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Committee Secretary
Senate Environment, Communications, Information Technology and the Arts References Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia.

Inquiry into the performance of the Australian telecommunications regulatory regime

I am pleased to make the following submission to this timely inquiry. As you can see from my website http://www.rosskelso.com, my professional background includes over 30 years as an engineer and manager in the telecommunications industry, followed by 10 years as an independent researcher and consultant covering a diverse range of aspects from telecommunications strategy, policy and regulation to the social and economic aspects of information and communication technology and services.

At present, I am undertaking doctoral studies at Queensland University of Technology that involve the following research question: *What are the technical, commercial and policy settings required for achieving open access to next generation broadband networks that best serve national and community needs?*

Due to the shortness of time available, I am bringing to your attention only two issues that I consider should be addressed, particularly before Telstra is fully privatized, so as to improve the outcomes for consumers and other end users of Australia's telecommunications networks. Both issues may be addressed through changes to the regulatory regime. They relate to the Inquiry Terms of Reference (b), (e), (h), (i) and possibly (k).

Issue 1: Dominant access providers of core infrastructure, such as Telstra, should not be beneficiaries of any regulatory regime that has the aim of promoting investment.

In December 2002, the Telecommunications Competition Bill was passed which, in part, had the objective of promoting greater certainty for major new telecommunications infrastructure investment. Part XIC of the Trade Practices Act has now been amended to enable the ACCC to grant exemptions from access declarations and approve undertakings for services that are not yet declared or supplied.

At least one instance is known where these new arrangements have been applied, viz. the ACCC has granted Telstra and Foxtel anticipatory exemption from access declaration on the basis that they would convert their analogue pay television network and systems to digital working. Not surprisingly, Telstra and Foxtel had previously threatened not to invest in such upgrading and had successfully delayed access for third parties by many years of litigation.

Although that case is now history (with third party access to the Telstra/Foxtel network unfortunately rather unlikely to ever occur), we must re-examine the fundamental objective behind the Telecommunications Competition Act 2002 (No. 140) and ask the question – should every access provider gain benefit (by way of greater investment certainty) from such amendments to the telecommunications regulatory regime?

On the premises that:

- Effective competition between telecommunications carriage and service providers needs to be facilitated by the government as the highest priority;
- As a dominant access provider of core infrastructure, Telstra has a long track record of lessening competition by inhibiting access for other providers;
- Any threat by Telstra not to invest in new infrastructure that exploits its existing areas of dominance (eg. in the customer access network, involving cables, pipes and pits; and in the rural trunk network) runs directly counter to the interests of its shareholders in the long term and should not be taken seriously;

I submit that the amendments to Part XIC of the Trade Practices Act arising from the Telecommunications Competition Act of 2002 should not apply to any access provider deemed to be dominant, or likely to become dominant, with regard to creation of the facilities or services in question.

In contrast, competitive telecommunications carriage and service providers would remain able to take advantage of any exemptions from access declarations and approvals of undertakings granted by the ACCC for facilities or services not yet declared or supplied. In so doing, the competitive 'playing field' would be made more level for non-dominant players in the Australian telecommunications industry by denying dominant players an unnecessary 'free kick'.

Issue 2: <u>The ACCC should mandate that any access provider deploying fibre-to-the-home infrastructure must not employ technology or systems that inhibit third party access</u>.

Over recent months, there have been a number of newspaper articles quoting Telstra spokespersons as saying that Telstra will not invest in new fibre-to-the-home cable infrastructure unless it is granted an "access holiday" by the ACCC, on the basis that during this period access would not have to be provided to third parties with the result that Telstra could better guarantee the return on its investment.

Given that Telstra could be readily deemed as maintaining its dominance in the customer access network as pertaining to any new fibre-to-the-home infrastructure, at least that installed underground, in the first instance Telstra would not be able to take advantage through exemptions from access declarations nor approved undertakings as discussed above if Issue 1 is addressed.

If, however, Telstra did proceed with such an investment it would be immediately liable to have such facilities 'declared' by the ACCC as being available for access by third parties. Of course, if one believed Telstra spokespersons, such a situation could 'chill' investment – resulting in either no investment ever or investment at a later date. Whichever is the case, such an outcome could allow other providers a window of opportunity for them to invest with a lower chance of being over-built!

However, one critical issue remains to be settled – should an access provider deploying fibre-to-the-home infrastructure be allowed to employ technology or systems that frustrate any access declaration by the ACCC by inhibiting third party access at the outset?

There are many ways to inhibit access, both technically and commercially. With the exception of the matter of pay television content where Telstra, though its equity in Foxtel, could continue to maintain its industry dominance, it is likely that the ACCC is already equipped with the necessary powers to deal with inventive ways of inhibiting access on commercial grounds. Technical obstruction is another matter as it involves scope for hiding behind obfuscation due to the potential complexity involved and/or adoption of network designs, devices or systems that provide technical obstruction to third party access making it either unnecessarily difficult or expensive.

I submit that the Trade Practices Act should be amended to require telecommunications access providers, whether considered dominant or not, to satisfy the ACCC *a priori* that network designs, devices or systems comprising new core infrastructure are truly capable of facilitating access by competitive service providers. Whilst such an arrangement could be criticized on the grounds that it would be technologically deterministic, such claims should be dismissed on the grounds that:

- Obstruction to third party access is not in the national interest;
- Technical standards and alternative designs are well known within industry suppliers for possibly five years or more in advance of implementation.

The ACCC would more than likely require additional resources in order to undertake or supervise the necessary technical audits.

Regulatory changes that address these two issues will contribute to a climate more favourable to the creation of competitive infrastructure and/or competitive services.

Yours sincerely

(Ross Kelso)