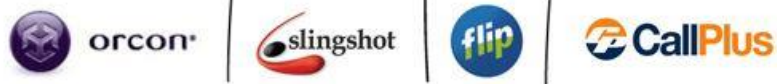


## **CallPlus Limited**

# **Submission on the Commerce Commission's Consultation Paper: Proposed view on regulatory framework and modelling approach for UBA & UCLL services**

## **Public Version**

**6<sup>th</sup> August 2014**



1. Thank you for the opportunity to comment on the Commerce Commission’s consultation paper outlining the Commission’s proposed view on regulatory framework and modelling approach for UBA and UCLL services (**Consultation Paper**). This submission is made by CallPlus Limited (**CallPlus**), representing the views of Slingshot, Orcon and Flip.
2. We would like to make the following comments.

### **Relativity**

3. Relativity remains a critical issue for CallPlus as the largest unbundler in New Zealand. Our unbundling investment has a significant bearing on the viability of our business and the competitive landscape in New Zealand. We would like to make the following points:
  - a) Following our acquisition of Orcon we are the third largest fixed line provider in New Zealand. Uniquely positioned with a 15% market share, larger than all the other smaller RSPs in total. It is not a coincidence that we are also the largest unbundler, by a considerable margin as outlined in previous submissions.
  - b) Our unbundled network allows us to provide greater control and better quality services to end users. Our UCLL based broadband performs significantly better than current UBA service and our brands, Flip, Slingshot & Orcon are able to create compelling, competitive products as a result. The rapid growth of Flip, which we estimate is now the 6<sup>th</sup> largest ISP in New Zealand, is a testimony to this.
  - c) **Chorus’ recent announcement of Boost Services and the associated constraints proposed for the regulated UBA service highlights the importance of our LLU investment and our ability to control the service end-to-end.** CallPlus has no plans to apply similar constraints to our unbundled lines and our customers will continue to benefit from having a full speed service with no constraints on the ‘last mile’. It should be noted that CallPlus also wholesales services, including UCLL, to other significant RSP’s.
  - d) To demonstrate the point that **an efficient operator reuses its existing assets** CallPlus plans to make further investment in UCLL order to rationalise and redeploy Orcon’s equipment in order to increase our coverage, improve efficiencies and leverage our existing assets.
  - e) Copper is intended to provide a competitive constraint to fibre. **Copper will still be the access network used by the majority of New Zealanders in 2020** even if UFB achieves a 40%+ uptake, double Chorus’ target. Unbundling remains a critical component – particularly in the light of Chorus’ recent announcements of plans to apply constraints the regulated UBA service that uses their own DSLAMs.
4. **Upwardly biasing UCLL prices will have a significant detrimental impact on our business with flow on consequences for both competition and end-users.** If upwardly biasing UCLL prices has the effect of forcing CallPlus to prematurely migrate its unbundled services onto fibre it will have a significant impact on our business, our investment and our

ability to compete. Given the criticality of our business to competition in the fixed line market this would not be in the best long-term interests of consumers.

### **Modelling**

5. **Re-use of Assets:** CallPlus supports the view that assets in legacy networks which are able to be utilised in new networks wouldn't be valued on a replacement cost basis. This would be the expectation of investors, who would expect operators to reuse assets to avoid inefficiencies. CallPlus would support a 'brownfield' rather than 'greenfield' approach in deriving the costs of the MEA.
6. **Fixed-Wireless Access (FWA):** CallPlus is pleased to see the Commission include FWA in the MEA, however we do not agree with the approach of limiting this to the existing RBI footprint. Taking a forward looking approach means considering the various technologies available to optimise the deployment. If FWA is more efficient then logically an efficient operator would utilise it regardless of location. Accordingly the use of FWA should not be limited to the existing RBI footprint which is dictated by many legacy decisions and constraints.
7. This approach also ignore the significant existing, and rapidly evolving, capability of LTE. That is a significant omission. Limiting the consideration of FWA using LTE to the RBI footprint given its performance capability does not seem justified in CallPlus' view.
8. **Government Funding:** CallPlus does not agree with the Commissions preliminary view of not including government funding of RBI in its model. Government funding is part of the New Zealand 'landscape' and a hypothetical new network builder should be considered to have access to funds, reflecting the reality of the NZ environment.
9. **Sharing of network elements:** Sharing of network elements is integral to building an efficient and effective network. Northpower provides a good, real life example of several aspects of this. Sharing can be in many and different forms. CallPlus supports the view that the Commission should not exclude any type of sharing arrangements from its thinking and incorporate relevant sharing into its model.
10. **Optimisation:** The optimisation of nodes and trench lengths is likely a critical component of the model. CallPlus would welcome the Commission outlining its approach to this issue and consulting with Access Seekers on this.

