

TO: Sasha Daniels, Senior Counsel - Competition & Regulation, Spark
FROM: Craig Shrive, Sally Fitzgerald and Emma Rae
DATE: 18 September 2014
SUBJECT: Chorus' proposed changes to the regulated UBA service

Introduction and executive summary

1. You have asked us to provide our views on the opinion provided to the Commerce Commission ("**Commission**") by David Laurenson QC and James Every-Palmer discussing the legality of Chorus' proposed changes to the delivery of the regulated UBA services ("**UBA Opinion**").¹ The Commerce Commission has released a consultation paper seeking views on the matters raised in the UBA Opinion.²
2. The UBA Opinion addresses the relatively narrow question of whether certain Chorus proposals would breach the UBA STD. We agree with the findings in the UBA Opinion on this issue. The more fundamental question though, which we believe the Commission should be considering, is whether the regulatory regime under the Telecommunications Act 2001 ("**Act**") should permit Chorus' proposed actions and, if not, what steps it should take as regulator to prevent them.
3. The UBA Opinion (and submissions from access seekers) makes a strong case that Chorus' proposed changes would:
 - (a) conflict with the section 18 purpose statement, as they would be likely to:
 - (i) result in a regulated service which is constrained, no longer capable of evolving over time (with what we are instructed would be significant adverse impact on end-users in the short term), and will become progressively less competitive with the Boost commercial services that Chorus proposes to offer;³
 - (ii) create market dynamics which mean end-users would be denied the protections of the regulated service (including in relation to price changes);⁴ and
 - (b) result in significant changes to the regulated UBA service as it was envisaged by Decisions 568, 582 and 611.⁵
4. This should be sufficient for the Commission to conclude that Chorus' proposed changes should not be allowed to proceed.

¹ David Laurenson QC & James Every-Palmer *Proposed changes to the regulated UBA services* 3 September 2014 ("**UBA Opinion**").

² Commerce Commission *Consultation paper on issues relating to Chorus' proposed changes to the UBA service* 4 September 2014.

³ UBA Opinion at paragraph 10(c)-(e).

⁴ UBA Opinion at paragraph 10(f)-(g).

⁵ UBA Opinion at paragraph 10(h).

5. We agree with the conclusion set out in the UBA Opinion that the proposed changes would likely breach Chorus' obligations to carry out its obligations under the STD⁶ in good faith and in furtherance of the purposes of the Act.⁷ In this context:
- (a) 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.
 - (b) The proper interpretation of the STD is heavily informed by the section 18 purpose statement and by the reasoning process set out in the series of UBA decisions leading up to and including the Commission's decision report in relation to the current UBA STD. In our view, this development illustrates that the intention was to define the terms of the STD so that the regulated service would evolve over time as end-user demand increased and available technology improved.
 - (c) In the context of the STD, the "good faith" obligation requires Chorus to carry out its obligations in a way that is faithful to the section 18 purpose, recognises the justified expectations of access seekers, and does not frustrate the intent of the STD and the Act.
 - (d) It is likely that Chorus' proposed changes are not consistent with the STD and the Act and, in particular, are likely to breach Chorus' obligation to carry out its obligations under the STD in good faith and in furtherance of the purposes of the Act. Rather, as set out in the UBA Opinion, it appears that a significant driver for Chorus' actions is to try to push users onto a new commercial (unregulated) service that costs more, but delivers a similar level of performance that is currently experienced as part of the regulated service.
6. It is apparent from its proposals that Chorus disagrees with the above analysis (and will likely continue to disagree) that its proposed changes will breach the STD. In the absence of a clear proposal by the Commission to address this matter, access seekers face uncertainty as to how it will be resolved. If the Commission takes no action, then they may need to consider taking enforcement action themselves.⁸ However that does not seem to be an efficient or desirable means to resolve this matter.
7. In these circumstances, our opinion is that it would be appropriate for the Commission to use its power to clarify the STD.
8. These points are expanded on in the balance of this memorandum.

Legal and regulatory principles that inform the interpretation of the STD

9. Chorus has argued that its proposed changes to the regulated UBA service are permitted under the STD. It takes a narrow approach to identifying the "minimum level

⁶ For convenience in this opinion, we use "STD" to mean the UBA Terms, as defined in the UBA General Terms.

⁷ UBA Opinion at paragraph 10.

