third limb of the LTIE test, namely the encouragement of the efficient use of, and investment in, infrastructure. In this regard, Telstra concurs with Dr Paterson's view that:

> "*…while the Commission recognises clearly the scope for more efficient use of, as well as investment in, ULLS-based infrastructure likely to be occasioned by OA exemption, it overlooks the scope for more efficient use of existing fibre-based*

[17] Paterson Statement, 26 September 2008, p. 13.
[18] Draft Decision, p. 138.

infrastructure in CBD ESAs with exemption. This point further strengthens the case for exemption of these particular ESAs." [19]

While it may be ambitious to expect that exemption would encourage the construction of an additional end-to-end fibre network in either Sydney or Brisbane (given the already extensive deployment of such networks), it may well encourage carriers such as [C-I-C] to build additional fibre connections to CBD buildings where it is efficient to do so (which, in the majority of cases, is likely to be the case).[20] This can be viewed alternatively as promoting efficient investment in new infrastructure (i.e. construction of the fibre tail) or efficient use of existing infrastructure (by way of improved utilisation of the existing network).

As Professor Martin Cave states in his expert report:

> *"Where spare capacity and marginal cost conditions make the switch [to an existing end-to-end network] technically and commercially feasible, this is likely to promote the efficient use of infrastructure or investment in infrastructure to expand capacity".* [21]

Finally, as the Commission itself highlights, in relation to the promotion of competition limb, the explanatory memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth), which introduced section 152AB states:

> *"...It is not intended that the access regime embodied in this Part impose regulated access where existing market conditions already provide for the competitive supply of services."* [22]

The Commission also states, (and Telstra concurs), that in considering whether a thing will promote competition, regard must be had to:

- the existing levels of competition in the markets to which the thing relates;
- the extent to which the thing will remove obstacles to end-users of carriage services or services provided by means of carriage services gaining access to

[19] Paterson Statement, 26 September 2008, p. 8.
[20] Statement of Michael Smart of CRA International on the economic considerations for Metro and CBD domestic transmission capacity service exemptions, 20 December 2007, p. 24.
[21] Cave Statement, 25 September 2008, pp. 2 - 3.

those services; and

- the extent to which the exemption would enable end-users to gain access to an increased range or choice of services.[23]

In the present instance, there is clearly effective competition to supply PSTN OA-like services within all 17 CBD ESAs. In fact, the Commission states in its Draft Decision:

> *"It is the ACCC's draft view that there is significant alternative infrastructure (fibre and wireless) to Telstra's PSTN present in the Proposed CBD Exemption Area capable of providing competing voice services at the retail level."*[24]

Accordingly, the dictates of the LTIE assessment demand that the Commission extend the scope of its draft exemption orders to exempt the Pitt and Roma Street ESAs.

2.3 The reasoning underlying the Commission's WLR/LCS decisions in 2002 and 2006 remains compelling

In 2002, the Commission granted Telstra unconditional exemption from its obligation to supply LCS within Australia's five principal CBD areas[25] because:

- It considered that continued declaration of the LCS within these areas was not necessary to ensure competitive market outcomes and deliver benefits to end-users given:
  - there was alternative local access infrastructure and declared services for originating local calls in these areas either being used, or that could readily be used, by alternative carriers and carriage service providers; and
  - the presence of alternative infrastructure and services was sufficient to serve as substitutes to the LCS and act as a constraint on the price that Telstra would be able to charge for the LCS.
- The availability of the LCS was preventing these alternative infrastructure and

22 Draft Decision, p. 29.
23 Draft Decision, p. 29.
24 Draft Decision, p. 82.
25 Commission, *Future scope of the LCS – Final Decision,* July 2002; WLR was never declared in these ESAs.

services from being used more extensively, and granting exemption would serve to encourage greater use of these alternative infrastructure and services for originating local calls.

- An exemption would force alternative service providers to make more of a concerted effort to obtain and retain customers and thereby increase in service diversity, which will be in the LTIE.[26]

This reasoning was recognised in the Commission's 2006 Local Services Review and accepted as the basis for the Commission's decision that the continued declaration of LCS and declaration of WLR should not apply in those CBD areas.[27] Telstra submits that these reasons for granting unconditional exemptions from supply of the LCS and WLR are equally applicable in the context of its PSTN OA exemption applications of 8 October 2007 ("**Exemption Applications**").

3 Delayed implementation is unnecessary

Telstra also considers that circumstances specific to the PSTN OA Exemption Applications should be taken into account in formulating any conditions or limitations on exemption (if, contrary to Telstra's view, any are deemed necessary).

Specifically, Telstra considers the Commission has been unduly conservative in proposing that its orders will only come into effect twelve months after the release of its final decision, particularly given the signals already provided to access seekers by publication of the Commission's WLR/LCS Final Decision. There is no reason for such a delay - especially given the conservative nature of the Commission's proposed threshold for exemption.

As Dr Paterson has previously concluded:

> "*In most exemption area ESAs, workable competition already exists and hence there would be no benefit to competition from delaying exemption, but a significant cost. Moreover in all exemption area ESAs it has been demonstrated that barriers to DSL AM-based entry and supply are low and hence there appears*

[26] Commission, *Future scope of the LCS – Final Decision*, July 2002, pp. 51-52.
[27] Commission, *Local Services Review – Final Decision*, July 2006, p. 9.

to be no need for, and a cost from, a 12-month delay".[28]

Accordingly, Telstra considers that any delay should, at a maximum, be limited to six months to reduce the significant and unjustified cost of delay.

Furthermore, that six months should be measured from the date of the Commission's final decision on Telstra's WLR/LCS exemption applications. That final decision has alerted access seekers to the need for them to ascend the ladder of investment, rather than continue to rely on resale services. In this regard, Telstra considers that any transition period should be aligned with that date on which its exemptions orders for WLR and LCS take effect.

