



## COMMERCE COMMISSION

### **Decision Whether to Investigate the TelstraClear Application for Determination for Designated Access Services**

Decision whether to investigate under section 25 of the Telecommunications Act 2001 (“the Act”) in the matter of an application for determination for designated access services under section 20 of the Act by:

**TELSTRACLEAR LIMITED**

**and**

**CLEAR COMMUNICATIONS LIMITED**

**Telecommunications Commissioner:** D Webb  
**Additional Commissioners:** P Rebstock  
D Curtin

**Summary of Application:** TelstraClear Limited on behalf of itself and Clear Communications Limited applied for a determination under section 20 in regard to interconnection with Telecom’s fixed PSTN, interconnection with TelstraClear’s fixed PSTN, and three designated resale services.

**Decision:** Under section 25, the Commission has decided to investigate the TelstraClear application for determination, so far as it concerns interconnection with Telecom’s fixed PSTN and TelstraClear’s fixed PSTN.

**Date of Decision:** 19 June 2002

**CONFIDENTIAL MATERIAL IN THIS REPORT IS CONTAINED IN SQUARE BRACKETS**

## TABLE OF CONTENTS

INTRODUCTION .....	1
THE APPLICATIONS .....	1
THE FRAMEWORK FOR THE DECISION.....	4
ASSESSMENT OF APPLICATION UNDER SECTION 22 .....	4
SECTION 22 (a) .....	5
SECTION 22(b).....	8
SECTION 22 (c) .....	8
The Commission guidelines.....	8
Case Law.....	9
Other Regulatory Jurisdictions .....	9
Australia.....	10
United Kingdom.....	10
United States .....	10
TelstraClear as Access Seeker to Telecom’s fixed PSTN .....	11
Reciprocity of negotiations on interconnection with fixed PSTN .....	12
SECTION 22 (d).....	13
COMMISSION DECISION UNDER SECTION 25.....	14

## INTRODUCTION

1. The Telecommunications Act 2001 (“the Act”) was enacted in December 2001 to regulate the supply of telecommunications services in New Zealand.
2. Part 2 of the Act and Schedule 1 are concerned with designated services and specified services.<sup>1</sup> The purpose of that Part and Schedule 1, is:
  - (1) to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.
  - (2) In determining whether or not, or the extent to which, any act or omission will result, or will be likely to result, in competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand, the efficiencies that will result, or will be likely to result, from that act or omission must be considered.<sup>2</sup>
3. The Commission has a range of responsibilities under the Act, including making determinations in respect of designated access services. Subject to sections 22 and 23, applicants may make an application to the Commission under section 20 for a determination of all or some of the terms on which a designated access service must be supplied during the period of time specified in the application.

## THE APPLICATIONS

4. On 16 May 2002, TelstraClear Limited on behalf of itself and Clear Communications Limited (together “TelstraClear”) filed with the Commerce Commission an application for determination of designated access services under section 20 (the “Application”). Telecom Corporation of New Zealand Limited and Telecom New Zealand Limited (together “Telecom”) also filed applications for determination of designated access services on 17 May as the access provider of the Telecom fixed PSTN network, and on 21 May as the access seeker to a fixed PSTN network other than Telecom’s.<sup>3</sup> On 19 June, the Commission issued a Decision, under section 25, not to investigate the Telecom applications for determination dated 17 May and 21 May, respectively.
5. Under section 10 (1) (c) (ii) the Telecommunications Commissioner has requested that two other members of the Commission assist him in carrying out the Commission’s functions under the Act in respect of the Application. Paula Rebstock and Donal Curtin have been appointed by the Chairman of the Commission for that purpose.

---

<sup>1</sup> All terms and phrases that are defined within the Act have the same meaning in this Decision.

<sup>2</sup> Telecommunications Act 2001 s 18

<sup>3</sup> For the purposes of this Decision, all references to a fixed PSTN other than Telecom’s refer to the fixed PSTN owned and operated by TelstraClear.

