MALAYSIAN COMMUNICATIONS AND MULTIMEDIA COMMISSION

A REPORT ON A PUBLIC INQUIRY UNDER SECTION 65 OF THE COMMUNICATIONS AND MULTIMEDIA ACT 1998 ON MANDATORY STANDARD ON ACCESS

30 JULY 2003

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SECTION 1: SUMMARY

1.1 Introduction

1.1.1 Under subsection 104(2) of the CMA, the Commission is required to determine a Mandatory Standard if the Minister directs the Commission to determine a Mandatory Standard in place of a Voluntary Industry Code. Under subsection 104(3), a Ministerial direction to the Commission to determine a Mandatory Standard may include reference to matters to be dealt with in the Mandatory Standard, and the manner in which those matters are to be dealt with.

1.2 Public Inquiry

1.2.1 On 18 March 2003, the Minister directed the Commission to determine a Mandatory Standard on Access (*Ministerial Direction to Determine a Mandatory Standard on Access, Direction No 2 of 2003*). The Minister's direction required the Commission to implement the determination by way of Public Inquiry in accordance with the procedures outlined in Chapter 3 of Part V of the CMA.

1.2.2 In accordance with the Minister's direction, the Commission has conducted a Public Inquiry to determine the Mandatory Standard on Access (**the Standard**).

1.2.3 The Public Inquiry commenced on 30 April 2003, with the release of consultation paper (*Public Inquiry Paper on Draft Mandatory Standard on Access*) (**Consultation Paper**).

1.2.4 To summarise, Part I of the Consultation Paper contained an explanatory paper about the draft Mandatory Standard on Access (**the draft Standard**). This provided an outline of key issues and material covered in the draft Standard, and sought public comment on the following issues:

(a) the scope and application of the Standard;

(b) the scope of the Standard in relation to dominance;

(c) general principles for the content of the Standard;

(d) access obligations contained in the Standard;

(e) whether the Standard should include detailed legal terms and conditions;

(f) administration of and compliance with the Standard;

(g) effect of the Standard on existing arrangements;

(h) review and amendment provisions contained in the Standard; and

(i) Dispute Resolution procedures in the Standard.

1.2.5 Part II of the consultation paper contained the draft Standard.

1.2.6 A public hearing was held by the Commission on 6 June 2003. At the public hearing an overview of the draft Standard was presented, and attendees were provided with the opportunity to put questions to the Commission and its advisers.

1.2.7 Following the public hearing, the Commission received written submissions from the following parties:

(a) Celcom (M) Bhd (**Celcom**);

(b) Digi Telecommunications Sdn Bhd (**Digi**);

(c) Maxis Communications Sdn Bhd (**Maxis**);

(d) Telekom Malaysia Bhd (**Telekom Malaysia**);

(e) Time Dotcom Bhd (**Time**);

(f) Rashid & Lee (Advocates & Solicitors) (**Rashid & Lee**);

(g) AtlasONE Malaysia Sdn Bhd (**AtlasOne**);

(h) Mimos Bhd (**Mimos**); and

(i) Natseven TV Sdn Bhd (**NTV7**).

1.2.8 This Report of the Public Inquiry has been prepared in accordance with the Commission's obligations under section 65 of the CMA.

1.3 Structure of the Report

1.3.1 The remaining of this Report is structured as follows:

1.3.2 Section 2 provides some background on the Access Regime under the CMA, and clarifies the relationship between the Standard and the proposed Access Code (which is being developed by the Access Forum).

1.3.3 Section 3 summarises the responses to the questions identified by the Commission in the Consultation Paper, and the Commission's responses to those submissions. Section 3 also notes the Commission's response to some of the more significant drafting issues raised in the submissions.

1.3.4 Section 4 sets out the Commission's conclusions.

SECTION 2: BACKGROUND

2.1 Access Regime under the CMA

2.1.1 The CMA establishes an Access Regime which ensures "that all Network Facilities Providers, Network Service Providers and Applications Service Providers can gain access to the necessary facilities and services on reasonable terms and conditions in order to prevent the inhibition of the provision of downstream services"[i].

2.1.3 The Standard will be one element of the CMA Access Regime that applies in respect of access to facilities and services that are specified on the Access List.

2.1.4 Other elements of the CMA Access Regime include:

(a) the Access Code to be developed by the Malaysian Access Forum Berhad (which was designated by the Commission as the Malaysian Access Forum on 31 March 2003);

(b) the regulation of Access Pricing under the Commission Determination on the Mandatory Standard on Access Pricing, Determination No 1 of 2003 (dated 28 June 2003);

(c) Access Agreements negotiated in accordance with the SAOs and registered by the Commission. The Commission is in the process of developing separate guidelines in relation to the registration process[ii]; and

(d) Access Undertakings provided to the Commission under section 155 of the CMA.

2.1.5 The Commission intends the Standard to operate as an interim measure, at least until the Access Code is developed by the Access Forum and registered by the Commission. The Commission will review the role of the Standard at the time an Access Code is registered, to determine whether the Standard should remain in place to complement the provisions of the Access Code. On this basis, it is possible that the Standard will continue to be in force (wholly or in parts) after the Access Code has been registered, but this will depend on the matters which the Access Forum decides to address in the Access Code.