Almost all acquirers of PSTN OA can be classified as voice resellers as they purchase local call, basic access and PSTN OA services from Telstra. In recognition of this, the Commission found:

> "*Accordingly, the ACCC considers that it is appropriate to consider PSTN OA in terms of a bundled product together with LCS and WLR (Fixed Voice Bundle) at the wholesale level.*"[29]

For this reason, there is no basis for there to be a longer period for acquirers of PSTN OA to continue obtaining this service at a regulated price outside of the Fixed Voice Bundle. Rather, it is appropriate that exemption in respect of PSTN OA take effect on the date the Commission's WLR/LCS exemption orders take effect.

4 The proposed conditions and limitations are not in the LTIE

4.1 Exemption should not be subject to conditions in CBDs

Given the abundance of alternative networks within Band 1 ESAs (as discussed at section 1.1 of this submission), it would not be in the LTIE to impose any conditions of exemption in respect of CBD ESAs. Exemption can promote competition, and encourage efficient use of and investment in, infrastructure in CBDs, without any of

[28] Paterson, Report in response to *ACCC Draft Decision on Telstra's WLR/LCS Exemption Applications*, 11 June 2008, p12

[29] Draft Decision, p. 65.

the conditions proposed by the Commission. As Dr Paterson observes:

> *"Additionally, I consider the Commission's proposed conditions on exemption (including those on capped and queued ESAs) to be unnecessary in the light of the competition assessment. As noted above, the Commission's exemption area has been delineated to include only those ESAs where there has already been sufficient entry to form basis for effective competition. This means that conditions aimed at ESAs for which there is perceived to be barriers to further entry are unnecessary."*[30]

These views, which have been expressed in respect of Telstra's Exemption Applications generally, are particularly applicable to the CBD Exemption Area, with its plethora of alternative networks.

Accordingly while Telstra considers that exemption within CBD ESAs should not be subject to conditions, it makes additional observations regarding the proposed conditions of exemption as they relate to metropolitan ESAs.

4.2 LSS-ULLS migration process condition

The Proposed Exemptions would not apply to the supply of PSTN OA supplied in a bundle with the line sharing service ("**LSS**"), WLR and LCS to an access seeker in respect of supply of a bundled fixed voice and broadband service to an end-user that was being supplied with the bundle immediately prior to the Commencement Date (as defined in the Draft Decision) - until the Commission publishes a Prescribed LSS to ULLS Migration Process (as defined in the Draft Decision) on its website.

Exemptions should be granted without such a condition

The Proposed Exemptions should not be subject to this condition because:

- it would not be in the LTIE in the light of the extensive substitution alternatives;
- it fails to take account of the continued availability of regulated access to

[30] Paterson Statement, 26 September 2008, p. 4.

WLR/LCS to the (allegedly) affected class of customers;

- it is a second best solution - likely to impose additional, significant and unnecessary costs, create distortions and increase regulatory complexity;
- there is not sufficient demand for a LSS - ULLS migration process to justify the substantial capital costs involved in developing one; and
- there are substantial concerns over the scope and detail of the condition, including the use of arbitrary untested benchmarks.

Each of these reasons is addressed in turn.

(i) *The proposed condition would not be in the LTIE in the light of the extensive substitution alternatives*

The Commission's rationale for the imposing this condition assumes that access seekers who acquire LSS in conjunction with the Fixed Voice Bundle (PSTN OA, LCS, WLR) would, following a grant of exemption, be unable to obtain access to PSTN OA, or to effective substitutes for it.

However, bundled acquirers of LSS/WLR/LCS/PSTN OA are presently able to substitute away from acquiring PSTN OA, to reliance on voice over internet protocol ("**VoIP**") and mobile calling for originating long distance, international and fixed-to-mobile calls.

Indeed, Telstra understands, and the Commission may well be in a position to verify, that LSS/WLR acquirers make *de minimus* use of PSTN OA within the Exemption Area for the purposes of supplying bundled voice and broadband services to their end-use customers. [C-I-C].

Telstra believes the [C-I-C] usage of PSTN OA by LSS/WLR/LCS bundlers is due mainly to substitution towards carrier-grade VoIP services.

The Commission appears to take a similar view, stating:

> "*In Telstra's Proposed PSTN OA Metropolitan Exemption Area (i.e. the ESAs the subject of Telstra's Metropolitan Exemption Application), only a minority of access seekers use the LSS to not only supply their customers with a broadband service via access to the higher frequency part of the copper line, but also to*

supply a voice service by re-selling Telstra's Fixed Voice Bundle over the same copper line."[31]

Accordingly, the condition is likely to have little or no practical effect on LSS/PSTN OA bundle providers within the Exemption Area.

VoIP

Based on information provided on Chime/iiNet's website,[32] customers acquiring a broadband service accompanied by a fixed voice (i.e. LSS-based) service can make use of a VoIP service rather than a traditional fixed voice service, by means of a VoIP-enabled DSL modem/router, or alternatively by using a DSL modem/router in conjunction with an analogue telephone adaptor ("**ATA**") device.[33]

Telstra remains of the view that such "carrier-grade VoIP" is a substitute for the services provided by means of PSTN OA within the Exemption Area.[34] The Australian Communications and Media Authority ("**ACMA**") has acknowledged the potential for VoIP to act as a substitute for PSTN fixed-voice services:

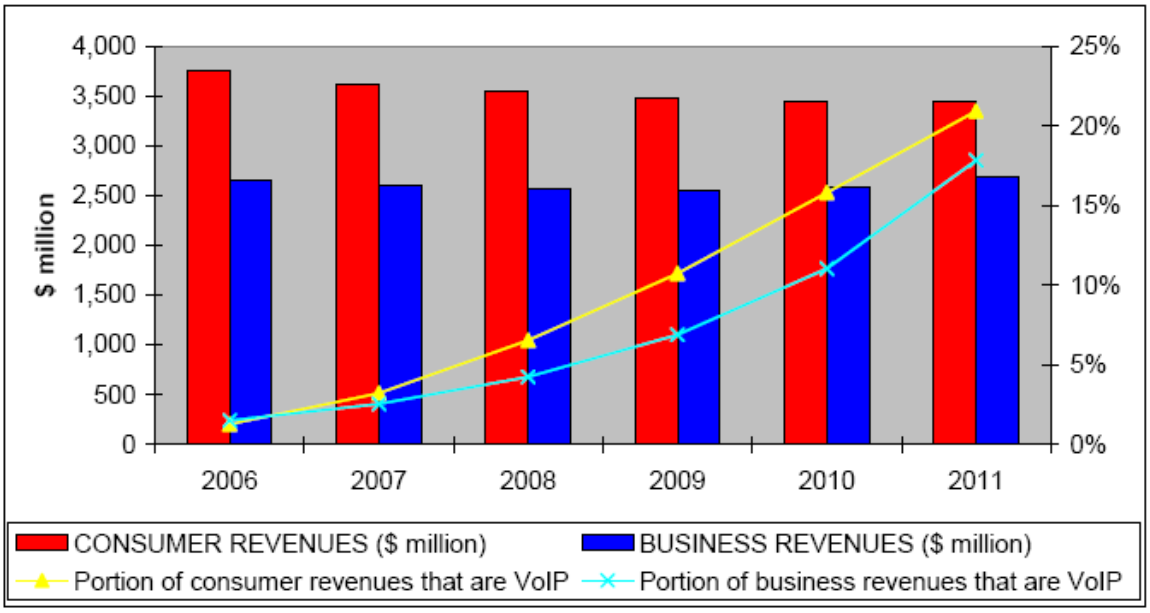
> "*The low pricing and additional functions offered by VoIP services create strong competition for traditional public switched telephone network (PSTN) fixed-voice services. Industry forecasts predict that VoIP will comprise 21 per cent of fixed-voice revenues in Australia by the end of 2011.*"[35]

Likewise, industry consultant Ovum forecasts that overall fixed-voice revenues will decline, while the percentage generated by VoIP will increase.[36] According to Ovum, by 2010–11 (i.e. within the proposed term of the exemptions), VoIP is expected to drive pricing trends in developed markets such as Australia. Figure 3 below, which is reproduced from Ovum's report, indicates that VoIP as a portion of business and

[31] Draft Decision, p. 120.
[32] See http://www.iinet.net.au
[33] See http://www.iinet.net.au/products/voip/equipment.html
[34] For a more detailed view on the potential substitutability of VoIP with traditional fixed-line services, see Paterson Statement of 11 June 2008 on Telstra's WLR/LCS Exemption Applications, as well as the [C-I-C].
[35] ACMA, *The Australian VoIP Market - The supply and take-up of VoIP in Australia*, p. 1.
[36] Ovum, Wireline Strategy, "Australia's Fixed Voice forecasts 2006-2011", August 2007.

consumer fixed-voice revenues in Australia is expected to increase to 18 per cent and 21 per cent respectively by the end of 2011.[37]

Figure 3: Ovum forecast—Australia fixed-voice revenues (US$ million)



Source: Ovum, Wireline Strategy, 'Australia Fixed Voice forecasts 2006–2011', August 2007

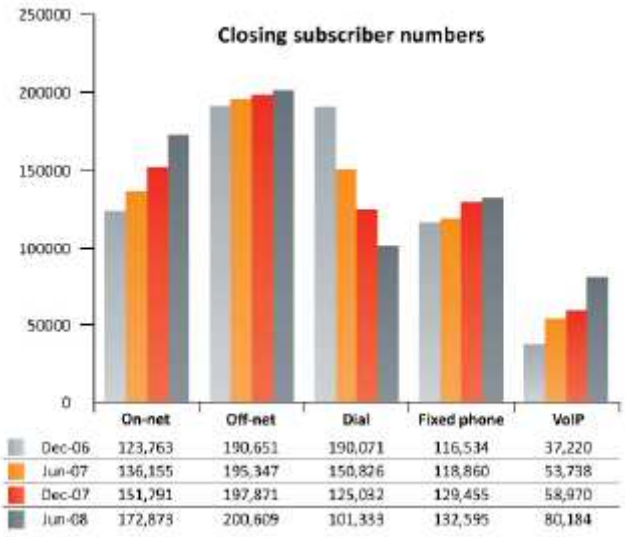
Access seekers clamouring for a LSS-ULLS migration process have endorsed similar views in their public statements to the financial markets. For example, in its Annual Report 2006, Chime/iiNet states:

> *"As a result of customers moving to mobile telephony and VoIP, the average monthly revenue per user from fixed line telephony has been steadily declining in the past year, with Telstra experiencing a 12% reduction in revenue from its fixed line revenue in the past year."*[38]

In the same annual report Chime stated that given these trends it expected to focus significantly more attention on VoIP in future.

[37] *Ibid.*
[38] Chime/iiNet Annual Report 2006, p. 15.

According to Chime/iiNet's 2008 full year results released on 18 August 2008, its closing subscriber numbers for VoIP services were 80,184 and are expected to continue their rapid growth.[39]



	On-net	Off-net	Dial	Fixed phone	VoIP
Dec-06	123,763	190,651	190,071	116,534	37,220
Jun-07	136,155	195,347	150,826	118,860	53,738
Dec-07	151,791	197,871	125,082	129,455	58,970
Jun-08	172,873	200,609	101,333	132,595	80,184

Accordingly, it is clear that even Chime/iiNet (the main proponent of the LSS-ULLS migration process) acknowledges its own substitution of other technologies such as VoIP for PSTN OA. From a functional perspective, carrier-grade VoIP is clearly a substitute for traditional fixed voice services. In this regard, Dr Paterson concludes that:

> *"In my view carrier-grade VoIP (i.e. that supplied using an Internet Access Device in conjunction with the ULLS or LSS) should be considered in the relevant market given the likelihood of demand-side substitution ...*
>
> *Carrier-grade VoIP allows the consumer to connect a POTS phone to the Internet Access Device and make little change to their calling habits. This contrasts with application-layer VoIP (which I do not consider to be a strong substitute) where calls are made using a different handset or software installed on a computer and the quality of these calls is subject to general internet transmission conditions beyond the control of the service provider or customer."*[40]

[39] Chime/iiNet, *2008 Full Year Results*, 18 August 2008.
[40] Paterson Statement, 26 September 2008, p. 5.

