Telstra Singapore Pte. Ltd.

Submission to the Infocomm Development Authority of Singapore on the First Triennial Review of the Code of Practice for Competition in the Provision of Telecommunication Services

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1 Introduction

Telstra Singapore Pte. Ltd. ("Telstra") welcomes the first triennial review of the Code of Practice for Competition in the Provision of Telecommunications Services ("the Code"). Telstra makes this submission in response to the Consultation Document issued by the Infocomm Development Authority of Singapore ("the IDA") on 7 October 2003.

2 Summary of Major Points

In this submission, Telstra confines itself to matters in the proposed revisions to the Code that are specifically relevant to the scope of its business and the services it provides in Singapore. As a new entrant into the Singapore market, Telstra is focused on a number of key regulatory issues:

(a) Services-based competition is critical as an entry-point

Telstra endorses the IDA's recognition that services-based competition can play an important role in facilitating new entry and increasing consumer choice in the short to intermediate term. Accordingly, Telstra supports the IDA's intention to strike a balance between providing economic incentive to build infrastructure and permitting services-based competition. Telstra intends that its business in Singapore will provide an example of growth beginning from a services-based entry point. This would increase competitive pressure in the Singapore market to the benefit of telecommunications users, and would vindicate the approach being taken by the IDA.

(b) Transparency and reasoned decision-making are key to investor confidence in the regulatory environment

Telstra supports the goals of the Code to promote the efficiency and competitiveness of Singapore's information and communications industry. In this regard Telstra notes that the IDA has articulated transparent and reasoned decision-making to be its guiding principle. By adopting these best-practice principles for regulation, the IDA encourages investment in Singapore – Telstra's Singapore business is one example. Adherence to these principles in coming years will sustain confidence in Singapore's regulatory environment by existing telecommunications market participants and encourage further investment.

(c) Give SBOs a "fair go"

Telstra's observation on the current access and wholesale arrangements in Singapore is that FBOs enjoy access rights to a wide range of core interconnection services, while SBOs have very limited access to true wholesale pricing from the Dominant Licensee(s). Telstra appreciates that some consideration is being given to expanding the list of Mandated Wholesale Services, for example in the recent consultation on the Designation of Singapore Telecommunications Limited's Local Leased Circuits As a Mandatory Wholesale Service,[1] and in the current consultation on the Code in which this issue is specifically raised. However, Dominant Licensees are only required to provide Mandated Wholesale Services to FBOs, not SBOs.[2] There are other regulatory hurdles imposed on SBOs that FBOs do not face, such as the requirement that if an SBO intends to provide resale of a leased circuit that terminates in a foreign destination, the SBO must present documentary proof from the relevant authorities in the foreign destination that such resale is permitted and approved. Telstra submits that the Triennial Review provides the IDA with a good opportunity to consider whether the imposition of such hurdles on SBOs may in fact be unnecessary and counterproductive to the development of healthy competition in telecommunications services in Singapore.

3 Statement of Interest

Telstra Singapore Pte. Ltd. holds an Individual Services-Based Operator (SBO) Licence No 64387911. Telstra Singapore Pte. Ltd. is wholly owned by Telstra Holdings Pty Limited, and is ultimately wholly owned by Telstra Corporation Limited, Australia's leading telecommunications and information services company.

4 Comments

Telstra has the following comments about specific paragraphs of the proposed Code.

Proposed Section One - Introduction

The IDA proposes to eliminate the reference to the telecommunications industry body, in preference to industry-led working groups to address individual issues.

Given the IDA's stated commitment to consultation with industry, Telstra's view is that the IDA should adopt the approach that provides the greatest breadth, timeliness and quality in terms of the content of its consultations. If the IDA believes that the establishment of industry-led working groups will enable it to carry out more effective

[1] Consultation Paper released by the IDA on 30 May 2003.
[2] As set out in sub-section 6.3.3.5 of the Code and Appendix 2 sub-section 7.1.

consultation, then Telstra supports the IDA's proposal. Telstra's key concern is that the IDA must ensure that the following requirements be met:

- the industry-led working groups are **open to participation by all industry players** (including SBOs) whose rights and obligations may be affected by the content of the particular consultation; and

- such consultations should be **notified to industry well in advance** so as to enable reasonable preparation time and full participation by industry players.