⁸ In that context, our view is that there is also merit in further exploring additional arguments that may be open to access seekers, for example, estoppel (which we have not done in this opinion).

of performance" it says is consistent with the service description and technical standards in the STD, and argues that minimum level is all it is required to provide going forward.⁹

10. This approach ignores the fact that the STD is an instrument of regulation. It forms part of the broader determination to implement the regulated UBA service, which includes the decision report. It is not, for example, a contractual document negotiated between commercial parties. It is, in effect, the "sharp end" of implementing the regulatory objectives set out in the Act, and its interpretation is necessarily informed by those objectives. This has previously been recognised by the Commission.¹⁰
11. This broader context is expressly recognised by the guiding principles of the STD, which provide that:
 - 2.1 The UBA Standard Terms Determination is designed to meet the purposes set out in the Act, and in particular, section 18 of the Act. The UBA Terms are to be interpreted in light of the Commission's decision report and the purposes.
 - 2.2 The Parties must:
 - 2.2.1 carry out their obligations under the UBA Terms in good faith and in furtherance of those purposes; and
 - 2.2.2 ensure that they and their employees, subcontractors and agents do all things reasonably necessary, including executing any additional documents or instruments, to give full effect to the UBA Terms.
12. These clauses capture the three core propositions we address below, which are consistent with the role of the STD within the statutory scheme.

The STD is designed to meet the section 18 purpose.

13. The Act defines the UBA service as a designated access service. However, the Act itself does not regulate traffic management or provide a minimum throughput specification. Nor does it prescribe the type of DSL technology that must be used to provide the UBA service. Accordingly, under the Act, the role of the Commission is to regulate the UBA service, through the STD, to a standard that would be expected in a competitive market, and that promotes competition in downstream telecommunications markets.¹¹
14. Section 18 requires that the Commission regulate access to services to promote competitive outcomes for the long-term benefit of end-users. We proceed on the same basis as the UBA Opinion, namely that the impact of the changes proposed by Chorus would amount to degradation of the regulated service and that this detrimental impact is

⁹ Chorus *Submission in response to the Commerce Commission's issues paper relating to assessing Chorus' new UBA variants - Boost HD and Boost VDSL (7 July 2014)*, 18 July 2014 at (for example) paragraphs B2, B14-18, B25, B31 and B39.

¹⁰ For example, in its draft decision to set the STD for Telecom's unbundled copper local loop network, the Commission rejected a clause proposed by Telecom which would have provided that the remedies available to a Court when enforcing the STD were the same as if the STD was a contract between the parties: Telecom *UCLL Standard Terms Proposal General Terms*, 12 June 2007 at clause 6.1. The Commission rejected this suggestion for the very reason that it did not believe that the STD should be treated the same as a contract, given that it is a regulatory instrument: Commerce Commission *Draft Standard Terms Determination for the designated service Telecom's unbundled copper local loop network* (Decision 609), 31 July 2007 at paragraph 247.

¹¹ Telecommunications Act 2001, s 18.

likely to increase over time. We also adopt the UBA Opinion's summary of Chorus' motivations for the proposed changes, including that it will improve the attractiveness of the commercial Boost offering (at paragraph 4). In our view, this is a type of behaviour that regulation under Part 2 of the Act (guided by the section 18 purpose statement) should seek to prevent.

The STD Terms are to be interpreted in light of the Commission's decision report and the purposes.

15. We agree with the UBA Opinion that the development of the current regulated UBA STD (including its predecessors) establishes that the regulated UBA service was not intended to be a static service.¹² In addition to the material cited in the UBA Opinion, we make the following points:
- (a) When an access determination for the bitstream service was first introduced (prior to the UBA STD), it was contemplated that actual service levels would continue to support competition and end-user requirements over time. We note that:
 - (i) It appears that end-user requirements and the requirement for equivalence between access seekers were intended to determine and drive service performance, rather than strict technical standards.¹³ This was at a time when the service provider also provided retail broadband services, so it was the demands of its own end-users that drove improvements in performance standards, which it was then required to offer to other access seekers on an equivalent basis.
 - (ii) Importantly, the Commission recognised that the specifications of the service should be designed in a way that did not constrain the services that access seekers could provide to end-users, and which provided incentives for access seekers to offer innovative and diverse services.¹⁴ As such, in order to drive maximum innovation and ongoing diversity in retail broadband services at different prices, the service provider was required to provide bitstream access at a uniform wholesale price that did not distinguish between customer type, speed, or generation of (A)DSL technology.¹⁵
 - (b) The expectation that the UBA service should be (and, therefore, was) defined in a way that would allow the regulated service to continue to evolve and to meet end-user demand carried through to the Commission's decision when setting the STD for the UBA service in 2007. In particular:

¹² UBA Opinion at paragraph 8.

¹³ See eg Commerce Commission *Determination on the application for determination for access to and interconnection with Telecom's fixed PDN service 'Bitstream Access'* (Decision 568), 20 December 2005 at paragraph 267, and Telecommunications Act 2001, Schedule 1, clause 5(c).