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[i] Explanatory Statement to the CMA, paragraph 82.

[ii] The Commission has noted the submissions of Telekom Malaysia in relation to the issue of whether Access Agreements which are not registered by the Commission are enforceable. This issue is outside the scope of the present Public Inquiry, but may be considered by the Commission in the context of the preparation of the guidelines on registration noted above.

SECTION 3: COMMENTS RECEIVED IN RESPONSE TO CONSULTATION PAPER ISSUED

3.1 Overview of the submissions received

3.1.1 This section 3 identifies the specific issues raised in the Consultation Paper about the draft Standard, and summarises responses provided in submissions. The Commission notes that some submissions did not respond to any or all the issues in the Consultation Paper, but focussed on drafting issues arising from the draft Standard instead.

3.1.2 The Commission has given detailed consideration to all submissions received. Comments received in submissions have been abbreviated in this Public Inquiry Report. The Commission wishes to emphasise that the abbreviation of comments contained in submissions does not imply that only limited aspects of submissions were considered as part of this Public Inquiry.

3.2 Comments on the scope and application of the Standard

The Consultation Paper sought views on:

(a) how broadly the Standard should apply to diverse facilities and services;

(b) whether it should deal with access to all the Network Services, Network Facilities and other services specified on the Access List;

(c) how broadly the Standard should apply in respect of diverse Access Providers and Access Seekers;

(d) how the Standard should ensure that non-licensees are covered by the Standard (if at all); and

(e) should the Standard be expanded to address other matters (eg the procedures which support Equal Access, domestic roaming, number portability, terms on which physical co-location is provided and other relevant services).

3.2.1 Comments received

Summarised below are comments received on the issues regarding the general scope and application of the Standard:

(a) Maxis considered that the Standard should be general in its application and not service-dependent in its terms. Maxis's position was that the Standard should be able to be applied to all of the services specified on the Access List, with one exception (mobile network origination service). Maxis agreed that the Standard should confer the same rights and apply the same obligations upon persons covered by the Standard, and make no distinction between large and small providers or whether they are new or established.

In relation to non-licensees (particularly owners and operators of non-licensed facilities), Maxis recommended that the Standard require non-licensees to permit access on fair and reasonable terms. Maxis considered that the coverage of Equal Access and physical co-location in the draft Standard was adequate, and did not recommend the inclusion of domestic roaming or number portability in the Access List.

(b) Digi supported the Standard applying to all the Network Facilities, Network Services and other services specified on the Access List. Digi outlined its understanding that the Standard is based on the application of non-discriminatory principles, and in light of those principles, the Standard should apply to all Access Providers and Access Seekers, and the grant of access should not be contingent upon the requirement to obtain a licence under the CMA. Digi also supported the view that Access Seekers should be able to seek access to provide applications and/or content services.

Digi considered that the Access List should be expanded. In particular, Digi sought the inclusion of domestic roaming, local loop unbundling, tower sharing and MVNO in the Access List. Digi noted that it agreed with the principle of Equal Access, but that it also sought the inclusion of Equal Access services originating from payphones.

(c) Telekom Malaysia expressed concern with the issue of an "almost all encompassing" Standard, particularly in light of the designation of the Access Forum.

In relation to the scope and application of the Standard, Telekom Malaysia suggested drafting amendments to the draft Standard, by which an Access Seeker would only be permitted to request access to Network Facilities and/or Network Services listed in the Access List from an Access Provider where the Access Seeker holds an individual and unrestricted licence (ie. not restricted in terms of the type of Network Facilities or Network Services or Applications Services that can be provided under the licence, or by geography). Further,

under Telekom Malaysia's proposal, the access being sought would need to be consistent with the terms of the relevant licence. If these requirements are not met, Telekom Malaysia's submission was that access should only be provided at the Access Provider's discretion, and not at cost-based charges. Telekom Malaysia also contended that section 278 licensees should not be included within the definition of "Access Seeker" in the draft Standard, as rights of access were not a benefit or right conferred under the "old" licence.

In relation to the question of whether the Standard should be expanded to address other matters, Telekom Malaysia's submission was that the Commission cannot determine ancillary issues. It also submitted that domestic roaming and number portability should not be included either within the Access List or within the scope of the Standard. In relation to physical co-location, Telekom Malaysia's submission was that in-span interconnection is to be preferred. Telekom Malaysia also expressed concern that the Standard does not address issues of "convergence".

(d) Celcom's view was that the Standard should not cover non-licensees, and that section 278 licensees should not be within the definition of "Access Seeker". Celcom's suggested drafting amendments to the draft Standard are consistent with those suggested by Telekom Malaysia. To summarise, these amendments (if adopted) would result in an Access Seeker only being entitled to seek access when it holds an individual and unrestricted licence, and where the access being sought is consistent with the terms of the relevant licence. If these licensing requirements are not met, Celcom considered that access should only be provided only at the discretion of the Access Provider, and would not need to be provided at cost-based charges.