6. TelstraClear sought a determination by the Commission in regard to:
- (a) interconnection between TelstraClear's fixed PSTN and Telecom's fixed PSTN and provision:
    - (i) by Telecom to TelstraClear of origination and termination (and their associated functions) of voice and data calls (including dial-up internet calls) on Telecom New Zealand's fixed PSTN; and
    - (ii) by TelstraClear to Telecom of origination and termination (and their associated functions) of voice and data calls (including dial-up internet calls) on TelstraClear's PSTN [sic];
  - (b) supply by Telecom to TelstraClear of:
    - (i) non-price capped retail services offered by means of Telecom's fixed telecommunications network;
    - (ii) bundles of retail services offered by means of Telecom's fixed telecommunications network; and
    - (iii) retail services offered by means of Telecom's fixed telecommunications network as part of a bundle of retail services.<sup>4</sup>
7. The Commission determined on 16 May that the Application complied with the requirements of section 23 of the Act, and notified Telecom and TelstraClear of receipt.
8. On 17 May, the Commission requested written comments from TelstraClear and Telecom on the TelstraClear application, addressing the application criteria specified at section 22 of the Act and any other matters either party considered relevant to the Commission's decision to investigate the application.<sup>5</sup>
9. On 21 May, the Commission made an order to prohibit disclosure of specific information, documents and evidence in relation to the Application and all annexures, schedules and attachments to the application.
10. On 31 May, the Commission received Telecom's comments on the Application.
11. On 6 June, TelstraClear applied to amend the Application to reflect that the word "fixed" was omitted by oversight from the expression "TelstraClear's PSTN". The Commission accepts that the word "fixed" was omitted

---

<sup>4</sup> TelstraClear, Section 20: Application for Determination for Designated Access Services and Specified Services, pp. 2-3.

<sup>5</sup> On 21 May, the Commission notified TelstraClear and Telecom of specific aspects of the Application on which it sought comment.

erroneously, and that there is no prejudice to Telecom as a result of that omission, and has amended the Application accordingly.

12. On 11 June, the Commission made an Order under section 9 (6) of the Act that the services named in the Application can be separated into two distinct types of designated services, i.e., interconnection services and resale services, and that the Commission would consider each type of service separately for the purposes of deciding whether to investigate under section 25 of the Act.<sup>6</sup> TelstraClear and Telecom were notified of the Order.
13. This Decision is accordingly made in respect of those services for which a determination is sought in paragraph 2 (a) of the Application, namely:
  - (i) interconnection with Telecom's fixed PSTN; and
  - (ii) interconnection with fixed PSTN other than Telecom's.
14. The services in paragraph 2 (b) of the Application (i.e. retail services) will be the subject of a separate decision under section 25. Telecom has challenged the validity of the Application on several grounds as it relates to retail services. The Commission will address those issues in its decision on retail services.
15. On 11 June, the Commission sought further comment from TelstraClear on issues raised by Telecom's comments of 31 May. TelstraClear's further comments were received by the Commission on 14 June.
16. One of the issues raised by Telecom in those comments was that the Application related to more than one service. Telecom accordingly argued that a separate application fee was payable in respect of each service and that, as TelstraClear had paid only a single application fee, the Application was defective.
17. The Commission does not agree with Telecom's argument, for three reasons. First, the fee prescribed by the Commission<sup>7</sup> is a fee for each application. As a matter of convenience, a single application may relate to more than one service. Second, the Commission construes the word "service" in section 20 as including both the singular and the plural.<sup>8</sup> Third, the Commission retains a general power under section 55 of the Act to recover its costs in respect of a determination or an application for a determination. Should the Commission in any instance incur additional costs in processing a multi-service application, the Commission may require one or more of the parties to pay those additional costs.

---

<sup>6</sup> ORDER OF THE COMMISSION under section 9(6) of the Telecommunications Act dated 11 June 2002, IN THE MATTER of the Telecommunications Act 2001 AND IN THE MATTER of the Application for Determination for Designated Access Services of TelstraClear Limited under section 20 of the Telecommunications Act 2001 dated 16 May 2002.

<sup>7</sup> Refer to the Guide to the role of the Commerce Commission in making access determinations under the Telecommunications Act, para. 102.

<sup>8</sup> Acts Interpretation Act 1999 s 33. "Words in the singular include the plural and words in the plural include the singular."