This view appears to be shared by Chime/iiNet. On its website, it is claimed:

> *"You'll be pleasantly surprised at just how clear VOIP sounds - that's because iiNet VOIP operates off its own premium-grade network, ensuring the highest quality sound and connection."*[41]

Fixed to mobile substitution

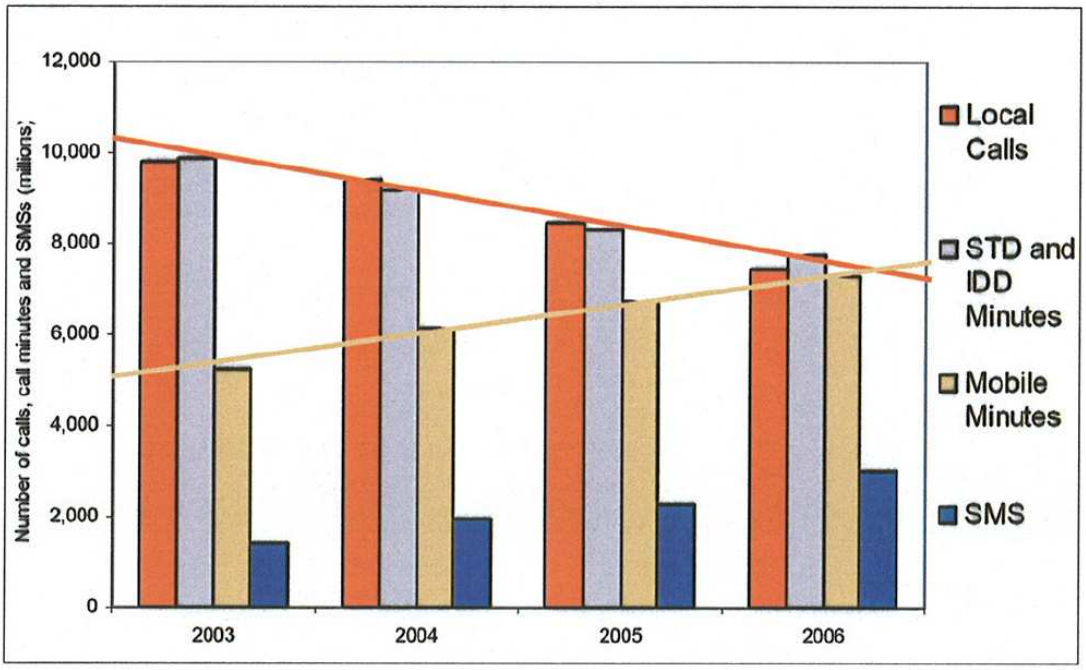
With mobile subscription penetration reaching saturation, mobile services are increasingly becoming substitutable for fixed-line services. From an end-user's perspective, there is little to no difference between making a call to a mobile from a fixed-line or from a mobile phone. The decision as to which device to use is largely a function of price and convenience.

The following graph is reproduced from Dr Paterson's 12 October 2007 report. It shows a strong correlation between increasing mobile call minutes and decreasing fixed voice volumes.[42]

[41] http://www.iinet.net.au/products/business/voip/what_is_voip.html. By contrast, Chime states in its submission on the WLR/LCS Draft Decision at p. 3: "Though VoIP provides a means to make cheap calls that are acceptable to a lot of customers, it is not widely regarded as a substitute to a fixed telephone service." There appears to be a question of inconsistency between these messages.

[42] Paterson Statement, 12 October 2007, p. 33.

Figure 9: Telstra Mobile and Fixed call volumes: 2003-2006



Source: Telstra Annual Reports (2004-2006)

This view is consistent with those espoused by both industry analysts and telecommunications providers. One industry analyst has observed that:

> *"...empirical evidence suggests the Australian market is at the cusp of wholesale migration of voice traffic to mobile services."*[43]

Vodafone has stated that it is:

> *"actively encouraging customers to substitute fixed calls with mobile calls with a number of customer offerings"* and the recognition *"that there is competition between M2M and F2M is in fact acknowledging that mobile services are part of a broader telephony market."*[44]

[43] Report from Citigroup, 11 October 2004 quoted in ACCC Price Control Review (2005), p. 20.
[44] Vodafone letter to ACCC dated 9 October 2003, p. 6.

Vodafone has elsewhere acknowledged that:

> *"For some people, mobile phones have now become a real alternative to the fixed line. Over time, we believe that fixed to mobile substitution will continue, particularly for voice services."* [45]

(ii) The proposed condition ignores the impact on the LTIE of continuing regulated access to WLR/LCS

In the WLR/LCS Final Decision, the Commission imposed a condition requiring continued supply of WLR/LCS to those access seekers which bundle LSS with WLR/LCS within the Exemption Area, in the absence of a LSS to ULLS Migration Process.[46]

Setting aside whether such a condition was justifiable in that case, it must be borne in mind that such a condition now forms part of the LTIE assessment to be performed by the Commission in the present context. In either the "without" or the "with" scenario, bundled acquirers of LSS/PSTN OA will continue to have access to declared WLR/LCS. And given the fundamental differences between WLR and other regulated services, any logic the condition may have in the WLR context is highly questionable in respect of PSTN OA.