(e) Time's submission was that access to services on the Access List should not be denied. It also contended that the Standard should apply to all Access Providers and Access Seekers, but there should be a provision to take into account that not all Access Seekers are the same. Time noted that a number of Network Facilities Providers are not licensed, but they should be subject to the Standard.

Time's submission was that the Access List should be expanded to include domestic roaming, number portability and Internet peering. Time supported the inclusion of Equal Access provisions in the Standard, and noted that the issue of physical location is addressed in the draft Standard reasonably well (although Time indicated that there are problems in achieving this in practice).

(f) Mimos supported amending and broadening of the Access List. Mimos suggested the inclusion of the "other access provisions" (eg post, network facilities, rights of way), and other services such as an IP Network termination services.

(g) NTV7's submission was that the Standard should only apply to licensees, but if the need arises the Standard can be extended to other service providers if this is in the national interest. NTV7 also argued that facilities and services provided for broadcast should be covered by the Standard.

(h) Rashid & Lee's submission was that the Standard should not apply to Network Facilities Providers or Network Service Providers whose operations in the communications market is either exempt or who are subject to a class licensing scheme. Rashid & Lee considered that the behaviour of such operators would be effectively constrained by market forces. Further, Rashid & Lee suggested that the Standard should not apply to non-dominant operators, as the behaviour of such operators will also be constrained by market forces. Under Rashid & Lee's approach, only dominant operators would be regulated by the Standard.

Rashid & Lee also considered that the application of the Standard to all Network Facilities and Network Services on the Access List is too broad a policy, and will discourage investment. Rashid & Lee suggested that operators who are similarly placed should share Network Facilities and Network Services according to the principle of reciprocity. Arrangements between operators who are not similarly placed should not be regulated on the basis of sharing and interconnection, but as a simple sale arrangement, such purchase and sale not being cost based. Rashid & Lee considered that the Standard should only mandate the sharing of essential services facilities.

3.2.2 The Commission's views

The Commission considers that the application and scope of the Standard should be consistent with the CMA. It should rise "no higher" than the CMA.

(a) Application issues

The Commission notes that the SAOs in section 149 of the CMA do not limit the provision of access by a Network Facilities Provider or a Network Service Provider to Access Seekers who are licensees. However, subsection 105(2) of the CMA provides that a Mandatory Standard determined by the Commission under

subsection 105(2) "shall specify the class of licensees who are subject to the Mandatory Standard." The Commission considers that as subsection 105(2) is a specific provision in relation to Mandatory Standards, it needs to be applied in relation to the Standard. However, the Commission is concerned that this will mean that the Standard will have less breadth of coverage than the SAOs in section 149 of the CMA (e.g. as non-licensees may be Network Facilities Providers and Network Service Providers under the CMA). The Commission's response to this concern is noted below.

To reflect the issues arising from the application of subsection 105(2), the Commission proposes to amend the definitions of "Access Provider" and "Access Seeker" in the draft Standard. The amendments to the definitions of Access Provider and Access Seeker will incorporate a requirement that the person holds a licence issued under the CMA. The amendment in the draft Standard will clarify that the Standard applies to a person who holds a licence issued under the CMA, where that person acts in one of the capacities described therein. The Commission also proposes to remove the reference to section 278 licensees from the definitions of "Access Provider" and "Access Seeker" in the draft Standard, noting the positions put in relation to section 278 licensees.

However, when the Commission exercises other powers under the Access Regime in the CMA (eg. in considering Access Undertakings from Access Providers, and in resolving Access Disputes between Access Providers and Access Seekers), the Commission may apply the principles contained in the Standard to non-licensees (depending on all the relevant circumstances). This will be noted in the draft Standard.

While the Commission has given the submission of Rashid & Lee about the application of the Standard careful consideration, the Commission does not propose to limit the application of the Standard to dominant operators only. The Commission has revised the provisions of the draft Standard that related to dominant operators, and this is discussed in more detail at 3.3.2 below.

(b) Scope issues

The Commission's view is that the Standard should apply to all the Network Facilities, Network Services and other services on the Access List. The Commission has noted that there was limited support in submissions for access being provided to facilities and services that are not included in the Access List.

The Commission is currently reviewing the Access List as part of a separate process.

3.3 Comments on the scope of the Standard in relation to dominance

The Consultation Paper sought comment on whether the Standard:

(a) should include provisions to take account of the effects that the exercise of market power by dominant operators might have on competition;

(b) should include a base level of regulation applying to all operators, and additional rules that apply only to dominant operators;

(c) draws appropriate distinctions between the obligations applicable to all operators and those obligations only applicable to dominant operators?

3.3.1 Comments Received

(a) Maxis noted that the Standard is required because the access service markets in which it applies are not effectively competitive. Once the Standard establishes the services to which access may be sought, and how access is regulated and disputes resolved, Maxis considered that there will be a lesser need to differentiate between dominant and non-dominant operators. Maxis noted that in principle and in general, the access obligations and rights of dominant operators should be same as for non-dominant operators in similar circumstances. Maxis made detailed submissions about the provisions contained in Part B of the draft Standard, and suggested that (with the exception of some of the negotiation obligations) these could all be either moved to Part A (with some modifications) or deleted.