## **THE FRAMEWORK FOR THE DECISION**

18. Under section 20, an access seeker or access provider may apply to the Commission for a determination of all or some terms of supply in respect of a designated access service.
19. The Commission cannot investigate an application under section 25 unless the applicant complies with the criteria under section 22. The Commission may also consider any other relevant matters in making such a decision to investigate, although none arise in the present application.
20. Section 22 states that no person may apply for a determination if –
  - (a) the persons who would otherwise be parties to the determination have an agreement for the supply of the service for part or all of the specified period of time; or
  - (b) those persons have agreed not to have any term for the supply of the service determined by the Commission; or
  - (c) that person has not made reasonable attempts to negotiate the terms of supply of the service with the person who would otherwise be a party to the determination; or
  - (d) the applicable conditions in relation to the service (if any) have not been met.

## **ASSESSMENT OF APPLICATION UNDER SECTION 22**

21. The Commission has reviewed the Application, in so far as it relates to interconnection services, against the criteria specified in section 22. The Commission has examined the documents, materials and other evidence provided in support of the Application, and the comments made by Telecom on the Application.
22. The Commission has noted that:
  - (i) Clear Communications and Telecom were parties to interconnection agreements providing for interconnection with Telecom's fixed PSTN and the Clear fixed PSTN during the period of 1 October 2000 to 30 September 2001. TelstraSaturn Limited and Telecom were parties to interconnection agreements providing for interconnection with Telecom's fixed PSTN and TelstraSaturn's fixed PSTN during the period 1 August 2000 to 31 January 2002.
  - (ii) Discussions between Telecom and Clear as to the terms of a new interconnection agreement commenced not later than September 2001. During the negotiations, Telecom provided to Clear Communications

(and subsequently TelstraClear) contract templates, with proposed amendments and alterations for a new interconnection agreement.<sup>9</sup> The mark-up of these templates by Telecom is comprehensive on both price and virtually all non-price terms<sup>10</sup>. Clear Communications, while not directly rejecting each price and non-price component individually, broadly rejected the proposed terms and conditions.<sup>11</sup> On 27 September, 2001, Clear sent to Telecom its own marked-up version of the interconnection document package. That mark-up included specific price proposals and specific proposals as to non-price terms. This exchange of draft contracts indicates that the respective opening positions of the parties on the contractual terms were known from at least September last year.

- (iii) Following the creation of TelstraClear, negotiating teams met on a number of occasions between early February and early May 2002. The records of those meetings suggest that much of the discussion concerned the negotiation process itself rather than substance, particularly the possibility of an interim agreement. The inability to agree on interim arrangements appears to have delayed the ongoing negotiation of a forward-looking interconnection agreement.
- (iv) Senior management of both TelstraClear and Telecom were closely involved in the discussions and on occasions met in an effort to resolve key topics. This included the involvement of both companies' Chief Executive Officers, as well as participation by senior management at TelstraClear's parent company, Telstra Corporation. Both CEOs provided management focus on high level issues in an attempt to ensure that interconnection agreement issues could be addressed and successfully negotiated without the interference of other peripheral issues.
- (v) [
 

]
- (vi) TelstraClear provided Telecom with a rationale for their pricing positions, by reference variously to their own international benchmarking study, a TSLRIC methodology and the Commission's draft benchmarking paper.<sup>12</sup>

## SECTION 22 (a)

---

<sup>9</sup> [ ]

<sup>10</sup> [ ]

<sup>11</sup> [ ]

<sup>12</sup> Commerce Commission "International Benchmarking Discussion Paper" 5 April 2002.

