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Naomi Feast
Associate Director
Australian Energy Regulator
GPO Box 520
MELBOURNE VIC 3000

The logo for Ashurst, featuring the word "ashurst" in a lowercase, bold, sans-serif font.

Dear Ms Feast

TELSTRA SUBMISSION – DRAFT AER (RETAIL) EXEMPT SELLING GUIDELINES NOVEMBER 2012

1. BACKGROUND

We act for, and have prepared this submission on behalf of, Telstra Corporation Limited ("Telstra").

On behalf of Telstra, we would like to thank the Australian Energy Regulator ("**AER**") for the opportunity to provide submissions to the AER in respect of the Draft AER (Retail) Exempt selling guideline ("**Draft Revised Exempt Selling Guideline**"), dated November 2012.

2. INTRODUCTION

As part of a number of integrated services Telstra provides to its customers, Telstra on-sells electricity and operates private networks in each jurisdiction of Australia. Telstra understands that the Draft Revised Exempt Selling Guideline as currently drafted will, in conjunction with the Network Service Providers Exemption Guideline, the National Energy Retail Law (as implemented in each State) and its associated rules and regulations (collectively, the "**New System**"), together with any State based laws, govern these arrangements.

Telstra has reviewed and considered the Draft Revised Exempt Selling Guideline and has a number of concerns about how it will affect Telstra's business, and the telecommunications, technology and content services ("**Telecommunication and Information Services**") industry more generally.

The purpose of this submission is to:

- (a) outline to the AER the nature of Telstra's business and the integrated services which involve the onselling of electricity;
- (b) describe the type of customers that are supplied and on-sold electricity by Telecommunication and Information Services entities and the regulatory and contractual arrangements that are currently in place to protect those customers;
- (c) demonstrate why Telstra considers that as the Draft Revised Exempt Selling Guideline is currently drafted, there is no category of deemed or registrable exemption that appropriately deals with onselling arrangements in the Telecommunication and Information Services industry; and

- (d) propose a new class of deemed exemption to be included in the Draft Revised Exempt Selling Guideline that will operate to exempt Telecommunication and Information Services providers from the operation of the Exempt Selling Guideline in appropriate circumstances.

3. **ONSELLING ELECTRICITY IN THE TELECOMMUNICATION AND INFORMATION SERVICES INDUSTRY**

3.1 **Overview**

Telstra provides a number of integrated services to third parties in the Telecommunication and Information Services industry. Broadly speaking, the integrated services provided by Telstra to consumers can be divided into two categories, regulated services and un-regulated services.

Regulated services

In this context, regulated services provided by Telstra refers to those services Telstra provides to other telecommunication carriers involving the provision to those carriers of access to Telstra owned facilities. The provision of these services are governed by the *Telecommunications Act 1997* (Cth) ("**Telco Act**") and the *Competition and Consumer Act 2010* (particularly Part XIC). Telstra provides these types of regulated services via a number of different channels, including:

- (a) through providing access to and utilising a network that comprises thousands of equipment buildings and other network sites ("**Facilities**"). These Facilities are linked by millions of kilometres of cabling such as optic fibre, copper wire and other mechanisms such as radio, microwave and satellite links; and
- (b) mobile communication towers.

Relevant definitions from the Telco Act are set out in paragraph 1 to the Schedule to this letter. Regulated services will commonly involve Telstra providing other telecommunication carriers with access to certain of its facilities (as defined in the Telco Act) in accordance with the requirements of the Telco Act (subject to certain conditions) in order for those carriers to install their own equipment to facilitate the provision of competitive telecommunication services.

Unregulated services

The un-regulated facilities infrastructure services provided by Telstra are other services in the Telecommunication and Information Services Industry that are also provided to third parties. These services are also provided through various facilities, including:

- (a) data centres; and
- (b) mobile communication towers, equipment buildings and other infrastructure where the access seeker is not a telecommunication carrier.

The un-regulated services provided by Telstra are related to technology and content services provided by Telstra, or that third parties provide using Telstra's facilities. For example, data centres are buildings where computer servers and other electronic equipment for data processing and storage are located. Often data centres host servers and other equipment owned and operated by multiple parties and which provide space for infrastructure to be located including for cloud IT services. The data centres and equipment buildings contain a large number of individual equipment racks that house the third parties' equipment. By way of example, for one product, Telstra hosts 6773 separate items of third party owned equipment at 573 sites across Australia.

3.2 Supply arrangements

In order to operate the facilities and equipment described above, and in turn to provide Telecommunication and Information Services, Telstra commonly supplies electricity to its customers.

This involves Telstra:

- (a) buying electricity (in kilowatt hours) from a licensed retailer at a connection point. Telstra's general approach to this is to negotiate State based electricity contracts (aggregating its sites in that State) with retailers to ensure Telstra can source the most cost effective rates;
- (b) depending on the nature of the facility either:
 - (i) converting the purchased electricity from AC to DC power and on-selling (as required) the electrical power to customers in Amps or kilowatt hours; or
 - (ii) providing the electricity at the same voltage to its customers;
- (c) providing backup electricity in the form of batteries and generators; and
- (d) providing air-conditioning in the common areas of some facilities.