Given that industry will take responsibility for leading these working groups, and that in this sense the IDA is delegating some of its authority to industry in terms of organising and managing these groups, it would be helpful if the Code's text made specific reference to the above two requirements. Telstra is concerned that unless the above requirements are spelled out, the industry-led working groups may become "exclusive clubs" for Dominant Licensees to the detriment of the IDA's consultation policy.

Proposed Section Four - Duty of Dominant Licensees

Sub-section 4.2.2.2(a):

> The IDA proposes that a Dominant Licensee would not be allowed to restrict other Licensees from purchasing telecommunications services on substantially the same prices, terms and conditions as End Users.

Telstra believes that the above drafting does not adequately capture the concept of a distinct wholesale telecommunications services market. The IDA will be well aware of the need for such a distinct market in order to foster retail-level competition. (The concept of voluntary wholesale services presupposes the existence of such a market.) Telstra proposes that Dominant Licensees should instead be required to provide services on **at least the same or better** prices, terms and conditions.

Telstra further argues that the drafting as currently proposed does not fit with the option in sub-section 4.3 of the Code to offer voluntary wholesale services at "retail-minus" pricing; nor with the discounts or special considerations referred to in sub-section 4.4.2.1 (b) of the Code.

Telstra is concerned that if the drafting is left as it currently stands in sub-section 4.2.2.2(a) of the Code, it could potentially be used by Dominant Licensees as a pretext to avoid providing wholesale pricing, substantially disadvantaging other Licensees seeking to compete in the retail services market. Telstra would expect a Dominant Licensee to provide better-than-standard pricing to those end users taking a higher volume of services or entering into a fixed term commitment, as compared with typical end users who do not take up bulk volumes or commit to specific term contracts. Similar considerations apply when a customer sources all of its supplies from one provider (so-called "whole-of-business" deals).

Telstra accordingly suggests the following amendment (text additions underlined):

4.2.2.2 Duty to Allow Resale of End User Telecommunication Services

(a) A Dominant Licensee must allow any Licensee to purchase any Tariffed Telecommunication Service that the Dominant Licensee makes available to End Users pursuant to a tariff, on <u>at least</u> the same <u>or better</u> prices, terms and conditions that the Dominant Licensee makes such service available to End Users. …

If the IDA is concerned that this opens the door to anti-competitive dealings by a dominant licensee (through below-cost pricing by a Dominant Licensee to its related entities or other such abuses), Telstra believes there are adequate remedies in the competition law provisions of the Code to deal with such conduct.

Sub-section 4.3: Telstra also suggests a further specific duty be imposed on the Dominant Licensee that any voluntary wholesale services it provides must also be consistent with its relevant End User obligations, outlined in the proposed section 3, particularly those relating to quality of service. This will prevent discrimination by Dominant Licensees against other Licensees that might unfairly preclude them from providing services of equivalent service quality and functionality. Telstra notes that Article 9 of the Telecommunications Chapter of the Singapore - Australia Free Trade Agreement requires major suppliers to offer telecommunications services for resale at reasonable rates and to not impose unreasonable or discriminatory conditions or limitations on resale.

The IDA proposes to require that where a Dominant Licensee chooses to offer wholesale services, it does so at "retail-minus" prices.

Telstra considers that wholesale services are most appropriately offered at cost-oriented rates. As the IDA will be aware, the World Trade Organisation's Basic Telecommunications Regulatory Reference Paper (a voluntary commitment undertaken by Singapore under its Schedule of Commitments to the General Agreement on Trade in Services) refers in Article 2.2 to **cost-oriented rates**, rather than "retail-minus". Regulators in most OECD jurisdictions adopt detailed element or service cost modeling (TELRIC or TSLRIC) as their first preference in determining regulated interconnect and core service wholesale pricing. Telstra's view is that "Retail-minus" pricing should only be used in preference to cost modeling where the IDA has good reason, for example, where the stated policy aim is to explicitly bias regulation towards network rollout (on the presumption that "retail-minus" would allow greater cost recovery in particular circumstances) or where "retail-minus" (and/or benchmarking) is a sufficiently adequate proxy for full cost modeling and saves the regulator and industry the extended timeframes and complexity of detailed cost modeling.

> In the case of retail tariffs, the IDA will continue to rely primarily on a "benchmark" approach, which compares the Dominant Licensee's proposed charges to those in other jurisdictions.