23. Section 22 (a) of the Act states that, despite section 20, no person may apply for a determination if –
- (a) the persons who would otherwise be parties to the determination have an agreement for the supply of the service for part or all of the specified period of time.
24. Within its application of 16 May, TelstraClear stated that “[t]here is no current agreement between the parties to the determination for the supply of the Requested Services.”<sup>13</sup>
25. Within its applications of 17 May and 21 May, Telecom replied “no” in answer to the question, “[i]s there any current agreement between the parties to the determination for the supply of the service”. Telecom stated however that it retained its right to argue in a different forum for other purposes that a contract for supply may have existed. The Commission has given no weight to this reservation, which it considers is not relevant to its decision in relation to section 22 (a).
26. The Commission notes that interim arrangements have existed for the supply of interconnection services<sup>14</sup>, but that in the view of the parties<sup>15</sup> those arrangements do not constitute an agreement for the purposes of section 22 (a). The Commission is not aware of any evidence to the contrary, subject to the paragraphs below concerning the 5 June settlement agreement.
27. The Act does not define the term “agreement” for the purposes of section 22 (a). In giving meaning to the term, the Commission will look to the purpose and intent of section 22 (a) for guidance as to the proper interpretation. Within this context, it would be reasonable for parties who have an established commercial relationship to agree to arrangements for the continued supply of service pending the outcome of a determination by the Commission that fall short of “an agreement” for the purposes of section 22 (a). Otherwise, parties would be placed in the untenable situation of having to cease commercial dealings of the type covered by the relevant service before they could file an application for determination in respect of such a service.
28. The Commission finds that such interim arrangements for continued supply of a service do not constitute agreements for purposes of section 22 (a). Therefore, some agreements or arrangements, whether formal or informal, do not constitute agreements under section 22 (a) if made for the purpose of continuing operations in the interim period prior to a determination.

---

<sup>13</sup> TelstraClear, Application for Determination for Designated Access Services and Specified Services, 16 May 2002.

<sup>14</sup> Telecom and TelstraClear have continued uninterrupted supply of interconnection services to one another notwithstanding the expiry of the previous agreements.

<sup>15</sup> As expressed in both the comments provided by TelstraClear and Telecom to the Commission, and pre-application communications to one another, [

29. On 5 June 2002, a settlement arrangement consisting of an agreement and undertakings of the parties was entered into in respect of proceedings in CP No. 177/02 in the High Court, Auckland by Clear Communications Limited, TelstraClear Limited and Telecom New Zealand Limited. Copies of the settlement documents were supplied to the Commission by Telecom and TelstraClear in response to an Order issued by the Commission.
30. The settlement addresses both interconnection and wholesale services. The terms of the settlement arrangement are the subject of a confidentiality undertaking, and this Decision therefore will refer only to the agreement and undertakings in general terms and to the extent necessary to explain the Commission's conclusions as to its relevance to the TelstraClear interconnection services application.
31. The settlement agreement records an agreement for Telecom to supply interconnection services to TelstraClear, and for TelstraClear to similarly supply services to Telecom. The terms are fixed by reference to certain prior agreements, and both parties agree to make payments in accordance with those prior agreements, pending any determination made by the Commission in respect of interconnection services. Retrospective price adjustments will be made as necessary to comply with any such determination.
32. The Commission has considered whether the settlement agreement itself is an agreement for the supply of interconnection services for part or all of the periods specified in the TelstraClear application. Section 22 (a) precludes the making of an application where there is an existing agreement for the supply of the service for part or all of the period of time specified in the application. The Commission considers that an agreement entered into subsequent to the making of the application would still be a relevant factor to be considered by the Commission in its decision whether or not to investigate the application. To the extent that the parties had reached agreement on the matters covered by the application, there would be no purpose in the Commission making a determination on the same matters.
33. The settlement arrangement appears to set terms for continuing supply of the service and for retrospective adjustment to payment terms once a determination has been made by the Commission. Such an arrangement is similar to the interim arrangements discussed above, which the Commission finds do not constitute a barrier to bringing an application. In this case, there does not appear to be an agreement of the nature envisaged by section 22 (a) that would preclude TelstraClear from making its application for determination, and the plain language of the arrangement appears intended not to detract from the Commission's decision-making process in relation to the Application.
34. In summary, the Commission has concluded that the 5 June settlement agreement and undertakings between the parties do not operate as a bar to the investigation by the Commission of the Application.

