



PO Box 382, North Adelaide SA 5006
ABN: 35 050 159 188
Web: www.efa.org.au
Email: email@efa.org.au
Tel: +61 2 9011 1088
Fax: +61 2 8002 4009

Committee Secretary
Senate Select Committee on the National Broadband Network
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

15 September 2008

Dear Sir or Madam,

Electronic Frontiers Australia is pleased to make following submission to the Committee's inquiry.

Sincerely,

Dale Clapperton
Chair

Submission of Electronic Frontiers Australia to the Senate Select Committee on the National Broadband Network

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I ABOUT EFA

Electronic Frontiers Australia Inc. (EFA) is a non-profit national organisation representing Internet users concerned with on-line freedoms and rights. EFA was established in January 1994 and incorporated under the *Associations Incorporation Act* (SA) in May 1994.

EFA is independent of government and commerce and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting online civil liberties.

Our major objectives are to protect and promote the civil liberties of users and operators of computer based communications systems such as the Internet, to advocate the amendment of laws and regulations in Australia and elsewhere (both current and proposed) which restrict free speech and to educate the community at large about the social, political, and civil liberties issues involved in the use of computer based communications systems.

II INTRODUCTION

In the modern digital environment, access to the Internet has almost become an essential facility of modern life. Australians are increasingly both working and living 'online', relying on the Internet to satisfy needs as diverse as social interaction, employment, purchasing goods and services, and entertainment and recreation.

Increasing the speed and availability of Internet connectivity to Australians is a worthy goal for government, but not one worth pursuing at any cost or by any means. In particular, government intervention to mandate a particular technical solution may not be the best way of achieving this goal.

In the current regulatory environment, Telstra owns the copper-pair 'land line' infrastructure, and the exchanges to which these lines run, but is compelled by the telecommunications access regime of the *Trade Practices Act 1974* (Cth) and decisions of the ACCC to allow competitors physical access to Telstra's exchanges to install their own equipment, and the use of the copper infrastructure either on a shared (i.e. Line Sharing Service or LSS) or exclusive (i.e. ULL or Unconditioned

Local Loop) basis. This level of regulation is necessary because the copper infrastructure is in the nature of an 'essential facility' which it would be uneconomical for a competitor to duplicate.

This system, notwithstanding alleged gamesmanship by Telstra to thwart competitor's attempts at access to exchanges, has provided genuine competition in the market for DSL services, at least in areas where it is economical for Telstra's competitors to engage in infrastructure-based competition. This level of competition provides substantial consumer benefits.

III THE PROPOSED FTTN MODEL

The Fibre To The Node (FTTN) model proposed for the National Broadband Network (NBN) requires the destruction of the existing copper network as we know it. Instead of the copper lines running to a relatively limited number of Telstra exchanges, the copper lines will be rerouted to a multitude of FTTN 'nodes' in the form of street-side cabinets.

Because FTTN requires such alteration to the existing copper network, which is the property of Telstra, it seems virtually certain that if the government purports to allow anyone *other* than Telstra to construct a FTTN network, Telstra will block those plans in the courts and would fight to the death to do so. This is not to imply that such legal action would be meritless or have the purpose only of stalling the FTTN plans of Telstra's competitors – Telstra would seem at first blush to have an excellent case to resist the constructive confiscation of what is, in effect, Telstra's crown jewels: ownership of the copper land-line infrastructure. A level of compensation to Telstra which would compensate them on 'just terms' for the damage to their business caused by the loss of this asset would likely render the entire NBN project uneconomical.

For this reason, as a matter of commercial and legal practicality, nobody other than Telstra would be able to build the FTTN network. The discussion which follows assumes that this is the case.

The FTTN nodes to which the copper lines will run will be so great in number, and disbursed over such a wide area, that it will likely be uneconomical for any competitor to duplicate, thus precluding infrastructure-based competition in the market for land-line telecommunications services.¹

Permitting Telstra to deploy the FTTN network will also have a number of other adverse effects:

- It will damage Telstra's competitors by stranding the hundreds of millions of dollars of investment that they have made in infrastructure-based competition in the current regulatory environment and based on assumptions as to the ongoing availability of ULL and LSS;
- It will relegate Telstra's competitors, at least in the market for land-line telecommunications services, to being resellers of Telstra products, with a consequent loss of standing, prestige, and control over the reliability and features of the services which they provide;

¹ Excluding services delivered by other unaffected land-line networks such as HFC.

