

Interim Determination

ACCESS DISPUTES BETWEEN OPTUS NETWORKS PTY LTD (ACCESS SEEKER) AND TELSTRA CORPORATION LIMITED (ACCESS PROVIDER)

PSTN ORIGINATING ACCESS SERVICE

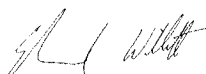
Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act 1974*
on 9 June 2006

Interim Determination under Section 152CPA

1. Except where the parties agree otherwise, the charge payable by Optus Networks Pty Ltd (Optus) to Telstra Corporation Limited (Telstra) for the PSTN Originating Access Service is to be based on Table 1 for the period 1 October 2007 to 31 December 2007.
2. Except where the parties agree otherwise, other terms and conditions on which Telstra currently supplies the PSTN Originating Access Service to Optus are to continue to apply.
3. This interim determination shall take effect as and from 1 October 2007, and will remain in force until:
 - it expires on 31 December 2007;
 - the date a final determination comes into effect; or
 - this interim determination is revoked.

TABLE 1

	Flagfall	EMOU charge	Headline rate
CBD	0.85	0.35	0.57
Metropolitan	0.84	0.49	0.70
Provincial	0.94	0.68	0.91
Rural	2.06	3.66	4.18
Average	0.95	0.76	1.00



Graeme Samuel
Chairman

Ed Willett
Commissioner

DATED: 28 August 2007

Interim Determination

ACCESS DISPUTES BETWEEN OPTUS NETWORKS PTY LTD (ACCESS SEEKER) AND TELSTRA CORPORATION LIMITED (ACCESS PROVIDER)

PSTN TERMINATING ACCESS SERVICE

Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act 1974*
on 9 June 2006

Interim Determination under Section 152CPA

4. Except where the parties agree otherwise, the charge payable by Optus Networks Pty Ltd (Optus) to Telstra Corporation Limited (Telstra) for the PSTN Terminating Access Service is to be based on Table 1 for the period 1 October 2007 to 31 December 2007.
5. Except where the parties agree otherwise, other terms and conditions on which Telstra currently supplies the PSTN Terminating Access Service to Optus are to continue to apply.
6. This interim determination shall take effect as and from 1 October 2007, and will remain in force until:
 - it expires on 31 December 2007;
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Interim Determination

ACCESS DISPUTES BETWEEN OPTUS MOBILE PTY LTD (ACCESS SEEKER) AND TELSTRA CORPORATION LIMITED (ACCESS PROVIDER)

PSTN ORIGINATING ACCESS SERVICE

Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act 1974*
on 9 June 2006

Interim Determination under Section 152CPA

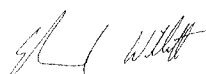
7. Except where the parties agree otherwise, the charge payable by Optus Mobile Pty Ltd (Optus) to Telstra Corporation Limited (Telstra) for the PSTN Originating Access Service is to be based on Table 1 for the period 1 October 2007 to 31 December 2007.
8. Except where the parties agree otherwise, other terms and conditions on which Telstra currently supplies the PSTN Originating Access Service to Optus are to continue to apply.
9. This interim determination shall take effect as and from 1 October 2007, and will remain in force until:
 - it expires on 31 December 2007;
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DATED: 28 August 2007

Interim Determination

ACCESS DISPUTES BETWEEN OPTUS MOBILE PTY LTD (ACCESS SEEKER) AND TELSTRA CORPORATION LIMITED (ACCESS PROVIDER)

PSTN TERMINATING ACCESS SERVICE

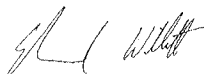

Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act 1974*
on 9 June 2006

Interim Determination under Section 152CPA

10. Except where the parties agree otherwise, the charge payable by Optus Mobile Pty Ltd (Optus) to Telstra Corporation Limited (Telstra) for the PSTN Terminating Access Service is to be based on Table 1 for the period 1 October 2007 to 31 December 2007.
11. Except where the parties agree otherwise, other terms and conditions on which Telstra currently supplies the PSTN Terminating Access Service to Optus are to continue to apply.
12. This interim determination shall take effect as and from the 1 October 2007, and will remain in force until:
 - it expires on 31 December 2007;
 - the date a final determination comes into effect; or
 - this interim determination is revoked.