In order to obtain LSS, there must be an underlying voiceband PSTN service in operation on that end-use customer line. Notwithstanding that this should in no way be interpreted as synonymous with WLR,[47] it is nevertheless true that once WLR has been acquired by an access seeker, the "underlying voiceband PSTN" requirement has been satisfied. There is no need for other wholesale voice services (such as PSTN OA) to be supplied over the line in order for LSS to be obtained - and, indeed, as observed above, VoIP and mobile calling appear to offer compelling substitutes within the Exemption Area.

[45] Vodafone, *Submission to the Australian Competition and Consumer Commission: Mobile Services Review 2003 Discussion Paper*, 13 June 2003, paras 3.22 and 3.65.

[46] Commission, WLR/LCS Individual Exemption Orders, 22 August 2008.

[47] In fact, this requirement may satisfied in a number of ways other than supply of WLR, as outlined in Telstra's response of June 2008 to the Commission's information request in respect of Telstra's WLR/LCS Exemption Applications, pp. 3-7.

Given that these bundled acquirers can already access declared WLR/LCS, there can be little or no material impact on the LTIE of exempting the supply of PSTN OA to the same access seekers.

Furthermore, to the extent that the development of a Prescibed LSS to ULLS Migration Process would be efficient from a public policy perspective, the Commission's WLR/LCS Final Decision provides sufficient impetus to encourage its development.

(iii) The condition is a second best solution

The proposed LSS-ULLS migration condition is likely to encourage gaming by access seekers, impose additional, significant and unnecessary costs, and create distortions and increased regulatory complexity.

Implementation of the proposed condition will also necessarily impose additional operational and IT costs on Telstra's wholesale billing systems. Unilaterally imposing particular terms on which a LSS-ULLS migration process must be implemented is inappropriate in the context of a PSTN OA exemption. While the development and implementation of a migration process may be on the Commission's "wish list" it can at best be characterised as tangential to the Commission's assessment of the present Exemption Applications.

In addition, this condition is based on the fundamental misconception that Telstra can develop and implement a LSS-ULLS migration process in isolation. This is simply not possible. Any LSS-ULLS migration process will necessarily require close co-operation between Telstra and other industry participants. This is why Telstra has maintained that if any such process is to be developed it should be developed by the Communications Alliance.

Finally, given the necessity of access seeker involvement in the development of any migration process, the proposed condition regarding a migration process can easily be frustrated at the whim of individual access seekers. That is, access seekers who wish to frustrate the benefits of exemption may refuse to co-operate in the development of a migration process, in order to ensure that they continue to receive regulated access to PSTN OA (and other resale services). This further illustrates the

inappropriateness of dealing with this issue in the exemption context.

(iv) There is not sufficient demand for a LSS- ULLS migration process to justify the substantial capital costs involved in developing one

At this stage there is clearly no commercial rationale for the costly development of such a process, nor has the lack of such a process proven to be a barrier to competition in the market for voice or broadband services.

The imposition of a condition on all LSS, WLR, LCS and PSTN OA bundles which can only be alleviated by the implementation of a LSS-ULLS migration process, presumes that all LSS, WLR/LCS and PSTN OA lines are automatically being prevented from moving over to ULLS-based supply when in fact, such a migration is likely to be contemplated in respect of only a fraction of such lines. Indeed, the Communications Alliance has found that such a process does not need to be implemented due to lack of demand.[48]

The fact that that a consultative body such as the Communications Alliance, with broad membership across the telecommunications industry, recently indicated to the Commission that there was insufficient demand to warrant the expense of developing and implementing such a process, suggests that the need for a LSS-ULLS migration process and the impact of the Proposed Exemptions upon the supply of bundled voice and broadband services has been dramatically overstated.

Finally, any demand that does exist for these migrations can easily be satisfied through the currently existing process of disconnecting LSS and connecting ULLS. This process is more than adequate to accommodate any migrations likely to arise from the grant of the Exemption Applications. Accordingly, granting the Proposed Exemptions can promote competition within the Exemption Area, even without a migration process.

[48] See Communications Alliance, "ULLS Migration Process Report to the ACCC, August 2008, available from http://www.accc.gov.au/content/item.phtml?itemId=839453&nodeId=298e3a7439caff11503e2b20612cf6b7&fn=Communications%20Alliance%20Final%20Report%20on%20ULLS%20migration%20pr

(v) Arbitrary and untested benchmarks and detail of the migration process

The Commission stipulates that any prescribed LSS-ULLS migration process developed and implemented by Telstra must ensure that any service downtime experienced by a consumer is limited to 3 hours, and that the end-user does not need to have any active involvement in the LSS-ULLS migration process.

The exemption process is not the forum for mandating the intricate detail of such a complex and technical process.

Further, the Commission's reference to, and reliance on, the *Report on ERG best practices on regulatory regimes in wholesale unbundled access and bitstream access* ("**ERG Report**")[49] as a justification for the 3 hour limit to service downtime experienced by a consumer in any LSS-ULLS migration process is out of context and inappropriate.

To begin with, the ERG Report only deals with migration processes for

- resale to wholesale access products;
- bitstream to LLU; and
- transfers inside the same wholesale access product. [50]

None of these processes is comparable to LSS to ULLS migrations. Whilst both LSS and bitstream access are access services for the provision of DSL services, the main difference between these two services is the provisioning of the DSLAM. In the case of LSS, the DSLAM is owned and operated by the access seeker, whereas in the case of bitstream access, the DSLAM is operated by the incumbent.[51] Given this major difference, the processes required for bitstream to LLU migrations will be significantly different to those processes required for LSS to ULLS migrations. This means that the standard service levels for migration processes contained in the ERG Report cannot be

ocesses.pdf

[49] European Regulatory *Group, Report on ERG best practices on regulatory regimes in wholesale unbundled access and bitstream access*, ERG (07) 53 WLA WBA BP final 080604 ("**ERG Report**") <http://erg.ec.europa.eu/doc/publications/erg_07_53_wla_wba_bp_final_080604.pdf>

[50] ERG Report, p. 20.