- It will effect a de-factor expropriation of customers from Telstra's competitors, or at least those of Telstra's competitors who currently engage in infrastructure-based competition with Telstra;
- It will preclude the deployment of future copper-network technologies which might allow NBN-specification speeds over copper lines without dismantling the existing copper network;
- It will dramatically increase the cost of Internet access to end-users, at a time where Australian families are under increasing financial strain due to increases in the cost of living (such as petrol, interest rates, etc).

Telstra have proposed, for example, to sell FTTN services on a *wholesale* basis (i.e. to other carriers, for resale) at a cost which is *higher* than which Telstra's competitors currently sell ADSL2 services with *higher* speed at a *retail* level. Even though FTTN services which are faster than most ADSL2 services will – theoretically – be available, there is a limit to the value which most Australian households ascribe to high-speed Internet connectivity. The notional availability of 24Mbps FTTN services will be of no benefit to the community if they are unaffordable.

Telstra are openly and notoriously anti-competition, and there is no reason to suspect that this attitude will change if they are permitted to build the FTTN network. This is perhaps most evident in their behaviour concerning the availability of ADSL2 services to Telstra customers. Despite having the equipment in place and the technical capacity to supply ADSL2 services from roughly 900 exchanges to 2.4 million Australian households, Telstra refused to supply high-speed ADSL2 services to those households unless and until the Commonwealth government gave Telstra specific assurances that they would not be compelled to offer ADSL2 services to their competitors on a wholesale basis.

Yet notwithstanding this public game of brinkmanship – if not blackmail – with the Commonwealth, they were unwilling to tolerate any inroads in their market share by competitors. If a competitor offered ADSL2 services from a particular exchange, Telstra would also offer ADSL2 services from that exchange.

Another example of Telstra's attitude to competition can be found in their High Court challenge to the validity of the portions of the *Trade Practices Act 1974* which compel them to supply certain 'declared' services (such as ULL and LSS) to their competitors.² A portion of the judgment of the High Court in that case is instructive:

[Telstra's argument] is synthetic and unreal because it proceeds from an unstated premise that Telstra has larger and more ample rights in respect of the [the existing copper network] than it has. But Telstra's "bundle of rights" in respect of the assets of the PSTN has never been of the nature and amplitude which its present argument assumes. Telstra's bundle of rights in respect of [the copper network] has always been subject to the rights of its competitors to require access to and use of the assets.³

Telstra failed in their attempt to avoid the operation of the legislative regime which facilitates infrastructure-based competition in telecommunications markets in Australia. However, a FTTN network would be one in which Telstra's 'bundle of rights' is greater than the existing copper network, and where not only would Telstra

² *Telstra Corporation Ltd v The Commonwealth* [2008] HCA 7.

³ *Ibid* at [52].

no longer be compelled to give access to the copper network to their competitors, such access would be economically unviable.

IV CONCLUSION

The status quo offers Internet connectivity at reasonable speeds, at reasonable costs, to a reasonable proportion of the country. A FTTN network, no matter who constructs it, may offer faster speeds to some, but they may not be able to afford it. Substantial increases in retail pricing, caused both by the FTTN pricing model itself and by the stagnation of competitive forces on pricing caused by the elimination of infrastructure-based competition, may mean that many consumers are worse off under FTTN – they will either be paying more for a service of equivalent speed, or be compelled to use a service slower than they currently enjoy because they are unable to afford the cost of a FTTN service of equivalent speed.

The benefits of a FTTN network do not, in our view, outweigh the costs, and a FTTN network should not proceed for that reason.

If an FTTN network is deployed, it is *critical* that its operator be structurally separated from the telecommunications carriers selling the services delivered by it. For any viable competition in fixed-line telecommunications markets to survive the demise of infrastructure-based competition caused by FTTN, the arrangements for and terms of supply between the FTTN network operator and the retailers of FTTN services must be fair, transparent, and accountable, with the objective of preventing preferential treatment of retailers associated with the wholesaler.