TABLE 1

	Flagfall	EMOU charge	Headline rate
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Graeme Samuel
Chairman
DATED: 28 August 2007

Ed Willett
Commissioner

Statement of Reasons

ACCESS DISPUTES BETWEEN OPTUS NETWORKS PTY LTD AND OPTUS MOBILE PTY LTD (ACCESS SEEKER) AND TELSTRA CORPORATION LIMITED (ACCESS PROVIDER)

PSTN ORIGINATING ACCESS SERVICE AND PSTN TERMINATING ACCESS SERVICE (PSTN OTA)

Access Dispute Notified under Subsection 152CM (1) of the *Trade Practices Act*
1974
on 9 June 2006

Statement of Reasons for the Interim Determinations

Background

The PSTN originating service and the PSTN terminating service (together PSTN OTA) are declared services under section 152AL of the *Trade Practices Act 1974* (the Act). The services were deemed to be declared services in July 1997 and were re-declared in August 2006.

The Commission set out its pricing principles, including price-related terms and conditions, (the PSTN OTA Pricing Principles and Indicative Prices Determination) in the document titled *Pricing principles and indicative prices, Local carriage service, wholesale line rental and PSTN originating and terminating access services - Final Determination and Explanatory Statement* dated 29 November 2006. The Commission is required to have regard to any pricing principles determination, including price related terms and conditions, made under section 152AQA of the Act when arbitrating an access dispute in relation to the declared services.

On 9 June 2006, the Commission received written notifications (the notifications) from Optus Mobile Pty Ltd and Optus Networks Pty Ltd (together Optus) of access disputes in relation to the supply by Telstra Corporation Limited (Telstra) of the PSTN OTA. Optus' notifications were provided to the Commission under section 152CM(1) of the Act.

The notifications state that Telstra provides the PSTN OTA to Optus under an Access Agreement between Telstra and Optus. The notifications state that the parties cannot agree on the price for the provision of the PSTN OTA.

The Commission has formed the view that the requirements of section 152CM (1) of the Act are satisfied. That is:

- Telstra is a carrier;
- Telstra supplies the declared PSTN OTA;
- standard access obligations apply to Telstra in relation to the PSTN OTA; and

- Optus is unable to agree with Telstra about the terms and conditions on which Telstra is to comply with those obligations.

Parties' Submissions prior to the draft interim determinations

On 1 February 2007 and 11 April 2007, the Commission sought submissions from the parties on whether it should issue interim determinations in these disputes.

The parties have made a number of submissions in relation to the relevant issues in these disputes. Optus provided submissions on 12 February 2007, 12 March 2007, and 15 April 2007. Telstra provided submissions on 26 February 2007 and 18 April 2007.

In a submission dated 12 February 2007, Optus indicated that it would not seek an interim determination because of certain complexities in implementing the Commission's November 2006 indicative prices determination for PSTN OTA. This view was reiterated at the case management meeting between the parties and Commission staff on 19 February 2007.

According to Optus, PSTN OTA services Telstra supplies to Optus are charged and billed on the basis of an inter carrier charging area (ICCA) pricing structure and not the call charging area (CCA) pricing structure set out in the Commission's pricing principles determination. As a result, Optus claims that it would have no means of verifying bills presented to it on a CCA basis, without implementing significant changes to its billing systems. Optus argues that it would not be in the LTIE to require Optus to make such changes, especially in circumstances where a final decision could reverse that change and in any event would only apply for a short period of time. In Optus' view, therefore, it would not be appropriate for the Commission to issue an interim determination that seeks to apply the rate table set out in its pricing principles determination.

Further, Optus submits that the rate table set out in the pricing principles determination does not deliver a weighted average headline rate of 1 cent per minute to Optus.

According to Optus, the rate table which reflects the Commission's final model prices determination of October 2003, no longer reflects current assumptions about traffic patterns (such as call volumes and call hold-times).

