

3 October 2014

Matthew Clark  
Senior Analyst – Regulation Branch  
Commerce Commission

**By email only:** telco@comcom.govt.nz

Dear Matthew,

**CROSS-SUBMISSION ON THE COMMISSION'S CONSULTATION PAPER ON ISSUES RELATING TO CHORUS' PROPOSED CHANGES TO THE UBA SERVICE**

1. Thank you for the opportunity to comment on the submissions made by parties on the Commission's independent legal opinion.<sup>1</sup>
2. CallPlus largely supports the submissions made by and on behalf of Spark. Conversely, we consider that the submissions made by and on behalf of Chorus fail to properly analyse Chorus' conduct and trivialise the fundamental issue – that is that Chorus does not have the ability to withdraw or artificially constrain the regulated service that it is providing (and to do so would breach the STD). Accordingly, the bulk of Chorus' submissions do not appear relevant.
3. In particular, we agree with Spark that: [emphasis added]
  - a. *“Chorus' proposed approach is **opportunistic** and will have **significant implications for RSPs and consumers, undermining the outcomes the STD seeks to achieve.**”<sup>2</sup>*
  - b. *“There is **no express provision in the STD** that gives Chorus the ability to **actively manage throughput.**”<sup>3</sup>*
  - c. *“[i]t was not contemplated that when the actual service levels (comfortably) exceeded the floor or new technology was introduced, the [access provider] would have the ability to **move backwards or take steps to halt progress to degrade the performance of the service, at any time and to any level of its choosing.**”<sup>4</sup>*
  - d. *“[i]t is difficult to see how a **monopoly service provider** which is taking steps that will **reduce the quality of a regulated service and affect the downstream services** that can be offered, while at the same time improving the attractiveness of [what it assumes is] a parallel commercial (non-regulated) offering, **could be said to be acting in good faith and in furtherance of the section 18 purpose statement.**”<sup>5</sup>*
4. We also agree that “...good faith obligations in a statutory context ... go further than they do in a contractual context. They go beyond compliance with the black letter of the law, requiring

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<sup>1</sup> Legal opinion from David Laurenson QC and James Every-Palmer, 3 September 2014.

<sup>2</sup> Spark, Submission on consultation paper on issues relating to Chorus' proposed changes to the UBA service, 18 September 2014 (**Spark Submission**).

<sup>3</sup> Russell McVeagh, Submission on behalf of Spark, 18 September 2014 (**RMV Submission**), para 29.

<sup>4</sup> RMV Submission, para 16.

<sup>5</sup> RMV Submission, para 18.

*adherence to the spirit of the law: "A good faith provision offers a warning that game playing at the margins of a statutory prescription or obligation may attract a finding of liability."*<sup>6</sup>

5. In addition, we **attach** to this letter a schedule of other key submissions made by Spark that we support.
6. We have instructed Matthews Law to review and provide their views on the submissions. A copy of their memo is **attached**. You will see that, in their view (and consistent with our views set out in this letter):
  - a. Spark's submissions are broadly correct, and Chorus' submissions do not appear to "*accurately define or address the fundamental questions*" or "*properly analyse the relevant conduct*".
  - b. The fundamental questions (and summaries of the answers to those questions) are:
    - i. ***Does Chorus have the right to unilaterally withdraw or artificially constrain the regulated service that it is providing?*** The answer to this question is no – there is no provision enabling Chorus to do this. An access provider cannot "read in" a right to unilaterally define the level at which it provides the regulated service.
    - ii. ***What is the effect of the good faith obligation in clause 2.2.1 of the STD General Terms?*** The answer to this question is that the statutory obligation to act in good faith is explicit and unambiguous in the STD. Case law confirms that good faith obligations in this (statutory) context "*forbid opportunistic behaviour*". In the absence of an express ability to withdraw or artificially constrain the regulated service, or even if there is simple ambiguity, it seems clear that there must be very real doubts about whether this conduct could be regarded as being in "good faith".
  - c. Chorus' conduct must be considered in the context of the relevant regulatory regime.
  - d. The Commission would clearly be justified in clarifying the STD under s 58 or s 156O(2)(b)(i) of the Telecommunications Act (**Act**), if it thought that was necessary to remove any potential ambiguity. The Commission may also be satisfied (having sought and obtained *independent* legal advice) that enforcement action is appropriate. A review under s 30R may also be appropriate on 1 December.
  - e. If Chorus persisted with its proposals, it would seem appropriate for the Commission to seek an interim injunction as there appears to be a serious question to be tried, and the balance of convenience would likely favour the granting of such relief.
7. CallPlus supports the views set out in the Matthews Law memo.

