



Consultation paper on issues relating to Chorus' proposed changes to the UBA service

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Executive Summary

1. Thank you for the opportunity to comment on the legal opinion provided to the Commission by David Laurenson QC and Dr James Every-Palmer (**opinion**).
2. We support and agree with the fundamental points made in the opinion. 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.
3. Russell McVeagh, in the attached opinion, supports the conclusions of the opinion; that any of these acts would amount to a breach of the STD.
4. Further, Russell McVeagh notes that the STD must be read within the context of the regulatory framework and Act. Chorus' proposals rest on the assumption that the STD is but a commercial contract, capable of being mis-applied where one party finds a clever narrow interpretation of it. But the STD is not a commercial contract, as the Commission explicitly affirmed in its draft decision setting the UCLL STD. It is an instrument of the regulatory framework and Act – an instrument of the s18 purpose statement. So where an action would be so obviously contrary to the s18 purpose – such as a monopoly service provider proposing to reduce the quality of the service they are offering while maintaining the price of that service at its existing level - it will also be contrary to the STD.
5. The STD also captures a wider set of principles that provide guidance for how the UBA service should be provided:
 - a. The UBA service is intended to be a building block service that would be suitable for the full range of internet services desired by end users and would maximise the innovation and flexibility for RSPs; and
 - b. The UBA service would remain fit for purpose for all internet purposes and for all users, not a sub-set of basic applications or low demand users.
6. Chorus' proposed approach cuts across these core principles, effectively marginalising the regulated UBA service and undermining the policy outcomes it is intended to achieve.
7. Under these circumstances, where:
 - a. The STD makes clear the standard to which the UBA service should be provided, and the obligation on the access provider of that standard to act in good faith;
 - b. There are clear principles and objectives indicating how the Commission intended the UBA service to be provided;
 - c. The UBA service has been provided in accordance with these principles and objectives for a significant period of time; and
 - d. There is little doubt the proposed actions of the access provider would be contrary to all of the above;

a clarification is possible and entirely appropriate. While it is clear to us that the determination in its current form does not permit throttling or withdrawal of the service, Chorus has a different view. We want certainty and to put the current proposals behind us, so that we can move forward as an industry and re-engage with Chorus on the question of what commercial services it could offer that we would value, and would pay a premium for, and that would be able to stand alone without contemporaneous degradation of the existing regulated service. The Commission can and should provide this certainty by clarifying how the terms of the STD should be interpreted.

Introduction

9. Thank you for the opportunity to comment on the Commission's consultation paper on issues relating to Chorus' proposed changes to the UBA service and the legal opinion provided to the Commission by David Laurenson QC and Dr James Every-Palmer (**opinion**).
10. We support and agree with the fundamental points made in the opinion. In this submission we have focussed on the framework for interpreting the provisions of the UBA Determination. The Determination, read as a whole, makes it clear that it was not envisaged that Chorus could create a throughput limitation on the service or, more importantly, be in a position to charge a premium to the regulated service on the basis of differentiated throughput. We also set out reasons why the regulated VDSL service cannot be unilaterally withdrawn.
11. We have included, together with our submission, a legal opinion from Russell McVeagh which comments on the opinion. Russell McVeagh are of the view that the opinion is correct. They go further to point out that 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. They also point out that this process presents an ideal case for the Commission to use its Clarification powers.
12. Chorus' proposed approach is opportunistic and will have significant implications for RSPs and consumers, undermining the outcomes the STD seeks to achieve. If implemented, these proposals would be a breach of the good faith requirements set out in the general terms.

Our views on the opinion

13. We agree that the provisions of the UBA STD should be properly understood as those contained in the Determination read together with the General Terms and Supporting documents and in light of the Telecommunications Act 2001 (**Act**).
14. When read together, it is evident that the Determination requires that the regulated UBA service be provided in a way that maximises the DSL capabilities available on a line in order to ensure that end users can use broadband to its full potential. It is also evident from the Determination that class of service differentiations other than those specified for the EUBA variants, would not ordinarily be permitted where they would be inconsistent with the FS/FS benefits. Throughput differentiation falls squarely into this category, as does removal of a DSL technology that is currently being used to provide the regulated service.
15. If the effect of Chorus' proposals is that we are compelled to either pay a monthly premium on each line or incur other inefficient costs to consume UBA, the proposal would materially hinder the attainment of competitive outcomes in the market and be inconsistent with section 18.
16. In our view the UBA service must continue to meet all reasonable demand. Capacity and capability enhancements over time to meet such demand form part of that expectation.

The STD captures core UBA principles

17. We agree with the opinion that the UBA decisions and the manner in which the STD has been applied provide a set of clear principles that the Commission has consistently applied over time. As noted in the Determination:
- a. The Commission was concerned to create a regulated UBA service which left dimensioning and retail differentiation to the RSP – where the competitive dynamic would drive an optimal outcome;
 - b. The regulated UBA service was not static, but was capable of evolving (and did evolve) as technology and end-user demand changed over time – ADSL became ADSL the ADSL 2+ and then VDSL; and
 - c. The Commission saw these characteristics as being consistent with and required by s18.
18. While we appreciate the opinion was focussed on proposals to limit throughput available to the regulated UBA service, it rightly recognises the relevance of questions relating to whether network management and traffic prioritisation could be imposed and the implications of a full speed requirement for provision of VDSL based variants.
19. The STD also captures a wider set of permissive principles that guide questions on how the service should be delivered. As set out in our previous submissions, the UBA service is intended to be an input that supports the full range of internet enabled services and facilitates innovation and flexibility by RSPs. The Commission was clear in Decisions 568, 582 and 611 that the regulated UBA service was designed to be the primary input into all retail broadband services, targeted at all New Zealanders, and to grow with New Zealanders' changing bandwidth requirements. For example, in Decision 611 the Commission concluded:¹

a single internet-grade FS/FS Basic UBA service would best give effect to s 18 ...