**SECTION 22(b)**

35. Section 22 (b) of the Act states that despite section 20, no person may apply for a determination if –
- (b) [the persons who would otherwise be parties to the determination] have agreed not to have any term for the supply of the service determined by the Commission.
36. Both TelstraClear and Telecom assert in their applications that there has been no such agreement. The Commission has studied the documents, materials and other evidence supplied by TelstraClear in support of its Application, and can find no evidence to suggest that the parties had agreed not to have any term for the supply of any of the designated services determined by the Commission.
37. Accordingly, the Commission is satisfied that the Application complies with the requirements of section 22 (b).

**SECTION 22 (c)**

38. Section 22 (c) of the Act states that despite section 20, no person may apply for a determination if –
- (c) that person has not made reasonable attempts to negotiate the terms of supply of the service with the person who would otherwise be a party to the determination.
39. The Commission notes that Telecom stated in its Comments of 31 May that:
- “In Telecom’s view, TelstraClear has made reasonable attempts to negotiate the service described in paragraph 2 (a) (i) of TelstraClear’s application (‘provision by Telecom to TelstraClear of origination and termination (and their associated functions) of voice and data calls (including dial-up internet calls) on Telecom New Zealand’s fixed PSTN’). The service was identified by the parties, and price and non-price terms were negotiated at meetings (as detailed in Telecom’s application for determination dated 17 May 2002).”<sup>16</sup>

**The Commission guidelines**

40. On 28 May 2002, the Commission issued a Guide<sup>17</sup> as to its role in making access determinations under the Act. Paragraphs 96-97 of the Guide set out factors the Commission would rely upon in making its decision on whether the applicant for a determination has made a reasonable attempt to negotiate the matter with the other party. For example, the Commission would look for evidence as to whether or not a reasonable commercial proposal was put to the other party and whether or not the other party was given sufficient time and opportunity to respond to the proposal.

<sup>16</sup> Telecom, Comments on TelstraClear Limited’s Application for Determination dated 16 May 2002, p. 19.

<sup>17</sup> Commerce Commission “A Guide to the role of the Commerce Commission in making Access Determinations under the Telecommunications Act” 28 May 2002.

41. In addition to the Guide, the Commission has also reviewed relevant case law and treatment of the issue in other jurisdictions. Upon further consideration and reflection upon the policy underlying the section 22 (c) requirement, the Commission has advanced its thinking beyond the matters suggested in the Guide. The Commission's analytical framework for determining whether there have been reasonable attempts under section 22 (c) is set forth below. As is explained below, the test is fact specific and objective. To the extent factors listed in the Guide could be read to lead to substantive analysis of the issues, they have been superseded by the approach described below. Further, various factors are meant to be indicative only and the weight to be given to particular factors is dependent on the specifics of a particular case.
42. Section 22 (c) requires an applicant for a determination to have demonstrated reasonable attempts in their negotiations. The Commission is therefore concerned only with the reasonableness of the attempts made by TelstraClear. In the context of the Application, Telecom's efforts to negotiate are relevant only to the extent that they shed light on the negotiation attempts made by TelstraClear.

### Case Law

43. The Commission is not aware of any New Zealand case law directly on the legal meaning of *reasonable attempts*. TelstraClear has referred to the Australian case of *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd (1996)*.<sup>18</sup>
44. That case concerned a provision of the New South Wales Conveyancing Act, requiring an applicant for an easement to make all reasonable attempts to obtain an easement itself before requesting the Court to do so. The decision is however of limited help as an aid to interpretation, given its specific context. The negotiation of an easement between adjacent property owners is likely to be less complex, and have different dynamics to a negotiation between an access seeker and access provider in the telecommunications industry.
45. There has been some judicial consideration of *reasonable steps*, *reasonable efforts*, and the term *reasonable*. Those authorities suggest the following general principles:
- (i) These expressions have no particular meaning as a matter of law; they are essentially factual issues;
  - (ii) The tests are objective. A party's own perception of reasonableness cannot govern the situation;
  - (iii) No particular minimum extent of conduct can be set in abstract.

### Other Regulatory Jurisdictions

---

<sup>18</sup> *Coles Myer NSW Ltd and Anor v Dymocks Book Arcade Ltd*, (1996) 7 BPR 97-585.

46. The Commission has considered whether the approaches taken by other telecommunications regulatory agencies in Australia, the United Kingdom and the United States, to threshold standards for prior negotiations in the exercise of their dispute resolution functions would assist in the interpretation of section 22 (c).