Telstra acknowledges the usefulness of benchmarks as a tool for the IDA to ensure that Singapore's telecommunications tariffs remain internationally competitive, in turn making Singapore an attractive place to do business, and thereby fostering investment in Singapore. However, the IDA will be aware of the widespread criticism voiced by numerous international carriers that, in fact, leased line retail tariffs presently offered by Dominant Licensees in Singapore do not benchmark at all well with tariffs in major OECD jurisdictions.

For example, Telstra refers to a news report in the *Business Times* of 9 May 2003, which cited claims by a group of international carriers that the tariff for a benchmark 1984 Kbps / 5 km line (a common product sold to most corporate customers) was twice as expensive as that prevailing in Hong Kong and seven times as expensive as the recommended tariff in the European Union.[3] Telstra is aware that another such report on Local Access Circuit Price Benchmarking is currently being finalised for a group of international carriers, and that report is likely to suggest (as one example of its many findings) that a 1984 kbps / 2 Km access circuit in Singapore costs four times as much as the same service in Australia.

Telstra recognises that benchmarks are only valid if they compare substantially similar products (so-called "apples for apples" comparisons) and extraneous factors causing variances are factored out. Thus, Telstra acknowledges that the methodology in the reports cited above needs to be demonstrated before their veracity is accepted. Telstra believes that it is in the industry's interest as a whole that the IDA should rigorously scrutinise such benchmarking claims. However, it is indisputable that the reports do focus on services that are in high demand, such as 2 Mbps tails. Pointing to the presence of other providers in the market is not helpful in rebutting the benchmarking comparisons because those competitors are often reselling the Dominant Licensee's services and thus having little pricing flexibility. Pointing to other services that benchmark better is also unpersuasive if those other services are in lesser demand and do not form a significant part of the typical purchase bundle.

Telstra suggests, therefore, that if the IDA intends to "primarily" rely on benchmarking in the manner it describes, it should make clear precisely which services it intends to benchmark (including reference specifications for the services), the methodology it intends to use, and the pool of comparison jurisdictions to which it intends to refer. This would provide the industry with a level of certainty around the pricing adjustments that may be achieved through benchmarking claims.

Sub-section 4.5: On the issue of publishing tariffs, Telstra welcomes the IDA's view that greater transparency of pricing information will help market players make more accurate business decisions and better understand the market. Telstra considers that this will also assist market players in accurately benchmarking tariffs in the Singapore market.

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[3] "Global telcos' complaint to IDA puts new FTA to the test", Tang Weng Fai, *Business Times*, 9 May 2003.

However, Telstra submits that the current proposed text leaves unclear whether the IDA intends to require the Dominant Licensee to publish every tariff for every telecommunication service approved by the IDA which that Dominant Licensee supplies, or just to publish tariffs in respect of those services markets in which it is Dominant (which appears inherent in the definition of "Dominant Licensee"). If the former interpretation were adopted, then in Telstra's view the competing concerns noted by the IDA would not be appropriately balanced.

The better interpretation of the proposed sub-section, in Telstra's view, is that it does not mean that a Dominant Licensee is required to publish tariffs for all services that it provides. The Dominant Licensee would only be required to publish tariffs for those services for which there is inadequate competition in the relevant market. For markets in which adequate competition exists, the requirement to publish all tariffs would more likely produce cartel behaviour rather than competitive outcomes. A targeted approach would focus on publication of tariffs in markets that are not yet fully competitive. To make the above approach clear, the IDA could issue a list of telecommunications services markets in which a Licensee is deemed to be dominant.

Finally, Telstra is unclear as to how the publication requirement fits with the concept of individualised interconnection agreements, for which commercially sensitive information (including pricing) may be kept confidential, as the IDA determines, under proposed sub-section 6.5. Telstra asks the IDA to clarify the interaction between these seemingly conflicting provisions of the Code.

Proposed Section Six - Interconnection with Dominant Licensees

Sub-section 6.3.2: Please refer to our comments on Appendix 2 about (i) the need to make Mandated Wholesale Services available to SBOs; and (ii) additional services that Telstra considers should be included as Mandated Wholesale Services.

Sub-section 6.3.5:

> The IDA mentions that the pricing standards that Dominant Licensees must use should be cost-based for IRS and "retail-minus" for Mandated Wholesale Services.