continuing to limit the upstream line speed of the Basic UBA service to 128 kbps would be unlikely to meet the changing needs of residential and SME broadband end-users where there is increasing use of symmetric web based applications such as social networking websites, video content, and increasing file sizes in general for residential and SME end-users ...

a single FS/FS Basic UBA service provides Access Seekers with the maximum flexibility to use bitstream access to differentiate their retail services

20. In the STD “Full Speed”

Means the maximum downstream line speed and maximum upstream line speed that the DSLAM will support.

¹ Decision 611, paras 59 and 107.

21. The Commission has consistently applied the STD in this way, and with non-discrimination and equivalence obligations supporting this approach, the regulated UBA service has continued to grow in lockstep with end-users changing needs and in accordance with the “full speed/full speed” requirement. In other words, the UBA service is intended to be an undifferentiated full speed service that operates as fast as the technology permits. The Commission rejected Telecom proposals for differentiated UBA service on a number of occasions.² 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.
22. Accompanying these principles is a clear expectation that the regulated UBA service would be a building block service on which RSPs would innovate and provide services to customers. This was an input service that was expected to continue to meet consumers changing needs, remaining suitable for end users [59 of D611, referred to at 9g of the legal opinion]:
- [the proposed limitation would mean the service would be unlikely to] meet the changing needs of residential and SME broadband end-users where there is increasing use of symmetric web based applications such as social networking websites, video content, and increasing file sizes in general for residential and SME end-users.*
23. In other words, the UBA service would remain fit for purpose for all internet uses and users, not a sub-set of basic applications or low demand users.
24. We believe that the proposal is accordingly inconsistent with a number of STD obligations and principles which, in themselves, seek to support these core principles set out above.

Chorus’ proposal cuts across the core principles of the STD and s18

25. In principle Chorus proposes that the BUBA service would be repurposed to meet the needs of a decreasing number of basic users (20% of all users). Chorus’ proposed throttling of the UBA service and proposed withdrawal of VDSL variant cuts across the principles inherent in the STD. If the Chorus approach were to be applied:
- a. The UBA service would no longer perform at the full speed of the DSLAMs. Applying a constraint to the UBA service will, by its very nature, prevent the access line from achieving the full speed of the DSLAM;

² Telecom has argued the Commission should: impute price for each wholesale bitstream service and the Commission should preserve its retail pricing structure [D568], define a range of wholesale services [D582], impute separate ISP charge based on virtual path consumption [reconsideration of D582], and set separate speed based services [D611].

- b. The UBA service would no longer remain relevant for all end-users internet needs; and
 - c. The effect of constraining the regulated service would be to introduce the very wholesale service differentiation that was specifically rejected by the Commission a number of times in the past.
26. 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).
 27. Permitting Chorus to degrade and withdraw services which RSPs have come to rely on for the purpose of increasing its price is the kind of conduct that is inconsistent with section 18. It is clearly not the kind of conduct that would be left unchecked in a competitive market.
 28. If Chorus were permitted to constrain the regulated UBA service there would be significant implications for RSPs and consumers. We set out the significant consumer impacts of a constrained service in our 15 August cross submission. In short, all consumers on a link would be impacted by throttling of the UBA service on that link. By constraining a link carrying on average 300kbps to 250kbps, customers' service speeds would decline by 18% and sensitive applications would become frustrating to use.
 29. Chorus proposed in its 15 August cross submission to increase the proposed constraint by 20% from 250kbps to 300kbps [16]. The impact of this is that the degradation on some links will be deferred by around 4 months (we expect around 20% of customers will see an immediate impact). In other words, if constraints were applied from the end of September, at current growth rates around 40% of customers will suffer a performance degradation by around March 2015, increasing to around 80% by the end of 2015. Chorus has also confirmed that it intends to withdraw the VDSL technology that forms part of the regulated service.
 30. We believe that the potentially significant customer impacts mean that, in practice, RSPs will be required to migrate significant numbers of customers on to Chorus' commercial service. The proposal would make the regulated service materially less relevant in the market, requiring RSPs and consumers to pay a premium above cost for the commercial alternative.

A clarification is appropriate

31. We think that this process presents an ideal opportunity for the Commission to utilise its powers to issue a Clarification. It is clear to us that the determination in its current form does not permit throttling or withdrawal of the service. The advice to the Commission in the opinion is that Chorus' proposals are a clear breach of the STD (but that there are terms that might be made clearer were the STD to be re-written in a structurally separated world, rather than in the vertically integrated world the current STD was drafted in).
32. In these circumstances a Clarification by the Commission seem the most efficient way to provide certainty to all parties. In fact, it is difficult to contemplate a more appropriate set of circumstances for the use of this power – the Commission would not be making any change whatsoever to the effect of the STD or to the clear principles and intentions that sit behind the STD.

33. Within that process, the Commission could provide clarity to Chorus and RSPs that the service cannot be throttled, Chorus cannot provide unreasonable network management on the service, and provide guidance on how best to work together to achieve the objects of the Determination in good faith.

END

Attachment: Russell McVeagh legal opinion

Provided as a separate document.