¹⁴ See eg Commerce Commission *Determination on the application for determination for access to and interconnection with Telecom's fixed PDN service 'Bitstream Access'* (Decision 568), 20 December 2005 at paragraph 328-329. See also Commerce Commission *Determination on the applications for determination for access to, and interconnection with, Telecom's fixed PDN* (Decision 582), 22 June 2006 at paragraph iii-iv, and 142.

¹⁵ See eg Commerce Commission *Determination on the applications for determination for access to, and interconnection with, Telecom's fixed PDN* (Decision 582), 22 June 2006 at paragraphs iii-iv (executive summary). The reference to ADSL technology by the Commission reflects that, at that time, ADSL was part of the service description in the Act. It is reasonable to assume that the Commission's statement would now relate to distinguishing between DSL technology given the current service description in the Act.

- (i) The Commission was clear that aspects of the service should not be limited or defined in the STD in a way that would be unlikely to meet the changing needs of residential and other broadband end-users where there was demand for an increasing range of uses (including, relevantly, video content) and increasing file sizes.¹⁶
 - (ii) Of particular relevance to the current issue, the Commission expressly noted in the STD Decision its understanding that there was a worldwide trend towards focussing on services for end-users that a broadband connection can support, rather than the specifications of the broadband service itself.¹⁷ The Commission considered that its decisions about how to define the UBA service were consistent with this approach.¹⁸
- (c) Further, in relation to investment levels, the price of the UBA service has historically been set in a way that was designed to encourage investment in the regulated UBA service:
- (i) When the STD was being developed, it was clear that ensuring future investment took place was a concern. At the time, it was considered that the use of a retail-minus pricing principle would ensure that the service provider (then Telecom) would continue to have appropriate investment incentives in respect of DSL technologies and other investment relating to the regulated bitstream access service.¹⁹ It was therefore not necessary to include separate obligations in relation to investment in the regulated service in the STD.
 - (ii) We acknowledge that pricing of the service has subsequently changed to a cost-based model. However, the IPP decision expressly acknowledged that investment incentives remain relevant to the price of the regulated UBA service. Separate processes are available (and are being used) to address any concerns about price under the new pricing principles.
16. Consistent with this history, the service level specifications in the Act and STD are floors only, and the relevant terms in the STD are to be interpreted in light of the intention set out in the decision report that actual service levels would improve in quality over time, including through the introduction of new technology (as would be expected in a competitive market). Conversely, it was not contemplated that when the actual service levels (comfortably) exceeded the floor or new technology was introduced, the service 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.
17. Put another way, consistent with section 18 and outcomes in competitive markets, it was expected that consumer demand would drive improvements in service levels. It was not anticipated that the monopoly service provider would be allowed to effectively dictate the level of regulated service it wished to provide.

¹⁶ Commerce Commission *Standard Terms Determination for the designated service Telecom's unbundled bitstream access* (Decision 611), 12 December 2007 at paragraph 59.

¹⁷ See eg Commerce Commission *Standard Terms Determination for the designated service Telecom's unbundled bitstream access* (Decision 611), 12 December 2007 at paragraph 71.

¹⁸ Commerce Commission *Standard Terms Determination for the designated service Telecom's unbundled bitstream access* (Decision 611), 12 December 2007 at paragraph 71.

¹⁹ Commerce Commission *Determination on the applications for determination for access to, and interconnection with, Telecom's fixed PDN* (Decision 582), 22 June 2006 at paragraph 122.

Chorus must carry out its obligations in good faith and in furtherance of these purposes.

18. In our view, it 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 a parallel commercial (non-regulated) offering, could be said to be acting in good faith and in furtherance of the section 18 purpose statement.
19. The starting point for interpreting the good faith obligation is that the requirement for the service provider to carry out its obligations in good faith and in furtherance of the purpose statement has been deliberately included in the STD and should be given a meaningful effect.
20. Although there is no discussion of these clauses in Decision 611, the development of the UBA STD closely followed the Commission's development of the UCLL STD, where identical clauses were included by the Commission following its review of Telecom's standard terms proposal for that service. The Commission noted that it had inserted these clauses in order to:
- [...] provide a clear statement of purpose for the UCLL Standard Terms Determination **and create a general good faith obligation on parties in carrying out their obligations under the UCLL Terms.** The Commission considers this aids parties' understanding of how the UCLL Terms should be performed. [emphasis added]
21. From this starting point, it is then necessary to consider what the obligation requires in practice. In our view:
- (a) Case law on the meaning of a good faith obligation is a useful aid for present purposes. The obligation must have a substantive content. Generally, it has been said that an obligation of "good faith":
- (i) embraces three notions: an obligation on the parties to cooperate in achieving the contractual objects, compliance with honest standards of conduct, and compliance with standards of conduct which are reasonable having regard to the interests of the parties;²⁰
- (ii) requires a party to behave in a manner that demonstrates "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party";²¹ and
- (iii) can be understood by reference to a range of forms of "bad faith", including endeavouring to frustrate the agreement between the parties and/or acting for an ulterior purpose.²²
- (b) In the context of the STD (and the legal and regulatory principles discussed above), and using the case law as a guide, it is reasonable to assume that the "good faith" obligation requires Chorus to carry out its obligations:

²⁰ See, for example *Vero Insurance New Zealand Ltd v Fleet Insurance & Risk Management Ltd* HC Auckland CiV-2007-404-001438, 21 May 2007 at [45] and the academic writing and case law cited in that decision.