*Australia*

47. In May 2002, the Australian Competition and Consumer Commission (“the ACCC”) issued a draft paper on the resolution of telecommunications access disputes.<sup>19</sup>
48. A precondition for an application for determination under Part XIC of the Trade Practices Act of 1974 is that the access seeker is “unable to agree” with the access provider. The ACCC’s view is that the ‘unable to agree’ threshold should not be interpreted as a particularly high threshold.<sup>20</sup> The ACCC described a “rule of thumb” which it proposes to use in considering whether the access seeker is unable to agree with the access provider:
- either the access seeker or the access provider must have made a request of the other party, or put a proposal to the other party; and
  - that other party must have refused the request or rejected the proposal. The refusal may be an explicit refusal or a constructive refusal (e.g. where the other part has not responded to the request or proposal within a reasonable time).<sup>21</sup>

*United Kingdom*

49. An applicant requesting the intervention of OFTEL in the resolution of interconnection disputes must provide OFTEL with reasons as to why a commercial settlement cannot be reached. OFTEL confirms with both parties to the dispute that there is a genuine dispute which the parties have first sought to resolve commercially and establishes the precise matters on which agreement cannot be reached. OFTEL has not issued criteria against which to assess the validity of the dispute or the extent of negotiations.<sup>22</sup>

*United States*

50. Section 251 (c) (1) of the Telecommunications Act of 1996<sup>23</sup> imposes on incumbent carriers (access providers) the “duty to negotiate in good faith” and further provides that requesting carriers (access seekers) also have the duty to negotiate in good faith the terms and conditions of agreements under the Act.
51. In implementing this provision, the Federal Communications Commission (FCC) noted that the Uniform Commercial Code defined “good faith” as “honesty in fact in the conduct of the transaction concerned.” The question of good faith is therefore “a narrow one focused on the subjective intent with

<sup>19</sup> Australian Competition and Consumer Commission “Resolution of telecommunications access disputes – a draft guide” May 2002.

<sup>20</sup> *ibid.* p.6.

<sup>21</sup> *ibid.* p.6.

<sup>22</sup> OFTEL, Requesting the Director General of Telecommunications to resolve an interconnection dispute: guidance for the telecommunications industry.

<sup>23</sup> Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§ 151 *et seq.*

which the person in question has acted”. The FCC accordingly set forth some minimum standards for determining whether a party has acted in good faith, but left specific determinations of whether a party has acted in good faith to be decided on a case-by-case basis.<sup>24</sup>

52. Each of the jurisdictions above has addressed in some way the issue of negotiations between access seekers and access providers. However, given the differing legislative language used and legislative purpose in each case, the Commission does not find them helpful in the interpretation of section 22 (c). The Commission is conscious of the policy in the Act to encourage commercial resolution of disputes and adopts that approach when considering what constitutes “reasonable attempts” to negotiate the supply of a service.

### **TelstraClear as Access Seeker to Telecom’s fixed PSTN**

53. The Commission, in reviewing the negotiation record, has given weight to the following factors:
- (i) The parties had previously entered into interconnection agreements at earlier periods of time. These prior dealings represent a substantial basis of common understanding as to appropriate interconnection terms going forward.
  - (ii) The parties exchanged marked-up contracts, which included specific proposals as to price and non-price terms, demonstrating an awareness of each other's opening negotiating positions from at least September last year.
  - (iii) Negotiating teams from Telecom and TelstraClear met on a number of occasions, between early February and early March.
  - (iv) Several efforts were made to clear away high level issues before substantive negotiations could occur.
  - (v) Senior management, including both CEOs, were involved in the negotiations.
  - (vi) [ ]
  - (vii) Though some important elements of the package received little attention in the discussions, it appears that there was a focus of discussion on the most significant issues, and a reluctance on both sides to deal separately with elements of the package.
  - (viii) TelstraClear provided Telecom with a rationale for its pricing positions.
54. The Commission considers that it is not feasible to separate the price and non-price terms and conditions of a service in determining *reasonable attempts* under section 22 (c).