[51] See: ERG, *Bitstream Access - ERG Common Position – Adopted on 2nd April 2004 and amended on 25th May 2005* ERG (03) 33rev2, for further information on the definition of Bitstream Access. < http://www.erg.eu.int/doc/whatsnew/erg_03_33rev2_bitstream_access_final_plus_cable_adopted.pdf >

used as reliable benchmarks for LSS to ULLS migrations. The Commission cannot justify imposing the requirements for a downtime period of no more than 3 hours and no end user involvement for LSS to ULLS migrations. To impose these requirements would amount to an arbitrary adoption of the ERG Report by the Commission without considering the issues relevant and specific to LSS to ULLS migrations in the Australian context.

In relying on the ERG Report, the Commission also appears to have ignored the various other terms and conditions that are required to enable an access provider to deliver migration processes, including but not limited to, cost recovery mechanisms. In addition, the ERG Report focuses purely on resale broadband and fails to consider issues relating to the provision of voice services such as local number portability and re-routing of basic access. The provision of voice services is what these Proposed Exemptions are all about.

Finally, the ERG Report itself acknowledges that very few member states have implemented bulk migration processes even in countries where intermediate wholesale offers are commonly used. According to the ERG Report, bulk migration processes are only available in five countries out of the 23 member states. [52] The reason for this may well be that there is insufficient demand for such processes to warrant the expense of developing and implementing it, as the Communications Alliance has found in the Australian market.

Proposed Amendments

For the reasons outlined above, Telstra considers that the condition requiring the implementation of a LSS - ULLS migration process should be removed altogether from the draft exemption orders.

4.3 TEBA capping condition

The Commission proposes to introduce the same capping condition as contained in its WLR/LCS Final Decision. Under this proposed condition, the Proposed Exemptions would cease to apply within an ESA from the date the exchange building within the

[52] ERG Report, p. 28.

ESA first becomes capped, 'potentially capped' or 'constructively capped'.

Telstra disagrees that such a condition is in the LTIE for the following reasons (as well as for the reasons set out above in connection with the Pitt and Roma Street CBD ESAs).

First, it is not at all clear that the benefits of the proposed condition outweigh the costs. The costs of imposing this condition primarily concern the distortionary effects it is likely to have on the build versus buy decisions of access seekers.[53] The disincentive effects this condition is likely to have on access seeker investment are considered in more detail below. In particular, in ESAs where the Commission has already identified three or more competitive ULLS-based suppliers (in addition to 4 mobile wireless operators and, in some ESAs, competitive HFC and fixed wireless networks) it is not at all clear what tangible competitive benefits can arise by re-imposing resale regulation.

As the condition is unlikely to improve competition, and has the potential to discourage efficient use of and investment in infrastructure, Telstra considers that it should not be applied. However, if the Commission is nevertheless minded to implement a condition concerning capped exchanges, it must be implemented in an effective manner (least cost, least distortionary) that achieves its stated objectives, ensuring that the benefits of such a regulatory intervention outweigh the costs.

The condition should not apply to 'Potential' sites

Sites listed as 'Potential' (potentially capped) do not represent a 'hard cap' or restriction in the sense that it is not possible for an ULLS-based access seeker to provide services to end users within that ESA. On the contrary, it is possible for new entrants to be accommodated, although the access seeker will be required to undertake establishment works prior to installation of their equipment. This is not unusual.

By including potential sites in the capping condition to the Proposed Exemptions, the

[53] Other costs include the additional administrative complexities it imposes on both Telstra and access seekers in terms of determining which exchanges will remain subject to regulated terms and conditions for WLR and LCS and those that will be subject to commercial negotiation.

Commission is likely to dissuade efficient investment that might otherwise occur. Prior to deploying equipment in an ESA, a potential ULLS access seeker must weigh up the costs and benefits of doing so. It is well understood that even access seekers who do not currently utilise a regulated product receive a real benefit from its existence (in terms of the low risk option it provides).

By continuing to regulate PSTN OA in exchanges which are listed as 'Potential', the Commission will distort the cost/benefit decision facing access seekers. This will likely result in less infrastructure-based competition due to the disincentive it creates to deploy ULLS-based facilities.

The Commission's condition effectively places the ability to determine whether or not the exemption will apply in a given ESA in the hands of a potential access seeker. A site which is classified as 'Potential' will typically come off the capped list and revert to 'normal' status if the necessary modifications/upgrades are undertaken by a new entrant access seeker. This condition will alter the incentives of that access seeker to invest. By not investing they can continue to have the benefits of the regulated price and conditions for PSTN OA in that ESA, whilst investing elsewhere (i.e. putting DSLAMs in exempt ESAs).

The condition should not apply in exchanges where ULLS-based supply is already present

As noted in Telstra's submission on the Commission's Draft Decision for Telstra's WLR/LCS exemption applications, one of the reasons exchanges become capped in the first place is because of extensive access seeker deployment of DSLAMs within them.[54]

Furthermore, in ESAs that are only listed as 'potentially capped', there is the possibility that a suitably motivated access seeker could install additional ULLS-based infrastructure in the exchange, or could take advantage of an External Interconnect Cable ("**EIC**") to connect externally located hardware to the exchange MDF.

If the Commission chooses to make this condition which can exclude an ESA from

[54] Telstra, *Response to ACCC Draft Decision on Telstra's WLR/LCS Exemption Applications*, May 2008, p. 6.

exemption sometime in the future, then, for the sake of consistency, it should also allow for the ESA to once again be exempt in the event that it becomes available to access seekers (i.e. its status changes from potentially capped to uncapped). If an ESA that was previously capped later becomes uncapped through some event such as extension works, then the Proposed Exemptions should be taken to apply as soon as the 'uncapping' occurs.