Without the supply of electricity at or to these facilities, neither Telstra nor the customer will be able to utilise the equipment located in the facilities (whether owned by the customer or Telstra) in connection with the contracted service. To this end, we understand that the electricity on-sold by Telstra in connection with Telecommunication and Information Services is only used by the customer to receive the contracted services from Telstra, and for no other purpose. Specifically, we understand that no electricity on-sold by Telstra to its customers in connection with Telecommunication and Information Services, is used to supply electricity to residences or for unrelated commercial purposes.

In most cases, the volume of electricity on sold to Telstra's customers (even if aggregated across multiple sites) is less than the upper consumption threshold for electricity and therefore, its customers would be classified as small customers under the National Energy Retail Regulations. However, in other cases, if the volume was aggregated, the upper consumption threshold would be exceeded.

3.3 Contractual arrangements

Regulated services

Generally, access terms and conditions for the regulated services are on common terms and conditions. Further, we are advised that Telstra sets its pricing (including for electrical power) in accordance with the Telco Act.

For example, Telstra has published a rate card for Telstra's access to its telephone exchanges which includes pricing for electrical power. This rate card, along with Telstra's standard terms and conditions for its regulated services, are published on Telstra's website and are readily accessible by Telstra's customers. (<http://www.telstrawholesale.com.au/products/facilities/teba/index.htm>, <http://www.telstrawholesale.com.au/download/document/tw-rate-card.pdf>)

We understand that generally, there is nothing in the contractual arrangements or Telstra's corporate policy which would prevent, where reasonably practicable and subject to any laws, a customer from installing its own electricity supply and exercising its right (in accordance with any jurisdictional requirements) to choose a retailer.

Un-regulated services

The terms and conditions which apply to the on-sale of electricity in connection with un-regulated services provided by Telstra, are dependent on the nature of the un-regulated service. For some products, we understand that Telstra provides power supply (up to a specified maximum volume) to customers as part of the overall service charge. However, a customer will usually be given the ability to request additional power to be supplied by Telstra for an additional service charge. For other products, Telstra may charge customers for electricity on-sold in connection with un-regulated services as a separate line item.

Again, we understand that generally, there is nothing in the contractual arrangements which would prevent, where reasonably practicable and subject to any laws, a customer from installing its own electricity supply and exercising its right (in accordance with any jurisdictional requirements) to choose a retailer.

Basis of charging

For both historical and practical reasons, we are advised that Telstra generally does not charge its customers for electricity on a metered consumption basis. Instead, we are advised that the relevant arrangements include a methodology for charging for electricity that is agreed with the customer. We understand that this is often based on the forecast electricity usage provided by the customer, or based on expected usage for equipment of that type in the industry. The costs of installing separate meters is likely to be significant and the cost/benefits to consumers would be minimal.

4. CUSTOMER PROTECTION

4.1 Nature of customer base being on-sold electricity

We are advised that all customers receiving Telecommunication and Information Services from Telstra, which involve the on-sale and supply of electricity, are commercial customers.

By way of example, many of the network customers of Telstra are participants in the Telecommunication and Information Services Industry that do not have the same infrastructure as Telstra. In fact, Telstra provides network services and solutions to more than 200 of the world's top 500 companies. However, Telstra's customer base also includes a range of other business customers from large corporate entities to medium and small businesses.

Therefore, despite the fact that the volume of electricity on-sold or supplied to commercial customers in connection with the Telecommunication and Information Services (even if aggregated across sites) will generally be below the upper consumption threshold in the National Energy Retail Regulations, Telstra's customers for such services are businesses customers and not domestic customers. We note that in some instances the aggregation across sites may result in the volume of electricity consumed by a customer exceeding the threshold upper consumption.

4.2 Complaints / Dispute resolution

Telstra's customers have access to a variety of mechanisms to make complaints in respect of the services they receive, including the charges associated with the provision of such services. In respect of regulated services, this includes a range of mechanisms enshrined in the Telco Act.

For example, pursuant to the Telco Act, a person has a right to make a complaint about certain matters relating to certain Telecommunications and Information Services to the Australian Communications and Media Authority ("**ACMA**"). The ACMA has the power to conduct an investigation in respect of the complaint made, as well as to refer specific

matters to the Australian Competition and Consumer Commission ("**ACCC**") or the Telecommunications Industry Ombudsman.

Information regarding Telstra's management of complaints by its customers (as well as disputes) is published on Telstra's website and is readily accessible by its customers. Further, we understand that under the contractual arrangements entered into between Telstra and its customers, customers also have contractual rights to access a range of alternative dispute resolution processes or to initiate litigation. In the case of regulated services, the customer can ask the ACCC to arbitrate if not satisfied when negotiating the contract under which the electricity is supplied.