Telstra has sought an interim determination based on the indicative prices determination of November 2006. In Telstra's view this would create a level of certainty and predictability for the industry as it would provide a further indication of the Commission's views on PSTN OTA pricing. Telstra also argued that the issuing of an interim determination based on the pricing principles determination would be consistent with the Commission's practice in other arbitrations where the Commission has issued interim determinations reflecting pricing principles in force at the time.

According to Telstra, there is a disparity between what Optus is currently paying under the expired commercial arrangement and what it would pay if its rate table were

based on the Commission's indicative CCA rate table as set out in the PSTN OTA Pricing Principles and Indicative Prices Determination.

This is because Optus is currently charged according to an ICCA-based price table, which involved a once-only translation from CCA prices based on a static traffic sample which was undertaken in August 2003.

In its submissions of 26 February 2007 and 18 April 2007 Telstra also stated that it is able to present bills based on the CCA rate table in an ICCA format to Optus so that Optus is able to verify its charges in its own systems without any information system changes on its part.

Submissions following the release of the draft interim determinations

The Commission provided draft interim determinations to the parties for comment on 22 May 2007. Telstra provided responses to the draft interim determinations on 5 June 2007 and 26 July 2007. Optus responded to the draft interim determinations on 29 May 2007 and 6 June 2007.

Optus submission of 29 May 2007 referred to the draft directions accompanying the Commission's draft interim determination. Optus considered that the Commission should not make the draft directions in the form proposed. Instead, Optus submitted that the draft directions be amended to provide more detail on the methodology that Telstra would use to apply the CCA rate table on an ICCA format.

Telstra submitted that the draft directions should not be made at all. Telstra stated that it was prepared to provide an undertaking that it would make available all relevant information to Optus to allow Optus to perform necessary reconciliation of the CCA bills in the ICCA format.

Optus made a further submission in respect to the draft interim determinations on 6 June 2007. In its submission Optus argued, among other things, that:

- It is inappropriate for the Commission to apply the rate table set out in its pricing principles determination without further analysis;
- The rate table set out in its pricing principles determination is only a starting point and it is necessary to consider the specific circumstances in which they are applied;
- The application of the rate table set out in its pricing principles determination will result in Telstra significantly over recovering its costs; and
- The Commission is under no obligation to make an interim determination.

Telstra's submission of 5 June 2007 in respect to the draft interim determinations stated that Telstra supports the making of interim determinations in these disputes. Telstra's submission also contained more detail on the methodology that Telstra would use to bill Optus at CCA rates in an ICCA format.

Discussion

Section 152CP of the Act provides that, unless the Commission terminates the arbitration under section 152CS, the Commission must make a written determination on access by the access seeker to the declared service. Section 152CP(4) provides that, before making a determination, the Commission must give a draft determination to the parties. Section 152CP(5) provides that when the Commission makes a determination, it must give the parties to the arbitration its reasons for making the determination.

Section 152CPA(1) provides that a determination may be expressed to be an interim determination.

As set out in the *Resolution of telecommunications Disputes – A Guide* ('Access Dispute Guidelines'), in considering whether an interim determination is appropriate in all the circumstances, the Commission will need to consider a range of matters, depending on the circumstances of the arbitration. They include:

- the nature of any contractual arrangements between the parties;
- whether backdating a final determination would provide an adequate alternative to making an interim determination;
- the likely impact of an interim determination on end-users;
- the timing of the final determination; and
- international treaty obligations.

In accordance with section 152CPA(1) of the Act, the Commission has made interim determinations in the arbitration of these disputes.

As noted above, the PSTN OTA is covered by a determination in force under section 152AQA of the Act. The determination includes, *inter alia*, price-related terms and conditions for the PSTN OTA.

Under section 152AQA(6) of the Act, the Commission must have regard to the PSTN OTA Pricing Principles and Indicative Prices Determination if it is required to arbitrate an access dispute in relation to the PSTN OTA.