The condition should not apply to 'Racks Capped' sites

The condition should not apply to exchanges that are listed as 'Racks Capped'. As with 'Potential' sites, these sites are still able to be serviced by new entrants. Access seekers that encounter TEBA capping issues can also make use of Telstra's EIC service.[55]

As Telstra has previously indicated:

> *"There are no thresholds (regarding exchange capping) required for an access seeker to request an EIC at a particular exchange. Irrespective of whether there is currently TEBA space available or not, an access seeker can request and deploy EIC. In fact, all of the EICs currently in use in the Exemption Area are being utilised in exchanges that are not capped."*[56]

At the very least, the availability of the EIC service means that it is not necessary to impose the proposed capping condition in respect of those ESAs for which access seekers wishing to deploy DSLAM-based infrastructure can avail themselves of the EIC service. Finally, the fact that access seekers already have extensive unused capacity installed in Telstra exchanges further emphasises the lack of need for this condition.[57]

The Condition should make no reference to "constructive capping"

The Commission proposes that the exemption not apply in respect of an exchange as soon as it becomes "constructively capped", that is, an exchange in respect of which,

[55] See Telstra, *Response to ACCC Information Request in relation to Telstra's WLR/LCS Exemption Applications*, 14 March 2008, pp. 9-12.

[56] See Telstra, *Response to ACCC Information Request in relation to Telstra's WLR/LCS Exemption Applications*, 14 March 2008, p. 11.

"the ACCC has determined that Telstra requires as a condition of Access improvements to be made to an Exchange Building at an Access Seeker's cost where such improvements go beyond the standard costs required for Access by the Access Seeker".

The Commission has provided no reasons in its Draft Decision for extending conditions to exchanges that become constructively capped. Even in the WLR/LCS Final Decision, the Commission gave only a single paragraph to this issue, which contained little in the way of substantive reasoning.[58] Telstra considers the proposed condition to be arbitrary and unreasonable, and considers that it should be discarded.

In addition, the condition creates uncertainty. The question of whether an exchange is "constructively capped" is reserved for the ACCC to decide at a future time. Accordingly, both Telstra and access seekers are unaware whether in fact the exemption is likely to apply in a particular ESA (since an ESA might easily be deemed to be constructively capped by the Commission). This uncertainty has the potential to detract seriously from the benefits of exemption.

It is also unworkable, as it is unclear what process the Commission will follow in deciding whether an exchange is 'constructively capped'. The meaning of the phrase, "where such improvements go beyond the standard costs required for Access by the Access Seeker" is even less clear.

Finally, this condition will alter the incentives of access seekers to invest. By not investing they can continue to have the benefits of the regulated price and conditions for PSTN OA in that ESA, whilst investing elsewhere (i.e. putting DSLAMs in exempt ESAs).

Moreover if the access seeker does complete the required improvements to the exchange building, there is no mechanism in the condition allowing the ESA to again become exempt if after the improvements it can no longer be classified as a Capped Exchange, Potentially Capped Exchange or a Constructively Capped Exchange. As such, this condition is likely to alter the incentives of access seekers to prolong

[57] See Telstra Response to ACCC Information Request, 14 March 2008, pp. 9-12.
[58] Commission, *Final Decision on Telstra's local carriage service and wholesale line rental exemption applications*, August 2008, p. 148.

unnecessary regulation rather than promote competition.

Proposed Amendments

Capped Exchange means an Exchange Building in one of the following Attachment A ESAs, [insert names of the ESAs with less than 4 ULLS-based competitors] which Telstra has ~~determined is unavailable for Access by Access Seekers for any reason, including without limitation those Exchange Buildings~~ listed ~~by Telstra~~ in the TEBA Capped List as 'MDF capped', ~~'Racks capped'~~ or 'Racks and MDF capped'.

~~***Constructively Capped Exchange*** means an Exchange Building other than a Capped Exchange which the ACCC has determined that Telstra requires as a condition of Access improvements to be made to an Exchange Building at an Access Seeker's cost where such improvements go beyond the standard costs required for Access by the Access Seeker.~~

Potentially Capped Exchange means a Telstra Exchange Building which Telstra has determined may be unavailable for Access by Access Seekers for any reason. This includes without limitation Exchange Buildings listed in the TEBA Capped List as 'Potential'.

5.6 Telstra must provide notice to the Commission within 24 hours of an Exchange Building within any Attachment A ESA first becoming a Capped Exchange ~~or a Potentially Capped Exchange~~. The notice must:

a. be in writing;

b. addressed to the Group General Manager, Communications Group (or such other person as notified by the Commission);

~~c. be~~ specify the Attachment A ESA within which the Exchange Building has become a Capped Exchange ~~or Potentially Capped Exchange~~;

d. specify whether the Exchange Building has become a Capped Exchange ~~or a Potentially Capped Exchange~~;

e. provide an explanation of why the Exchange Building has become a Capped Exchange ~~or Potentially Capped Exchange~~;

f. specify the date upon which the Exchange Building first became a Capped Exchange ~~or Potentially Capped Exchange~~; and

g. [Telstra does not understand why] ~~be in a form appropriate for publication by the~~

~~Commission on its website~~; ~~and~~

h. not contain any confidential information.

5.7 The Exemption ceases to apply within an Attachment A ESA from the date on which the Exchange Building within the Attachment A ESA first becomes a Capped Exchange, ~~a Potentially Capped Exchange, or a Constructively Capped Exchange~~ until the date on which the Exchange Building is no longer a Capped Exchange.

4.4 Queuing condition

The Commission is proposing that the Proposed Exemptions do not apply to the supply of PSTN OA to an access seeker that is currently in a queue to install DSLAMs in a Telstra exchange building.