---

<sup>24</sup> See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499 (1996), aff’d in part and vacated in part sub nom. *Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8<sup>th</sup> Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), aff’d in part and remanded, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). See also 47 C.F.R. § 51.301.

55. Negotiation of non-price terms appears to have had less focus relative to interconnection price. However, the exchange of marked-up interconnection agreements, and subsequent refusals and counterproposals, included comprehensive non-price terms. Further, certain non-price terms and conditions were specifically discussed between the parties in the course of their interconnection negotiations, including billing issues and Specific Point of Local Interconnection ('SPOLI') links.
56. The Commission considers that industry practice and the dynamics of a negotiation between a new entrant and an incumbent are also legitimate factors to be taken into account in assessing the threshold as to what constitutes reasonable attempts.
57. To the extent initiatives by the applicant prior to the merger of TelstraSaturn and Clear have a reasonable bearing on their post-merger initiatives, then those earlier steps can be validly considered in determining whether reasonable attempts have been made.
58. Accordingly the Commission is satisfied that reasonable attempts were made by TelstraClear to negotiate the terms of supply by Telecom of interconnection with Telecom's fixed PSTN.

#### **Reciprocity of negotiations on interconnection with fixed PSTN**

59. The Application relates to interconnection terms for the Telecom and TelstraClear networks. The Commission is required to decide whether reasonable attempts were made by TelstraClear to negotiate both services.
60. The Commission has determined that due to the reciprocal nature of the terms of supply sought by both parties, as reflected in the proposed language of the parties in relation to each other's fixed PSTNs,<sup>25</sup> reasonable attempts by TelstraClear to negotiate interconnection with Telecom's fixed PSTN will also demonstrate reasonable attempts to negotiate interconnection with the TelstraClear fixed PSTN.
61. The focus in negotiations was understandably on the terms for interconnection with Telecom's fixed PSTN. However, the negotiations of the interconnection terms for Telecom's fixed PSTN were also regarded by the parties as designed to settle the reciprocal terms for interconnection with the TelstraClear fixed PSTN. Though there were likely to be some points of difference between the two interconnection arrangements, those differences reflected differing commercial objectives (such as Telecom's [ ]), and were peripheral to the core interconnection terms for which reciprocity was appropriate.

---

<sup>25</sup> [

62. The Commission has concluded that the TelstraClear Application for a determination as to the terms of interconnection with TelstraClear's fixed PSTN is in compliance with section 22 (c).

**SECTION 22 (d)**

63. Under section 22 (d) of the Act, no person may apply for a determination if –
- (d) the applicable conditions in relation to the service (if any) have not been met.
64. There are no applicable conditions defined in the Schedules to the Act relating to the designated service of interconnection with Telecom's fixed PSTN. Section 22 (d) is therefore met in relation to this interconnection service.
65. In regard to TelstraClear's application for a determination of the terms for interconnection with TelstraClear's fixed PSTN, there is a condition under the Act requiring that either: (1) an application for a determination by TelstraClear for interconnection with Telecom's fixed PSTN must be pending; or (2) there must be a determination that has not expired in respect of interconnection by TelstraClear with Telecom's fixed PSTN.
66. The Commission finds this condition is met since TelstraClear filed simultaneously for a determination on interconnection to Telecom's fixed PSTN, and interconnection to TelstraClear's fixed PSTN. Therefore, that request for access to Telecom's fixed PSTN was "pending". The requirements of section 22 (d) are consequently satisfied in relation to this service as well.

**COMMISSION DECISION UNDER SECTION 25**

67. Following due consideration of the information provided in the Application, and applying the relevant provisions of the Act, the Commission's Guidelines and comments from both the access seeker and the access provider, the Commission has concluded that it is appropriate that the Commission investigate the TelstraClear application for determination, so far as it concerns interconnection with Telecom's fixed PSTN and TelstraClear's fixed PSTN ("the interconnection application").<sup>26</sup>
68. The Commission, under section 25 (1) (d), will require the parties to make written submissions on the interconnection application not later than 10 working days after the receipt by the parties of this Decision.

---

<sup>26</sup> Resale services will be addressed in a separate order.

---