Section 152CR(1) of the Act sets out matters that the Commission must take into account in making a final determination. Section 152CR(4) specifies that, in making an interim determination, the Commission does not have a duty to consider whether to take into account a matter referred to in a paragraph of subsection (1). Under section 152CR(3), in making an interim determination, the Commission may take into account a matter referred to in a paragraph of subsection (1) or any other matters that it thinks are relevant.

As outlined in the Commission's *Resolution of telecommunications access disputes – a guide, March 2004 (revised)*, (the Access Dispute Guidelines), the Commission considers that, for the purposes of making an interim determination, it does not need to have all the information necessary for making the final determination, nor to have

reached a view on all outstanding issues between the parties. Rather, the Commission considers that the information should provide a reasonable basis for the terms and conditions set out in the interim determination.¹

On 11 April 2007, the Commission wrote to the parties seeking to further explore some of the issues raised by Optus in relation to the traffic-weighted allocation of PSTN OTA costs between different charging 'bands'. The Commission sought further information on the parties' views about the traffic data used as the basis for making the PSTN OTA Pricing Principles and Indicative Prices Determination and also sought further information on the different ICCA and CCA charging regions/areas.

In response, Optus submitted that it was constrained from providing a full response because relevant information is subject to onerous confidentiality constraints. Optus suggested that the Commission should direct Telstra to provide to Optus, for the purposes of these disputes, information that Telstra had made available to the Commission in the context of its PSTN OTA and LCS undertaking of March 2006.

Optus also suggested that, in its view, there have been significant changes in the call holding times and traffic profiles which form the basis of the disaggregated rates table from which PSTN OTA charges are derived. Again, however, Optus stated that it was unable to support this contention with data, given confidentiality restrictions. On 26 April 2007, Optus did provide further information on these issues.

¹ *Resolution of telecommunications access disputes – a guide, March 2004 (revised)*, p. 51.

TABLE 1

Telstra, on the other hand, submitted that the issues associated with industry wide call holding times and traffic profiles used to create the traffic weighted allocations contained in the rate table are matters that would properly be considered in the substantive phase of these disputes. Telstra stated that the Commission should not delay the issuing of an interim determination while it reviews further substantive issues as this would create uncertainty in the industry. In Telstra's view, the Commission does not need to form a view on these substantive issues prior to the issuing of an interim determination based on the indicative prices determination. Finally, Telstra also suggested that updating the rate table with current traffic profile data will result in higher disaggregated CCA charges given the ongoing decline in traffic call volumes. Telstra indicated that it would be making further submissions on this issue during the substantive phase of the arbitrations.

Based on the submissions from the parties, and the fact that limited information was provided to allow assessment of the specific, and complex, issues associated with the traffic-weighted allocation of PSTN OTA costs between different charging bands at this stage, the Commission is of the view that the PSTN OTA Pricing Principles and Indicative Prices Determination would provide a reasonable basis for making interim determinations in these disputes.

The Commission notes that the PSTN OTA Pricing Principles and Indicative Prices Determination was the outcome of a thorough review process based on input from a variety of stakeholders, including the parties to these disputes. In the Commission's view, the issues raised by Optus and the associated information requirements to assess the impact of current traffic volumes on disaggregated CCA rates would be more appropriately dealt with as part of the substantive phase of these arbitrations.

The Commission has had regard to the PSTN OTA Pricing Principles and Indicative Prices Determination which sets out the supporting reasons in relation to the PSTN OTA pricing principles and indicative prices.

In response to the draft interim determinations, Optus submitted that the application of the rate table set out in the pricing principles determination will result in Telstra significantly over recovering its costs. In Optus' view, this will occur because there have been significant changes to industry traffic distributions and call holding times resulting in an increase in the average cost of an end minute of PSTN OTA. In Optus' view, this will have the effect of allowing Telstra to over-recover its costs by some 26 per cent. No detailed analysis was presented to substantiate these views.

As already indicated the issues surrounding the traffic-weighted allocation of PSTN OTA costs between different charging bands and the level of cost recovery resulting from these allocations is complex. The Commission considers that these issues can be more appropriately dealt with in the substantive phase of the arbitrations.