(b) Digi supported the approach in the draft Standard in relation to the regulation of dominant operators. It supported the Standard including provisions to take account of the effect that a dominant operator may have on competition. Digi considered that a good delineation was made in the draft Standard between the items of general application and the items to apply to dominant operators

only (although it considered that the relevant parts should be included in Part A). However, Digi expressed concern that no determinations of dominance have yet been made under section 137 of the CMA.

(c) Telekom Malaysia opposed the introduction of "asymmetrical regulation", stating that it did not believe that this approach was warranted. Telekom Malaysia considered that the approach in the draft Standard in relation to the regulation of dominant operators was ultra vires, as Telekom Malaysia's view was that it is inconsistent with the CMA. Telekom Malaysia argued that the proposed regulation of dominant operators in the draft Standard was not consistent with subsection 149(2) of the CMA, or with the scheme in Chapter 2 of Part VI of the CMA. As a further submission, Telekom Malaysia put the view that the proposed regulation of dominant operators is also uncertain, as the draft Standard does not define who the dominant operator rules would apply to and for how long.

(d) Celcom contended that the "scope of the Standard in relation to dominance" should be deleted in order to be consistent with the CMA.

(e) Time supported the view that the Standard include additional regulation of dominant operators, and argued that the provisions in the draft Standard should be made more specific (eg to open up ISDN data interconnectivity and the private circuit completion service).

(f) Rashid & Lee considered that only dominant operators should be obliged to prepare Access Reference Documents for public comment and regulatory review against the Standard and general competition principles. Further, Rashid & Lee noted that the Standard does not specify what civil remedies may be used by the Commission in the event that a dominant operator fails to comply with its obligations under the Standard or under an Access Agreement.

3.3.2 The Commission's views

The Commission has considered the range of different views outlined in submissions about whether the Standard should contain "targeted regulation" of dominant operators. The Commission has also given further consideration to the legislative scheme in the CMA, including the principle that the Access Regime should be of general application.

Having considered these matters, the Commission proposes to remove the distinctions between "Part A" and "Part B" in the draft Standard, so that the provisions previously contained in Part B of the draft Standard will be of general application under the Standard (noting that there has been some support for this approach in submissions). A number of subsections of the draft Standard that previously addressed the regulation of dominant operators are proposed to be deleted.

Before reaching this view, the Commission gave careful consideration to whether amending the draft Standard in this way would impose an unreasonably high regulatory burden upon Access Providers, particularly those who are smaller operators.

The provisions which were located in Part B of Section 5 of the draft Standard were originally intended to ensure that negotiations for access can take place on a more equal basis than may otherwise be the case, thereby promoting the objectives in the CMA.

The Commission has noted that some submissions received during the Public Inquiry process considered that many of these provisions should be of general application (ie the provisions should apply to all Access Providers, and not just those determined to be "dominant"). As indicated above, the Commission considers that making the provisions previously in Part B of more general application will be consistent with the scheme of the Access Regime in the CMA.

In this context, the Commission considers that amending the draft Standard in the manner proposed will not impose an unreasonable regulatory burden upon Access Providers (including those who are smaller operators). Also, as discussed at 3.5.2 of this Report, the Commission proposes to make some amendments to the draft Standard to ensure that the application of the Standard is more flexible.

3.4 Comments on general principles for the content of the Standard

The Consultation Paper sought comment on whether the Standard should expand on the SAOs contained in the CMA, for example by:

(a) including detail relating to the types of activities that will be subject to the SAOs (eg ordering, access to billing and support systems, fault reporting, fault information);

(b) examples of the basis on which an Access Provider may refuse a request for access because it is unreasonable (eg capacity limitations,

previous failure by the Access Seeker to comply with terms and conditions); and

(c) including customer principles (eg a rule that does not permit an Access Provider to claim an Access Seeker's customer as its own).

3.4.1 Comments Received

(a) Maxis considered that there was no need for the Standard to expand on the SAOs, or to include the level of detail suggested by the questions posed in the Consultation Paper.

(b) Digi indicated that the Standard should provide guidance in relation to the matters identified, but this should be sufficiently flexible to allow commercial negotiations take place on equal terms. On the subject of customer relationship principles, Digi agreed that the Standard should clarify this issue (so that end customers of the Access Seeker are not customers of the Access Provider).

(c) Telekom Malaysia noted that from a legal perspective, the Standard cannot "expand" the scope of the SAOs. Telekom Malaysia does not consider that there is a compelling case for detailing additional rules in this area, given that these issues are dealt with in interconnect agreements between operators. In relation to customer principles, Telekom Malaysia noted that it was satisfied in the draft Standard.

(d) Celcom was of the view that the Standard cannot expand on the SAOs in the CMA.