As the term "retail minus" is not defined, Telstra suggests that the IDA provide guidelines or further details on how such pricing standards will be determined and applied.

In any event, Telstra considers that as a starting point pricing methodology should be cost based, unless there is a good reason otherwise. Please refer to our comments above, on proposed sub-section 4.3.

Telstra also suggests that the IDA should monitor each Dominant Licensee's costs on an ongoing basis using its financial reporting and accounting separation data filings to demonstrate that the Dominant Licensee is complying with its duty to provide services on a non-discriminatory basis. Regular publication of a report by the IDA containing

the key accounting separation reporting data points would engender greater confidence in this process.

Sub-section 6.6:

The IDA would have discretion as to whether to intervene in an Interconnection Agreement dispute with a Dominant Licensee.

Telstra strongly believes that the IDA should adopt a general inclination to intervene in disputes where the parties to the dispute have significantly unequal bargaining power, or the commercial impact of the dispute falls disproportionately on one of the parties – circumstances that characterise the negotiation of Interconnection Agreements between Dominant Licensees and most other Licensees. Should the IDA decline to intervene, in keeping with the principle of transparent and reasoned decision making it should publish reasons for each such decision. Typical reasons could include the existence of equal bargaining power between the parties or that the dispute is clearly vexatious.

This issue also highlights the continuing importance of a private right of enforcement, as mentioned in our comments on proposed section 11 of the Code.

Proposed Section Eight - Unfair Methods of Competition

The IDA proposes to delete a number of provisions governing false and misleading claims and improper interference with End User or Supplier relationships, on the basis that these issues are better resolved under the forthcoming Fair Trading Act (or through industry self-regulatory bodies).

Telstra is concerned that this approach will create an enforcement deficit, as it appears that rights and obligations under the current proposed Fair Trading Act are enforceable only by consumers and consumer bodies.

Licensees directly affected by these types of anti-competitive behaviour engaged in by competitors should be entitled to bring enforcement actions and seek appropriate remedies from the competitor. To the extent that such an enforcement right does not exist in the Fair Trading Act, it should be enabled by the Code or (if this is not possible) included in the Act.

Proposed Section Eleven - Administrative Procedures

The IDA proposes to expand the provisions governing Request for Enforcement.

Telstra supports this proposal, but believes it does not go far enough. Telstra is concerned that high thresholds for submitting a request to IDA remain, together with the IDA's wide discretion to reject a request.

This again emphasises the importance of a private right of enforcement to enable an aggrieved Licensee to obtain a remedy against a Licensee that is acting in breach of the Code and is causing damage and loss to the aggrieved licensee.

Sub-section 11.4.3: Telstra suggests that the IDA consider including the power to backdate its decisions to the time of commencement of the dispute or the date contemplated in the relevant contract term; and to give interim decisions where appropriate to preserve parties' rights.

Sub-sections 11.5 and 11.9.2: Telstra is concerned by the requirement that initial submissions are binding, together with the IDA's proposal that parties should not be allowed to raise claims or make arguments for the first time on reconsideration without good cause, if they could have raised the issue before the IDA during its initial proceeding. The danger here, as the IDA will readily recognize, is that it may be denied access to all the information that it needs to help it make a correct decision. This is particularly the case with any complaint against a Dominant Licensee, which will most likely involve asymmetric information resources. The current provision appears to place the onus squarely on the party raising new material to show good cause. Telstra submits that this onus should be relaxed somewhat, by the deletion of sub-section 11.9.2(b).

Sub-sections 11.9.1 to 11.9.4: On the two proposed options to clarify the process by which IDA decisions can be reviewed, Telstra has the following views and comments:

- Telstra prefers the first option: that a party adversely affected by an IDA decision may seek reconsideration from the IDA within 14 days. Should either party not be satisfied with the IDA's reconsideration decision, it can then appeal to the Minister within 7 days. The reason for Telstra's preference is that it is concerned about the danger of forum-shopping where a choice of avenues of appeal is provided – particularly where one of those avenues is to government and the other is to an independent regulatory agency. This would appear to create a dissimilar decision-framework for reconsideration with potentially inconsistent outcomes.

- Telstra also considers that the proposed time frames are reasonable. Most concerns about timeframes can be addressed by the availability of discretion for the IDA to make its decision effective as from the date of initiation of the dispute or the date contemplated in the relevant contract term (i.e. backdating).

