

Consultation on possible section 30R review of the UBA STD General Terms and Service Description

Date: 2 December 2014

Purpose

1. We are considering conducting a section 30R review of the Unbundled Bitstream Access (UBA) Standard Terms Determination (STD) General Terms and Service Description.
2. The purpose of this paper is to seek the views of interested parties on whether or not we should conduct such a review now, and if so, the appropriate scope of the review.

Background

3. Under the current UBA STD, Chorus is able to offer commercial UBA services at different prices to the regulated UBA service. However, before doing so, Chorus must provide us with notice under clause 10 of the UBA STD General Terms.
4. On 14 May 2014, Chorus announced that it intended to introduce new commercial UBA services (Boost variants).¹ As part of the introduction of the Boost variants, Chorus also proposed the following changes to the regulated UBA service:
 - 4.1 capping aggregate throughput at the handover point, based on a formula of 300kbps per end-user connection, which is shared between those users; and
 - 4.2 withdrawal of VDSL as a regulated UBA service.
5. After receiving a complaint from Telecom (now Spark) that Chorus' proposed changes to the regulated UBA service breached the UBA STD, we commenced an investigation under section 156O of the Telecommunications Act 2001 (Act) on 22 July 2014 (Spark complaint investigation).
6. The Spark complaint investigation was suspended on 16 October 2014 after Chorus put the proposed changes to the regulated UBA service on hold, including in particular, any constraints on the regulated service and the withdrawal of the current regulated VDSL service.
7. Chorus launched Boost VDSL as a commercial UBA service on 1 December 2014 on the basis that its core features are materially different from the regulated UBA service presently being provided.
8. The UBA STD was originally published on 12 December 2007. The last time we updated the UBA STD General Terms and the UBA STD Service Description was on 30 November 2011. This was immediately before the structural separation of Telecom under which Chorus became a separate entity in its own right. The wholesaling incentives of a structurally-separated Chorus are different to those of a vertically-integrated Telecom.

¹ Chorus amended its proposals relating to the commercial variants on 28 July 2014.

9. Submissions received from the industry during the Spark complaint investigation and our processes under clause 10 of the UBA General Terms have highlighted the need for greater clarity on Chorus' obligations under the UBA STD.
10. In addition, the external counsel who provided us with legal advice on whether or not Chorus' proposed changes to the regulated UBA service breached the UBA STD identified a number of areas where the UBA STD would benefit from clarifications.
11. The changes to the industry structure since the UBA STD was first drafted and last amended provide further reasons for conducting a review.
12. Section 76(a) of the *Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011* provides that section 30R of the Act does not apply in relation to Chorus' UBA service (except as provided in sub-Section 73 and 77) for the period ending three years after separation date. This prevented a review of the type under discussion until 1 December 2014.
13. As the statutory freeze on reviewing the UBA STD has expired we are now considering conducting a section 30R review of the UBA STD General Terms and Service Description to provide greater clarity and certainty to the industry and to ensure it is 'fit for purpose'.

Potential scope of the section 30R review

14. The areas such a review could cover include:
 - 14.1 whether or not the clause 10 process for assessing proposed commercial UBA services is workable and appropriate;
 - 14.2 the role of the technical characteristics when assessing whether or not new services are regulated services or commercial services (for example, should a proposed new service be held to fall outside the Schedule 1 description on the basis of particular features – ie, on the basis of the extent to which it exceeds the minimum requirements for those features, or on the basis that the features are not provided for in the Schedule 1 description);
 - 14.3 changes to the technical characteristics in the UBA STD Service Description;
 - 14.4 the role of access principle 2 under clause 5 of Schedule 1 to the Act, as incorporated into the Schedule 1 description by clause 2.3 of the UBA STD, that "the service must be supplied to a standard that is consistent with international best practice";
 - 14.5 the practical effect of the requirement in the "Guiding Principles" in the UBA General Terms that the parties must "carry out their

obligations under the UBA Terms in good faith and in furtherance of those purposes”, for example:²

- 14.5.1 in what circumstances network management can be imposed;
- 14.5.2 in what circumstances traffic can be prioritised; and
- 14.5.3 in what circumstances a regulated service can be withdrawn;
- 14.6 whether the UBA STD should require the provision of regulated services using any xDSL technology that increases the maximum downstream speed where it is available (for example, that VDSL has to be provided when a DSLAM card is installed in relation to the line);
- 14.7 the extent to which the UBA STD requires, or should require, the evolution of the regulated service to meet the demands of end-users, which may require investment that will be recognised in the FPP; and
- 14.8 the extent to which the access provider should take account of the reasonable expectations of access seekers, particularly where they have made investments based on those expectations.

We are interested in your views

- 15. We are interested in your views on the following questions:
 - 12.1 Do you agree that it would be appropriate for us to conduct the review of the UBA STD now?
 - 12.2 If not, would it be appropriate to conduct the review in the future, and if so, when?
 - 12.3 Do you agree with the areas that we might cover in the review?
 - 12.4 Are there any other areas or matters which we should cover in the review?
- 16. Please provide your views by 23 January 2015. Please address responses to Simon Thomson, c/o telco@comcom.govt.nz.

² The words “those purposes” mean “the purposes set out in the Act, and in particular, Section 18 of the Act.” See clause 2.1 of the UBA General Terms.