### **Reasonable Investor Expectations**

11. We are concerned at the suggested adoption, and potential application, of the "reasonable investor expectations" test, which is stated as being to help build predictability into regulation (para 80 of the Consultation Paper).
12. **This test is not noted, let alone defined, in the Act.** Yet the Commission appears to have imported and applied this test. In our view, this approach must be incorrect.
13. As the Commission has itself noted, consistent with the advice from Dr James Every-Palmer, the correct starting point is the TSLRIC objectives.

14. The overriding objective of s18 is to “*promote competition [...] for the long-term benefit of end-users*”. Subsection 2 (“efficiencies”) provides that when considering the primary subsection (i.e. s18 (1)) it is necessary to take efficiencies into account. This is clearly drafted as a consideration for determining whether or not, or the extent to which, that overriding objective is met. (With respect to efficiencies, we consider that the efficiencies available from re-using or sharing existing assets should be taken into account.)
15. Subsection 2A (“incentives to innovate”) of s18 was incorporated into the Act as part of the 2011 amendments. It is difficult to see how either subsection could be used as a basis for importing such a strong predictability test in this context. If one accepts Chorus’ consistent submission that we are in “transition”, then that would imply that the innovation related to new technology, or at least innovative ways of delivering the older technology. (Again, we note that the latter would involve efficient use of existing assets, such as asset sharing.)
16. Related to the above:
  - a) It is not clear why the linkage between predictability and investment has been implied. We wonder if the suggested approach, and the thinking behind it, has perhaps been influenced by the approach taken to certainty in the regulation of Input Methodologies under Part 4 of the Commerce Act. Clearly, again following the Commission’s own approach to statutory interpretation, if the legislature had intended this approach, it would have clearly specified this in the Act, which it has not.
  - b) It is not clear how the arguments about externalities and migration efficiencies are to be quantified (or at least qualitatively addressed) and/or incorporated into this test.
17. Finally, even if the Commission were to “import” this test, we submit that greater clarity is required. Among other things we recommend that the Commission would need to clarify which “investors” or “expectations” should be taken into account, or how “reasonableness” is to be determined. We note for example that CallPlus has made significant investments in UCLL, and has innovated, which presumably any such test would need to take into account.
18. In summary, we submit that it is incorrect to import a new test and superimpose it over clear legislative obligations (or at the very least depart from clear legislative language). We consider that the adoption of a new test confuses the analysis and is legally incorrect. If such a test were to be adopted, we submit that greater specificity would be needed as to how this was to be applied within the statutory framework.
19. From a practical perspective (and related to the legal analysis above) we make the following further points:
  - a) CallPlus, as did everyone, anticipated price reductions from the change to cost based services. CallPlus is already facing a 20%+ increase in its urban UCLL costs as a result of averaging of UCLL - was that in line with reasonable investor expectations (ourselves & others) when we commenced unbundling?

- b) CallPlus is concerned that interpretation of a reasonable investor is based on Chorus' PR. A reasonable investor would certainly have expected a price drop at the end of a three year transition period where Chorus has enjoyed a 'price freeze' in contrast to global and NZ trends.
- c) A reasonable investor was probably pleasantly surprised by Chorus' exceptional dividend payment policy for the majority of the 'price freeze' transition period.
- d) Investors have already factored in the Commission's draft price into Chorus' share price and CFH have renegotiated their arrangements to further accommodate Chorus.
- e) Several interested parties have already expressed the view that Chorus will continue to make more than adequate returns on their investment.

### **Process**

20. We have an overriding concern, as do other RSP's, that the Commission should not squeeze this process into a timeframe given its criticality and the asymmetry of information between Access Seekers and Chorus. We have previously expressed our concerns with respect to reliance on Chorus data and would prefer to see the Commission take the time to consult at various steps to allow input from Access Seekers drawing on their experiences of deployments and networks.

Please direct any questions in relation to this submission to: -

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