By virtue of access seekers deploying equipment in Telstra exchanges, there will be times when an access seeker is in the process of building (i.e. between submitting their application and the completion of the JCI (as defined in the Draft Decision)). This process is unavoidable, and obviously takes time. The necessity of linear builds where new TEBA space and common infrastructure is to be established can cause delays to other access seekers who wish to deploy equipment in that TEBA space. However, it is unfortunate that the Commission, in this process, has taken at face value the claims of access seekers that it is 'routine' to wait months or years to deploy equipment. The simple and easily verifiable facts of the rapid deployment of more than one thousand DSLAMs by more than a dozen companies in hundreds of exchanges would suggest that such claims are not credible.

Further, Telstra does not see why such a condition is necessary. It does not agree with the Commission's reasoning that the substitutability of ULLS for PSTN OA is weakened because access seekers in a queue cannot access the ULLS (unless they already have equipment in the exchange).

As Dr Paterson states in his most recent report:

> "*Thus it is my view that the conditions proposed by the Commission should not be imposed. Given that the Commission has designed an exemption threshold which captures only ESAs where sufficient entry has occurred for effective competition, there should be no need for additional conditions on exemption.*

> *Indeed in a number of ESAs subject to the conditions (of which the Pitt ESA is an example), competition appears to be particularly intense. Imposing conditions where they are not necessary is only likely to dampen facilities-based competition where it is clearly viable and harm the interests of end-users. Therefore it is my view that these conditions should not be imposed at all."*[59]

In fact, by seeking to apply additional (unnecessary) protections to access seekers that choose to deploy infrastructure within the next 12 months, the Commission is creating significant opportunities for access seekers to 'game' and is imposing potentially significant additional administrative costs.

The Commission has acknowledged that imposing the queuing condition can create opportunities for regulatory gaming by access seekers.[60] Such gaming is not only possible, but probable. Access seekers, regardless of whether they have a legitimate PSR (as defined in the Draft Decision), will seek to be the last to enter the queue just before the 12 month transition ticks over. Being last on the queue will mean continued access to regulated PSTN OA for the longest period possible. Telstra does not consider that the Commission's attempt to limit the opportunities for regulatory gaming will deter this activity.

Nonetheless, if the Commission is still minded to impose a condition of this kind, Telstra proposes some amendments that may reduce the incentives for gaming. The key amendment amongst these is reducing the time available for access seekers to submit a PSR from 12 months to 6 months before the Proposed Exemptions take effect. This will reduce the incentive for an access seeker to simply jump on to a queue in order to enjoy any legitimate delays that may arise for those in the queue before them.

[59] Paterson Statement, 26 September 2008, p. 12.

[60] ACCC, *Telstra's local carriage service and wholesale line rental exemption applications and proposed class exemption - Consultation on proposed conditions - Explanatory Memorandum*, 13 August 2008, p. 3.

Proposed Amendment

That the definition of a Queued Access Seeker be amended as follows:

Queued Access Seeker means an Access Seeker who:

a. submitted a PSR before a date no less than 6 months before the Commencement Date in respect of Access to an Exchange Building within an Attachment A ESA that has not been rejected by Telstra and has not been withdrawn by the Access Seeker at any subsequent time; and

b. has not passed JCI in relation to that PSR.

4.5 Existing contracts in force

The Proposed Exemptions are subject to the condition that they will not apply in respect of PSTN OA provided under an agreement which is in force as at the date of the exemption orders coming into effect for so long as that agreement remains in force.

Telstra recognises that this proposed condition largely reflects the condition proposed in Telstra's individual Exemption Applications for PSTN OA. However, as the Commission has proposed a 12 month transition period, such a condition now appears to be largely redundant. In any event, such a condition is unnecessary, since Telstra takes its contractual obligations seriously.

Accordingly, Telstra does not think that such a condition needs to be imposed. However, if it is imposed, it should for clarity be amended as follows:

Proposed Amendment

5.9 For the avoidance of doubt, the Exemption will not ~~apply in respect of~~ have any effect on any obligation to continue to provide PSTN OA ~~provided~~ in accordance with the terms of ~~under~~ an agreement which is in force as at the Commencement Date for so long as that agreement remains in force.

5 Class exemption

The Commission proposes to exempt all carriers and carriage service providers except Telstra from the SAOs in respect of the supply of PSTN OA in the 248 metropolitan ESAs and 15 CBD ESAs which are the subject of the proposed individual exemption orders.

While in principle Telstra has no issue with the granting of class exemptions, it is important for the Commission to maintain a consistent approach. If the Commission is satisfied that there is sufficient existing competition and or serviceable SIOs such that it is prepared to grant an unconditional class exemption it is difficult to justify the proposed conditions surrounding the exemptions conferred on Telstra in the same workably competitive ESAs.

This problem could be further exacerbated by the fact that the decisions of the Commission to grant a class exemption are not capable of review by the Australian Competition Tribunal ("**Tribunal**"). As such, it is possible to envisage a scenario in which the Commission's grant of individual exemptions is overturned by the Tribunal but no review of the class exemptions is available. The fact that, on 12 September 2008 an application was made by Chime Communications Pty Ltd to the Tribunal for review of the WLR and LCS individual exemption orders indicates that such a scenario is entirely possible.

Telstra Corporation Limited

30 September 2008

Annexure 1 - Statement of Dr Paul Paterson

Annexure 2 - Statement of Professor Martin Cave

Annexure 3 - [C-I-C]

Annexure 4 - [C-I-C]

Annexure 5 - [C-I-C]

Annexure 6 - [C-I-C]

Annexure 7 - Statement of Craig Lordan on optic fibre installation costs

Annexure 8 - [C-I-C]

Annexure 9 - [C-I-C]

Annexure 10 - [C-I-C]

Annexure 11 - [C-I-C]

Annexure 12 - [C-I-C]

Annexure 13 - Statement of [C-I-C]