(e) Time observed that section 149 of the CMA sets out overriding or guiding principles, and that the expansion of the Standard and the Access List would improve the application of these principles. It noted that the draft Standard has addressed some procedural matters (ie in relation to activities that are subject to the SAOs), but also noted that provisions relating to Dispute Resolution and the provision of product lists and pricing by Access Providers are of particular importance. Time supported the Standard including examples of the basis upon which access may be refused because it is "unreasonable". It also supported the inclusion of customer principles.

(f) NTV7 supported the inclusion of customer principles, noting that an Access Provider should not be able to claim an Access Seeker's customers as its own.

(g) Rashid & Lee suggested that access to new and improved infrastructure should not be on the basis of cost-based pricing or on non-discriminate terms. In such circumstances, it suggests that access is best left to private negotiations and market forces.

3.4.2 The Commission's views

The Commission accepts that the Standard cannot "expand" upon the SAOs. Perhaps the question could have been expressed as whether the Standard should "elaborate upon" or "clarify" the SAOs. The Commission's approach in the Standard will be to seek to clarify the SAOs where this is perceived to be necessary, for example by illustrating what may be considered to be an unreasonable request by an Access Seeker, and to clarify customer relationship principles (again, noting that there was some support in submissions for this approach).

In response to the emphasis placed in submissions in respect of the need for flexibility (and so the Standard does not unduly restrict commercial negotiations), the Commission proposes to incorporate drafting amendments to address this issue in the Standard. This is discussed in more detail at 3.5.2 below.

3.5 Comments on access obligations contained in the Standard

The Consultation Paper sought comment on whether:

(a) the draft Standard covers sufficient matters, and in a sufficient degree of detail. In particular, comment was sought on whether the draft Standard retained sufficient flexibility between providing detail and leaving scope for negotiation between operators;

(b) the time periods suggested in the draft Standard for ordering and provisioning, network change obligations and operations and maintenance obligations were adequate; and

(c) the Standard should deal with technical matters in more detail, and whether it should contain more details regarding quality of service and remedies.

The Commission also sought specific submissions on the maximum amount of comprehensive liability insurance that may be required by an Access Provider (who is a Dominant Operator).

3.5.1 Comments received

(a) Maxis noted that the draft Standard appears to contain a general excess of detail that will unduly limit the flexibility of operators in negotiating agreements, and the Commission's ability to assist at a later stage. It suggested a more flexible approach was required. Maxis did not consider that technical matters should be dealt with in more detail. However, it considered that more detail regarding quality of service should be included, reflecting the work done by the Inter-Carrier Working Group.

Maxis also provided detailed drafting comments on the subsections in Section 5, including in relation to the time periods in the draft Standard. Maxis raised particular concerns over the approach to forecasting in the draft Standard, and asked that this be revisited.

Maxis suggested that the maximum amount of comprehensive liability insurance that may be required by an Access Provider should be set at RM20 million in relation to any one event, but this should apply to all Access Providers, not only dominant operators.

(b) Digi's submission was that the draft Standard had covered access obligations satisfactorily, noting that the Standard needs to contain clear and definite principles (where necessary) to facilitate smooth commercial negotiations. Digi considered that there are some drafting issues to be addressed, and provided detailed drafting comments. Digi also provided detailed submissions in relation to time periods in the draft Standard.

In relation to technical matters, Digi considered that the Standard should include appropriate technical details to ensure that basic terms are adhered to. It also was of the view that the Standard should provide for parties to comply with quality of service standards, to be determined in service level agreements, which are consistent with the Quality of Service Determination.

Digi considered that it was the responsibility of dominant operators to take out their own insurance.

(c) Telekom Malaysia was of the strong view that the draft Standard is overly detailed and prescriptive and does not leave scope for negotiation between operators. Its submission stated that there is no compelling case for the determination of the Standard, noting that interconnection agreements have been in place since 1995 and have been subject to review since then. Telekom Malaysia did not consider that the Standard should address technical issues. Telekom Malaysia provided detailed drafting comments in response to the draft Standard, including in relation to the relevant time periods.

Telekom Malaysia suggested that the maximum amount of comprehensive general liability insurance that may be required by an Access Provider should be RM20 million.

(d) Celcom proposed some drafting amendments to the draft Standard to cater for negotiation between operators.

(e) Time stated that in principle the draft Standard covers sufficient matters, but some of these may be over-detailed and constitute a burden on newer Access Seekers (eg an Access Seeker has to include approximately 17 categories of information in an Access Request, and if it fails to do this the Access Provider can refuse to commence negotiations). However, Time also noted that clearly defined simple processes will reduce duplication of effort. Time also submitted that there is sufficient flexibility and scope for negotiation, if the Standard is treated as the minimum standard for best practice and proactively put into operation. Time also provided comments in relation to the time periods. Time did not believe there is a need for the Standard to legislate for compulsory comprehensive insurance.

(f) Rashid & Lee suggested that the Standard should not impose terms or conditions which limit the Access Seeker's ability to take advantage of its technological, business and operational efficiencies, and Access Providers must not impose conditions requiring the purchase of a minimum amount of equipment, Network Facilities or Network Services, or which require an Access Seeker to segregate the traffic it hands over for termination on the basis of call type or origins.