One issue raised by Optus is that its current information systems do not allow it to reconcile charges based on a CCA rate table with the ICCA based charges currently paid by Optus. In response, Telstra has submitted that it is able to present bills based on the CCA rate table in an ICCA format to Optus so that Optus is able to verify its charges in its own systems without any significant system changes on its part. The Commission, therefore, considers that it is possible for Optus to be billed on a CCA basis with little additional system development cost to Optus.

In order to ensure that the translation from ICCA based charges to CCA based charges is as transparent as possible, the Commission facilitated a meeting between Telstra and to Optus to discuss the methodology that will be used by Telstra to convert CCA charges to ICCA charges. Following this meeting, the parties wrote to the Commission on 26 July 2007 indicating that there had been agreement that optus would implement the required system changes by 1 October 2007. As a result of the parties' agreement on the billing issues, the Commission does not consider that the draft directions which were provided to the parties on 22 May 2007 are required.

As the

Commission indicated in the PSTN OTA Pricing Principles and Indicative Prices Determination, prices established either through commercial negotiation or arbitration will reflect the specific characteristics (in terms of call holding times and traffic profiles) of the carriers involved. In the Commission's view, there should be no expectation that individual access seekers will receive a headline rate of 1 cent per minute in all circumstances.

The Commission has made interim determinations that the PSTN OTA rates that Telstra charges Optus for the period from 1 October 2007 to 31 December 2007 are as set out in Table 2. Accordingly, the price-related terms and conditions in the interim determinations are consistent with the PSTN OTA Pricing Principles and Indicative Prices Determination.

TABLE 2

	Flagfall	EMOU charge	Headline rate
CBD	0.85	0.35	0.57
Metropolitan	0.84	0.49	0.70
Provincial	0.94	0.68	0.91
Rural	2.06	3.66	4.18
Average	0.95	0.76	1.00

The Commission considers that a decision to make interim determinations that are consistent with the PSTN OTA Pricing Principles and Indicative Prices Determination provides a degree of regulatory certainty to the parties. The Commission is also of the view that interim determinations that are consistent with the PSTN OTA Pricing Principles and Indicative Prices Determination also promote commercial certainty by contributing to a more timely resolution of disputes.

A more timely resolution of disputes meets the aims of the interim determination process. That is, as discussed in the Access Dispute Guidelines, the Commission sees interim determinations as being important for the smooth operation of the access regime². Accordingly, interim determinations that are consistent with the PSTN OTA Pricing Principles and Indicative Prices Determination contribute to meeting the aims of the interim determination process.

The Commission considers that there are a number of reasons in support of issuing an interim determination that is consistent with the Commission's indicative prices in relation to these disputes. These include that:

- the Commission's indicative prices provide a reasonable basis for making interim determinations in these disputes. They were the outcome of a thorough review process based on input from a variety of stakeholders, including the parties to these disputes;
- a decision to make interim determinations consistent with the Commission's indicative prices:
 - will provides a degree of regulatory certainty to the parties while the substantive phase of the dispute is considered; and
 - will promote a possible commercial resolution of the disputes by signalling to the parties the Commission's views on the ICCA and CCA issue.

² Ibid, p. 50.

The Commission notes that the price-related terms and conditions contained in the PSTN OTA Pricing Principles and Indicative Prices Determination are indicative only, and that the Commission has stated that in the event of arbitration it would look at specific issues, raised by the parties on their individual merits. Further, the Commission may, if appropriate, decide to backdate the final determination in this arbitration. The Commission will have regard to information submitted by the parties regarding PSTN OTA pricing for the purpose of the final determinations.

In its submission to the draft interim determinations, Optus stated that it considers that the Commission had no basis to extend the interim determination beyond the scope of the dispute, which was limited to the period 1 July 2006 to 30 June 2007. The Commission considers that section 152CP of the Act is sufficiently broad to allow the Commission to make a determination which applies for a period of time outside the notified period of a dispute provided that the access seeker will continue to require access to the declared service at that time. In the current arbitration, the Commission considers that an interim determination which applies until 31 December 2007, will allow the Commission to assess the substantive issues in dispute while at the same time providing a basis for the parties to continue possible commercial negotiations to resolve the disputes.