4.3 **Competition**

In respect of the un-regulated services provided by Telstra, Telstra considers that there is substantial competition within the Telecommunication and Information Services industry. Given the competitive market for the provision of such services, customers have the ability to have other participants in the Telecommunication and Information Services industry provide them with un-regulated services if they do not wish to be serviced by Telstra. For example, in relation to data centres, Telstra is not the only owner of data centres or the only provider of data services. The services can be obtained by customers from other parties both in Australia and overseas.

4.4 **Choice of retailer**

As noted above, we understand that there is no policy within Telstra preventing its customers from choosing its preferred electricity retailer, in connection with the Telecommunication and Information Services provided by Telstra. In fact, some of Telstra's contractual arrangements with customers expressly state that Telstra will not unreasonably hinder a customer from obtaining its own supply of electricity to the equipment located within Telstra's infrastructure. However, in many instances, Telstra notes that it will be impractical from an engineering and cost perspective for a customer to have a separate electricity supply.

5. **EXEMPT SELLING GUIDELINE**

5.1 **Deemed exemptions and registrable under the Exempt Selling Guideline**

Telstra has reviewed and considered the deemed exemption classes which are currently included in the Draft Revised Exempt Selling Guideline. Unfortunately, Telstra considers that there is currently no appropriate class of deemed exemption for Telecommunication and Information Services providers.

Telstra have also reviewed and considered the registrable exemptions classes included in the current Draft Revised Exempt Selling Guideline. Telstra does not consider any of these classes captures the onselling arrangements described above and there is no class of suitable registrable exemption. Telstra is also concerned that, with the growing number of sites involved in providing Telecommunication and Information Services, the burden of a registrable exemption would be significant and involve a substantial amount of work on an ongoing basis.

The National Energy Retail Law acknowledges that it is not appropriate for everyone that on-sells electricity to hold a retailer authorisation. Similarly, Telstra considers that it is not appropriate for everyone that is deemed to be exempt from the requirement to hold a retailer authorisation, to be subject to conditions analogous to those which apply to holders of retailer authorisations.

On this basis, Telstra suggests that the AER include a new class of exemption for the Telecommunication and Information Services industry in the Draft Revised Exempt Selling Guideline. The inclusion of such a class of deemed exemption would reflect that:

- (a) the on-sale of electricity is incidental to the core business of Telecommunication and Information Service providers;
- (b) the electricity on-sold by Telecommunication and Information Service providers in connection with Telecommunication and Information Services is only used by customers to receive the contracted services, and for no other purpose. For example, no electricity on-sold by Telstra to its customers in connection with Telecommunication and Information Services, is used to supply electricity to residences;
- (c) generally, the on-sale of electricity occurs on a cost recovery basis. Telstra does not seek to profit in respect of its provision of electricity and conjunction with the provision of Telecommunication and Information Services;
- (d) the amount of electricity on-sold by Telecommunication and Information Service providers to each of its customers is negligible in the context of the wider national electricity market;
- (e) other laws are in place which appropriately govern Telecommunication and Information Service providers relationship with its customers. Such laws include substantial protections for such customers in specified circumstances; and
- (f) the cost of compliance with the National Energy Retail Law as well as the conditions attached to the deemed exemptions (as the Draft Revised Exempt Selling Guideline is currently drafted) will impose exorbitant compliance costs on Telecommunication and Information Service providers and will not provide a significant benefit (if any) to its customers.

5.2 **Telecommunications and Information Services**

Exemption

Telstra therefore submits that, in light of its submission and the underlying policy objectives of the New System, a deemed exemption for the Telecommunications and Information Services Industry could be included in the Revised Exempt Selling Guideline as follows:

Class D[] Service Providers in the Telecommunications and Information Services industry selling electricity to business customers in conjunction with, or ancillary to, the provision of telecommunication or information services, for use with facilities installed by the customers in or on the Service Provider's premises.

6. **OTHER**

Telstra's supports the AER's proposal to include a new registrable exemption class R7 for historical un-metered on-selling arrangements.

Again, on behalf of Telstra, we thank the AER for allowing Telstra to make this submission.

If the AER would like to discuss this submission with Telstra, please contact Joy Hooker of Ashurst to arrange a convenient time. Joy's contact details are: phone: (03) 9679 3416, email: joy.hooker@ashurst.com.

Yours faithfully



Schedule

1. Telco Act

The Telco Act defines a facility as:

- (a) any part of the infrastructure of a telecommunications network; or
- (b) any line, equipment, apparatus, tower, mast, antenna, tunnel, duct, hole, pit, pole or other structure or thing used, or for use, in or in connection with a telecommunications network.

The telecommunications industry is defined in that Act as "includes an industry that involves:

- (a) carrying on business as a carrier; or
- (b) carrying on business as a carriage service provider; or
- (c) supplying goods or services for use in connection with the supply of a listed carriage service; or
- (d) supplying a content service using a listed carriage service; or
- (e) manufacturing or importing customer equipment or customer cabling; or
- (f) installing, maintaining, operating or providing access to:
 - (i) a telecommunications network; or
 - (ii) a facility;
 - (iii) used to supply a listed carriage service."