(g) Mimos, NTV7 and Atlas ONE provided some drafting suggestions in response to specific provisions of the draft Standard.

3.5.2 The Commission's views

(a) Flexibility

In preparing the draft Standard, the Commission was concerned to ensure that the obligations imposed by the Standard could be applied in a flexible way, while ensuring that the rights of Access Seekers were not diminished. While the Commission considers that this objective was met in the draft Standard, the Commission has taken account of the fact that a number of submissions considered that the Standard should be made more flexible.

Accordingly, some amendments are proposed to be made to the Standard to ensure greater flexibility in its application.

For example, the relevant subsections in the draft Standard will be amended to specify that handover will be at the option of the Access Seeker, unless the parties to the relevant Access Agreement agree otherwise. Amended definitions of "Near End Handover" and "Far End Handover" will also refer to certain matters being agreed between the parties. This is discussed in more detail at 3.11 below.

Also, the relevant subsection will be amended to clarify that an Access Provider and an Access Seeker may agree to an alternative forecasting and ordering procedure than that which is specified in the draft Standard. This is also discussed in more detail at 3.11 below.

The Commission will also amend various other subsections in the draft Standard to allow parties to agree to adopt a different approach to that specified in the Standard (adding to those subsections which already did so). For example:

- an Access Seeker and an Access Provider may agree to approach the initial meeting in a different way, or not at all.

- parties may agree to "set off" invoices, rather than adopt the approach contained in the relevant subsections the draft Standard; and

- parties may agree to review the provisions of an Access Agreement under the relevant subsection in the draft Standard.

However, the Commission has also been careful to ensure that incorporating additional flexibility in some parts of the draft Standard does not result in a Standard which is less transparent and less fair than would otherwise be the case. Ultimately,

and as noted in the conclusion to this Report, this is an issue of balance. It should be noted that where parties cannot agree in respect of the matters noted above, the Standard specifies the procedures to apply as a "fall-back", and this protects the rights of Access Seekers.

(b) Time periods and quality of service

In relation to the time periods suggested in the draft Standard, the Commission has carefully considered all the submissions, and considers the approach suggested by Maxis to be the most balanced and appropriate. The suggested time periods outlined by Maxis will be reflected in the relevant subsection (i.e. indicative delivery times and target times for fault response and rectification) of the Standard.

In relation to quality of service issues, the Commission proposes to insert a table into the relevant subsection of the Standard, which again incorporates the Maxis submission. If the Access Code developed by the Access Forum (and registered by the Commission) addresses quality of service issues, the Standard will be amended to make it consistent with the Access Code (assuming that the Standard will complement the Access Code).

(c) Insurance

The Commission proposes to insert the figure of RM20 million into the relevant subsection of the draft Standard as the maximum amount of comprehensive liability insurance that may be required by an Access Provider in relation to any one event (accepting the submissions of Telekom Malaysia and Maxis).

3.6 Comments on the inclusion of detailed legal terms and conditions

The Consultation Paper sought comment on whether the Standard should include detailed legal terms and conditions in a precedent format (eg as a precedent Access Agreement for parties to sign), or whether it should only specify key access details in sufficient detail to guide parties to expeditiously and efficiently negotiate their own Access Agreements.

3.6.1 Comments received

(a) Maxis considered that the terms and conditions in the Standard should only specify key access issues in sufficient detail to provide meaningful guidance to the parties to expeditiously and efficiently negotiate. It suggested that if the Standard went beyond that, it would deny parties flexibility.

(b) Digi suggested that the Standard should include detailed legal terms and conditions in a precedent format. However, it also noted that commercial terms and conditions may be decided by the parties.

(c) Telekom Malaysia considered that the Standard should not be prescriptive but provide meaningful guidance to parties, who have considerably more knowledge of inter alia their commercial objectives and business plans.

(d) Celcom was of the view that the Standard should not include detailed legal terms and conditions, and that it is appropriate to leave it to the parties to conclude their Access Agreements.

(e) Time considered that the Standard should include detailed legal terms and conditions in a precedent format.

3.6.2 The Commission's views

The Commission does not consider that the Standard should include detailed legal terms and conditions in a precedent format, as this would unnecessarily restrict the ability of Access Providers and Access Seekers to efficiently negotiate their own agreements. The Commission accepts the submissions of Telekom Malaysia, Maxis and Celcom on this issue.

The Standard will note that it does not contain a precedent agreement.

3.7 Comments on the administration of and compliance with the Standard

The Consultation Paper sought comment on the matters set out in Section 6 of the draft Standard (ie the provisions relating to enforcement, implementation and compliance).

3.7.1 Comments received

(a) Maxis agreed with the approach in the relevant subsections. Maxis noted that if the Standard is to be reviewed every 3 years, this supports the view that a minimum 10-year term for Access Agreements is too long.

(b) Telekom Malaysia suggested some minor drafting amendments to Section 6 of the draft Standard.