#### **Next steps**

8. We appreciate the Commission giving advance notice of its proposed timetable for considering the issues raised by Spark's complaint (including its intention to make a final decision by 25 November).<sup>7</sup> However, we reiterate that the Commission has various options available to it under the Act (as outlined in previous submissions, this letter and the Matthews Law advice), some of which do not rely on the complaint from Spark, to address these issues if it considers that earlier action is warranted.

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<sup>6</sup> Matthews Law, Consultation paper on issues relating to Chorus' proposed changes to the UBA service, 18 September 2014.

<sup>7</sup> Email from Ben Oakley, New UBA Variants - timeframe update, 1 October 2014.

9. Having now submitted extensively on these issues, we look forward to the Commission's draft decision on 29 October (or earlier action, if necessary).
10. Please note that we have not had sufficient time to fully consider the implications of Chorus further changes to their proposed approach in the 1 October dialogue session.
11. Please do not hesitate to contact me for additional information.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'G. Walmsley', with a large, sweeping flourish at the end.

**Graham Walmsley**

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**ATTACHMENT**  
**Support for submissions made by Spark**

CallPlus supports the following submissions made by Spark (in addition to those already noted in the body of our letter):

1. *“Chorus’ proposed changes to the regulated service rely on an artificially narrow interpretation of the STD. When properly interpreted, the regulatory framework does not permit Chorus to engage in conduct that would not be left unchecked in a competitive market, as this would be inconsistent with section 18.”*<sup>8</sup>
2. An argument that the “minimum level” is all that Chorus is required to provide *“ignores the fact that the STD is an instrument of regulation”*.<sup>9</sup>
3. *“taking Chorus’ position to its logical end point... it would be open to take steps now to reduce throughput to a minimum of 32 kbps – with serious and wide ranging impact for end-users. That cannot have been the purpose and intent of the STD.”*<sup>10</sup>
4. The requirement to act in good faith does not introduce additional obligations on Chorus – rather it amounts to *“recognition that the UBA STD, properly interpreted, does not permit Chorus’ proposed changes to the regulated service.”*<sup>11</sup>
5. *“Spark and other RSPs have reasonably relied upon the ability to consume an unconstrained UBA service, have on that basis invested in their own competitive retail products and would, if Chorus is entitled to implement their proposals, suffer damages to their detriment.”*<sup>12</sup>
6. *“Conduct which would not go unconstrained in a competitive market should not be permissible within the regulatory framework, or within the STD (or any STD).”*<sup>13</sup>
7. *“The STD, read as a whole, makes it clear that it was never envisaged that Chorus could unilaterally impose a throughput limitation on the service, charge a premium for the regulated service on the basis of differentiated throughput or unilaterally withdraw the regulated VDSL service.”*<sup>14</sup>
8. *“Even where the Commission permitted WVS to be a commercial service, it did so only on the basis that the regulated service would not be withdrawn or degraded and would continue to be provided under the STD terms. Further, it did so in a way that expressly confirmed VDSL as a technology was caught by the STD.”*<sup>15</sup>

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<sup>8</sup> RMV Submission, para 5(a).

<sup>9</sup> RMV Submission, paras 9-10.

<sup>10</sup> RMV Submission, para 30(b).

<sup>11</sup> RMV Submission, para 26.

<sup>12</sup> Spark Submission, para 11.

<sup>13</sup> Spark Submission, para 26.

<sup>14</sup> Spark Submission, para 2.

<sup>15</sup> Spark Submission, para 21.