18 September 2014

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Commerce Commission

By email only: telco@comcom.govt.nz

Dear Mr Clark

CONSULTATION PAPER ON ISSUES RELATING TO CHORUS' PROPOSED CHANGES TO THE UBA SERVICE

1. Thank you for the opportunity to comment on the legal opinion provided to the Commission by David Laurenson QC and James Every-Palmer (**Opinion**). We applaud the Commission for its prompt action following the s156O complaint from Spark and for consulting on the Opinion.

2. CallPlus largely supports the views expressed in the Opinion, and in particular agrees with the conclusion that Chorus' proposed changes to the regulated UBA service would likely breach the STD. However we note that this language appears to have been carefully crafted, and our view is that the proposed changes would **in fact** breach the STD.

3. We have instructed Matthews Law to provide views on the Opinion. A copy of their advice is attached. You will see that they:

    a. broadly agree with the Opinion and its conclusions;

    b. notes direct arguments that there is no ability under the STD to withdraw or vary the regulated service;

    c. consider that there is a fundamental inconsistency between setting a TSLRIC price and then varying the underlying service;

    d. consider that the good faith obligations go further than the Opinion indicates, especially in this context.

4. The Opinion and Matthewslaw advice affirms a number of the views expressed by us, Spark and other interested parties in our submissions on the Issues Paper. In particular, that:

    a. Chorus must carry out its obligations in good faith and in furtherance of the section 18 purpose. This is explicit in the STD and the Telecommunications Act (**Act**).[1]

    b. Chorus' proposed changes to the regulated UBA service, especially when taken together with the introduction of Boost, are clearly inconsistent with those obligations and appear

[1] Opinion, paras 6 & 7. CallPlus Limited, Submission on the Commerce Commission's Issues Paper: Assessing Chorus' new UBA variants – Boost HD and Boost VDSL, 18 July 2014 (**CallPlus Submission**), para 63. Telecom NZ, Boost and Commercial Handover Connection Services issues paper – Submission | Commerce Commission, 18 July 2014 (**Spark Submission**), para 92.

to be an attempt to migrate RSPs and end-users to unregulated (ie not price protected) services.[2]

c. Neither the STD nor the Act permits Chorus to degrade the regulated UBA service. In fact, the STD specifically requires a FS/FS service.[3] Further, the (outdated) 32kbps minimum throughput requirement is a universal "rock bottom" requirement, not an indicator of acceptable performance.[4]

d. If Chorus was permitted to degrade (or was not prevented from degrading) the regulated UBA service, that service would not evolve with user demand and technology, and risks becoming obsolete over time. In fact, it is obliged to maintain this service on a "business as usual" basis, consistent with the regulatory regime (including TSLRIC pricing). Chorus' proposed changes cannot be for the long-term benefit of end-users.[5]

5. We also agree that "[t]*he "capping" of the regulated UBA service also seems to create a mismatch between what Chorus is being paid for (that is a service which improves over time due to ongoing investment in its network) and what it would be providing (a service with a capped average throughput)*."[6] Any artificial degradation of the regulated UBA service should be reflected in the price that RSPs pay for that service. This point is hugely significant and appears to be ignored by Chorus, whose suggested approach is fundamentally inconsistent with a regulated service.

6. We make the following further points:

a. We agree that Chorus' proposed changes to the regulated service appear to have the "*ulterior motive of making Boost services more attractive by comparison and migrating RSPs away from the regulated (price controlled) service*"[7] and that such a motive is clearly inconsistent with Chorus' "good faith" obligations.

However we consider that this motive is not critical to the analysis. Even absent the concurrent launch of the Boost services, Chorus' proposal to unilaterally withdraw and/or artificially constrain the regulated service (or a part of it) would breach the STD, including the "good faith" obligations.[8] To do so would not be "*loyal to the promise*". Further, as the Opinion notes, it cannot be Chorus' decision to define or vary the regulated UBA service.

b. We reiterate our earlier submission that Chorus is not permitted to unilaterally withdraw VDSL under the STD, Act, or otherwise.[9] The STD terms provide only limited rights for Chorus to terminate the regulated UBA service (or part of it), none of which apply here. As the Commission has previously confirmed, "[Chorus] *is not able to cease offering a part of the UBA service under the UBA Terms, until the Commission has amended the UBA Terms*."[10]

7. Please do not hesitate to contact me for additional information.

[2] Opinion, para 10. CallPlus Submission, paras 65-67. Spark Submission, paras 15 & 72. InternetNZ Submission: New UBA Variants Issues Paper, 18 July 2014 (**InternetNZ Submission**), para 8. TUANZ submission on Chorus UBA Variants, 18 July 2014, para 3. Kordia, Assessing Chorus' new DBA variant - Boost HD and Boost VDSL, 15 July 2014, para 10.
[3] CallPlus Submission, para 38. Spark Submission, para 17. InternetNZ Submission, para 13a.
[4] Opinion, para 12a. CallPlus Submission, paras 35-40. Spark Submission, paras 19-23. Vodafone Submission on assessing Chorus' new UBA variants – Boost HD and Boost VDSL: Issues Paper, 18 July 2014 (**Vodafone Submission**), paraF2.
[5] Opinion, paras 10ciii3 & 10d. CallPlus Submission, para 2.
[6] Opinion, para 10e.
[7] Opinion, para 10a.
[8] CallPlus Submission, paras 59-64.
[9] CallPlus Submission, paras 51 & 59-61.
[10] Standard Terms Determination for the designated service Telecom's unbundled bitstream access, Decision 611, 12 December 2007, para 346.

Yours sincerely,

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