3.7.2 The Commission's views

Section 6 of the draft Standard is proposed to be retained with minor drafting amendments only (as noted below at 3.8.2). Also, amendments will be made to the relevant subsections of the draft Standard to clarify that the Commission may direct a person who is subject to the Standard to comply with the CMA, and this will include compliance with the Standard (on the basis of subsection 105(3) of the CMA).

3.8 Comments on the effect of the Standard on existing arrangements

The Consultation Paper asked for submissions on what would be a reasonable period of grace for Operators to renegotiate their existing interconnection agreements to enable them to comply with the Standard.

3.8.1 Comments received

(a) Maxis recommended that a reasonable period of grace for the renegotiation of existing Access Agreements would be three (3) months.

(b) Digi anticipated that a reasonable period to renegotiate existing interconnection agreements to enable compliance with the Standard would be approximately six (6) months.

(c) Telekom Malaysia considered that a period of at least twelve (12) months will be required to renegotiate existing interconnection agreements, noting the large number of agreements and parties involved.

(d) Celcom suggested that a reasonable time frame should be given.

(e) Time noted that it will take some time to renegotiate interconnect agreements, but this would be shorter if the Standard contained precedent legal terms and conditions (eg with 30% variables).

(f) Rashid & Lee suggested a timeframe of 90 days for current operators to ensure that their present Access Agreements comply with the Standard.

3.8.2 The Commission's views

The Commission proposes that the Standard will come into force when it is registered on **14 August 2003**. However, the relevant subsection of the Standard will provide that amendments to existing Access Agreements will need to be made by

31 March 2004. This allows a period of just over 6 months from the "Effective Date" under the Standard for parties to ensure that the Access Agreements comply with the Standard.

Further, Access Reference Documents will need to have been settled by persons who are "Access Providers" (as defined in the Standard) by **30 November 2003**. For clarification, the Commission expects that Access Reference Documents will be prepared only by those Network Facilities Providers and Network Service Providers who presently own or operate network facilities listed in the Access List, or who provide network services listed in the Access List. The Commission does not expect Network Facilities Providers and Network Service Providers who do not own or operate network facilities in the Access List, or who do not provide network services in the Access List, to prepare Access Reference Documents.

3.9 Comments on the review and amendment provisions in the Standard

The Consultation Paper queried whether the Standard should include review provisions (eg requiring regular review of the provisions of the Standard) as well as reviews triggered by certain events?

3.9.1 Comments received

(a) Maxis suggested that the Standard be reviewed as required, rather than according to any calendar-based timetable. This should be matter for the Commission to determine at the relevant time.

(b) Digi supported regular review provisions (eg for reviews to be conducted at 2 year intervals) and reviews triggered by certain events (eg a review of the Access List or the issue of a new Determination by the Commission).

(c) Telekom Malaysia supported regular reviews of the Standard, so long as these are at least three (3) years apart. However, it notes that there is merit in the view that the Standard should fall away when the Access Code is approved by the Commission.

(d) Celcom agreed with the review period, subject to some drafting amendments.

(e) Time's view was that the review provisions in the draft Standard are acceptable.

3.9.2 The Commission's views

The Commission proposes that the review periods contained in the draft Standard be retained.

3.10 Comments on the inclusion of Dispute Resolution procedures in the Standard

The Consultation Paper queried whether the Standard should contain Dispute Resolution procedures and for comment on the proposed procedures in Annexure A of the draft Standard.

3.10.1 Comments received

(a) Maxis agreed that the Standard should contain Dispute Resolution procedures, but that these should reflect current best practice and align with similar processes elsewhere in the telecommunications regime. It stated that the Standard should encourage parties to attempt to resolve disputes between themselves, and working group arrangements could do this.

(b) Digi strongly recommended the inclusion of Dispute Resolution procedures.

(c) Telekom Malaysia agreed that the Standard can include Dispute Resolution procedures, and suggested some drafting amendments to the Dispute Resolution procedures in Appendix A of the draft Standard.

(d) Celcom agrees to the inclusion of Dispute Resolution procedures, subject to some drafting amendments.

(e) Time strongly supported the inclusion of Dispute Resolution procedures, and outlined the principles that such procedures should embody.

(f) Rashid & Lee suggested that the Dispute Resolution procedures in Annexure A be streamlined, as it considers that the use of both working groups and an Interconnect Steering Group involves unnecessary administration.

3.10.2 The Commission's views

The Commission proposes that the Dispute Resolution procedures in Annexure A of the draft Standard will be retained in the Standard, with some drafting amendments (to clarify issues raised in submissions). Also, the relevant subsection of Annexure A will be amended to clarify that an Access Provider or an Access Seeker will be

entitled to seek resolution of a dispute by the Commission in accordance with section 151 of the CMA. Annexure A will also incorporate the section 151 provisions about when the Commission will decide a dispute (i.e. the Commission must determine a dispute if it is satisfied that the parties will not reach agreement on the matters in dispute or will not do so in a reasonable time, that the notification of the dispute is not trivial, frivolous or vexatious, and that resolution of the dispute would promote the objects in the CMA).