- Telstra considers that the party requesting reconsideration from IDA should notify all other parties directly involved in the proceeding. Those parties should have a

period of seven days in which to respond to any matters concerning them, in accordance with administrative law principle of *audi alteram partem*.

Proposed Appendix 1 - Interconnection Pricing Principles

Proposed Appendix 1 clarifies that Dominant Licensees should generally use long run incremental cost to set the price of IRS. Telstra accepts that the IDA reserves the right to require the use of other appropriate pricing methodologies, as it is generally recognised that some cases justify a benchmarking or a retail-minus approach.

However, Telstra submits that the IDA should only exercise this right after seeking input from the industry, by holding a public inquiry and inviting comments. This is in keeping with the IDA's emphasis on transparency and consultation. For example, the recent Consultation Paper on Designation of Singapore Telecommunications Limited's Local Leased Circuits as a Mandatory Wholesale Service sought views and comments on the proposed pricing principle to be adopted.

The proposed Appendix 1 also expressly includes the principle of cost causality, but does not expand upon what this means. It would be helpful for IDA to provide guidelines or further details about how this principle will be applied.

Proposed Appendix 2 - Interconnection Related Services (IRS) and Mandated Wholesale Services

Telstra submits, first, that Dominant Licensees should be obliged to make available Mandated Wholesale Services to SBOs. In Telstra's view, the chilling of competition caused by limiting availability of these services to FBOs under the Code far outweighs any benefit that might be achieved in encouraging facilities-build. The concept of Voluntary Wholesale Services is unlikely, in Telstra's view, to be an adequate compromise solution unless those Voluntary Wholesale Services that are offered at least duplicate the Mandated Wholesale Services – in which case having two separate categories of wholesale services amounts to duplication. Having Mandated Wholesale Services made available equally to FBOs and SBOs would save much unnecessary complexity in regulatory categorization.

Second, Telstra considers that the following services should be included in the list of Mandated Wholesale Services:

(a) Local Carriage Services;

(b) Local Leased Circuits;

(c) Symmetrical and Asymmetrical DSL Layer 2 and Layer 3 services; and

(d) Digital Data Access Services.

Telstra would be glad to provide detailed reasoning on the basis for the proposed Mandated Wholesale Services, if required. Telstra notes that it has confined itself to suggesting the addition to the list of Mandated Wholesale Services of only those

services relevant to its current business in Singapore. Should Telstra expand its business in the future to provide further telecommunication services and/or reach new market segments, it may supplement this list of proposed Mandated Wholesale Services. Telstra notes that new Mandated Wholesale Services appear in the *Government Gazette* and not in the text of the Code, so that such further requests do not necessarily need to await the next triennial review of the Code.

Telstra is not an FBO and hence does not have mandated access to local loops (Appendix 2 sub-section 5.3). This notwithstanding, Telstra submits that local loops should remain in the list of Unbundled Network Elements to which a Dominant Licensee must provide access, as Telstra has an interest in competing FBOs obtaining access to UNE and wholesaling downstream services to SBOs such as Telstra in competition with a Dominant Licensee.

Proposed Sub-section 5.3.3 of Appendix 2:

IDA proposes to retain the Dominant Licensee's obligation to provide "line sharing" as an Unbundled Network Element.

Telstra believes that this requirement remains valuable for non-dominant Licensees and for broadband competition in general. It is likely that new entrants will deploy fibre or wireless local loop services, rather than roll out their own copper networks. Realistically therefore, while there may be facilities-based inter-modal broadband competition (e.g. between DSL over copper *versus* wireless broadband *versus* cable), intra-modal competition (i.e. DSL *versus* DSL competition) is going to be very difficult to develop without access to line sharing.

Telstra notes further that service take-up for line sharing depends on its pricing relative to other up and downstream services for which the copper local loop is used, such as the full local loop, unbundled local loop and DSL. In Telstra's experience, it can take some time to achieve the tariff settings that will stimulate optimum take up across the value-chain. Line sharing is potentially a significant stimulant for broadband development and for competition in Singapore's telecommunications market, and Telstra's view is hence that (at this time, at least) the obligation on the Dominant Licensee should remain.

5 Conclusion

Telstra believes that the Code has been an important starting point to developing competition in Singapore's telecommunications market. Telstra looks forward to continued and appropriate development of the Code, which will consolidate Singapore's position as a regional hub.