3.11 Other significant drafting comments and amendments

The Commission proposes to incorporate a range of drafting amendments to the draft Standard, based on, or adopting comments contained in submissions, or which have resulted from the Commission's further consideration of the relevant issues. Some of the more significant changes are summarised below:

(a) Confidentiality issues

Digi, Telekom Malaysia, Celcom and Mimos all queried confidentiality issues, particularly in relation to the disclosure obligations contained in the relevant subsection of the draft Standard. These concerns have been noted by the Commission and amendments are to be made to the draft Standard to clarify that disclosure obligations are subject to confidentiality agreements entered into pursuant to the relevant subsections.

(b) Forecasting issues

Maxis, Telekom Malaysia and Celcom raised concerns about the fact that forecasts are not binding under the relevant subsection. In response, the Commission proposes to amend the subsection so that:

(i) if an Access Provider needs to incur significant costs to ensure that it can provide access in accordance with a forecast, it may request the Access Seeker to confirm the relevant forecast. Once confirmed, the forecast is deemed to become an "Order", and the subsection will apply; or

(ii) the parties may agree to an alternative forecasting and ordering model to that set out in the relevant subsections of the Standard.

Again, these proposals are intended to introduce greater flexibility to the Standard, and to ensure that an Access Provider is not financially

disadvantaged as a result of taking reasonable steps to ensure capacity is available to meet a forecast.

(c) Billing procedures

A range of amendments are proposed to be made to the relevant subsection of the draft Standard, including new provisions to address billing errors (as suggested by Telekom Malaysia and Celcom), provisional billing (as suggested by Maxis and Digi) and amendments to the billing dispute process to ensure consistency with Annexure A.

(d) Term of Access Agreements

The minimum term of Access Agreements will be changed from ten (10) years to three (3) years in the relevant subsection of the draft Standard, in response to submissions (there being little support for ten year terms). The draft Standard will also be amended to ensure that the Commission is notified if an Access Provider seeks to materially vary an Access Agreement, or in the event that the parties adopt the terms and conditions of an Access Undertaking which has been registered by the Commission in accordance with the CMA. In the event that parties adopt the terms and conditions of a registered Access Undertaking, the Standard will clarify that the relevant provisions of the Access Agreement will continue in force for the remainder of its term, even if the registered Access Undertaking is withdrawn or expires prior to the expiry of the Access Agreement.

(e) Handover issues

The draft Standard originally outlined Handover Principles, which were designed to ensure that operators could seek efficiencies in relation to the carriage of interconnected calls. In particular, a significant change introduced by the draft Standard was that it specified that calls from a fixed number to a mobile number would be handed over on a near end handover basis. Submissions made in relation to handover issues requested a more flexible approach, and also for more types of calls to be specified in the relevant subsection.

As a result of further consideration of these issues, the Commission proposes to amend the relevant subsection so that it reflects the services on the Access List rather than specific call types. Accordingly, where access is provided to a Service that is included on the Access List as an originating or terminating

service, handover shall be on the basis requested by the Access Seeker (i.e. either on a near end handover or on a far end handover basis). To clarify, for originating services provided by an Access Provider, the terminating operator will be the "Access Seeker", and for terminating services provided by an Access Provider, the originating operator will be the "Access Seeker". However, there will also be scope for the parties to agree to a different approach. The definitions of "Far End Handover" and "Near End Handover" contained in the draft Standard will also be amended.

The Commission's intention is to ensure that Access Seekers have the option of minimising the costs they incur as a result of acquiring access, as well as to ensure that additional flexibility is introduced (reflected in the fact that the parties can agree to approach handover issues in a different way).

(f) Churn issues

The Commission considers that the Standard needs to include some procedures to apply in the event that a Customer wishes to change its service provider (i.e. to "churn" from one service provider to another). A new subsection will be inserted into the Standard.

In addition to the amendments indicated above, a wide range of smaller amendments will be made to the draft Standard, in response to submissions and as a result of further consideration by the Commission.

SECTION 4: CONCLUSIONS

Throughout the present Public Inquiry, the Commission has sought to ensure that the introduction of the Standard will result in efficiency, transparency and fairness for both Access Seekers and Access Providers. In addition, the Commission has also recognised that negotiations between Access Seekers and Access Providers and a flexible approach should be encouraged, where possible.

Achieving balance between all these objectives, and the objectives in the CMA, has been a key objective of the present Public Inquiry process.

Submissions received by the Commission have emphasised that the draft Standard needs to be made more flexible. Accordingly, and as outlined in this Report, the Commission proposes to make some amendments to the draft Standard to ensure that the objective of flexibility is attained, while still ensuring a balanced approach to the other identified objectives (including the objective that the rights of Access Seekers not be diminished by the introduction of a more flexible approach).

The Commission wishes to thank all those who took part in this important Public Inquiry. In particular, the Commission would like to thank all persons who made written submissions for their constructive comments. As noted, the Commission gave close consideration to all submissions received, and the submissions have assisted the Commission to settle the Standard.

The Commission proposes to release the Standard on 14 August 2003.