²¹ *Bobux Marketing Ltd v Raynor* [2002] 1 NZLR 506 at [41].

²² *Symphony Group Ltd v Pacific Heritage (Auckland) Development Ltd* HC Auckland CP 362/98, 17 August 1998 at page 16-17, citing *Mogridge v Clapp* [1892] 3 Ch 382 (CA).

- (i) in a way that is faithful to the objective of regulation under Part 2 of the Act (as the "objects" or "common purpose" of the STD), and is reasonable having regard to the interests of access seekers and end-users;
 - (ii) in a way that recognises the justified expectations of access seekers in receiving a regulated UBA service that allows them to provide competitive broadband services to end users, including as the demands of those end-users evolve over time; and
 - (iii) such that, in providing the regulated UBA service, it is not seeking to evade or frustrate the intent of the STD, and/or to perform its obligations under the STD in a way that serves an ulterior motive.
- (c) In this respect, we think it is relevant that the Commission decided to include an obligation to act in good faith *and* in furtherance of the statutory purposes in a single clause. Read together, it is a strong directive to parties that their conduct under the STD should not be inconsistent with the statutory purposes that the STD is designed to promote.
- (d) Further, as discussed above, in many cases the service description in the UBA STD was drafted in a non-prescriptive way to allow for evolution in the way the UBA service is provided over time. It is reasonable to interpret the requirement for Chorus to carry out its obligations under the STD in good faith and in furtherance of the purpose statement as having an active role in these situations.

Chorus' proposed changes to the regulated UBA service

22. We agree with the UBA Opinion that making changes to the regulated service that would degrade the performance of that service would be likely to put Chorus in breach of the STD. The UBA Opinion proceeds on the assumption that Chorus' proposals will result in end-users of the regulated service experiencing reduced performance (with the impact of that reduced performance becoming greater over time), and are likely to reduce the ability of retail service providers to offer broadband products suitable for "higher-end" applications by way of the regulated UBA service.²³
23. We are instructed that these assumptions are realistic, and in particular, that if Chorus is permitted to make the changes it proposes, a material number of end-users will be adversely affected in coming months.²⁴ The concerns noted at paragraph 10(c) of the UBA Opinion are also important. In particular, the UBA Opinion finds that at least part of Chorus' motivation for the proposed changes is to make the new commercial Boost services more attractive. Put bluntly, Chorus would be able to charge a higher price for a service that is similar in quality to the existing regulated UBA service.
24. In our view, such outcomes are not consistent with the purpose of regulation under the Act and the role of the STD in the statutory scheme:
- (a) 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. It seems very unlikely that an economist would conclude that it is sustainable for suppliers who are subject to the pressures of

²³ UBA Opinion at paragraph 3, particularly 3(a) and 3(d).

²⁴ Absent, of course, RSPs paying a higher price to take the "commercial" service that Chorus proposes to offer (which will maintain existing end-user experience).

competition to reduce the quality of the service they are offering while maintaining the price of that service at its existing level. On the other hand, we are instructed that competing RSPs typically face a scenario of needing to invest in technology to meet growth in customer demands while facing declining margins and/or per customer revenues.

- (b) Similarly, the regulatory framework does not permit Chorus to engage in conduct that will have a negative impact on competition in downstream telecommunications markets that rely on the UBA service. As such, regulation under Part 2 requires that the UBA service is provided in a way that does not restrict the ability of access seekers to provide competitive services to end users, or detrimentally affect incentives to invest in differentiated retail products for end-users as part of that competitive process.
25. We therefore agree that Chorus' proposals are likely to breach the requirement to carry out its obligations under the STD in good faith and in furtherance of the section 18 purpose.²⁵ Taken as a whole, it is difficult to see how a monopoly service provider which is taking active steps that will reduce the quality of a regulated service and affect the downstream services that can be offered could be said to be acting in good faith and in furtherance of the section 18 purpose statement (particularly given the apparent drivers for Chorus' actions set out in the UBA Opinion).
26. Further, this is not a case of a requirement to act in good faith introducing *additional* obligations on Chorus. Rather, it would amount to recognition that the UBA STD, properly interpreted, does not permit Chorus' proposed changes to the regulated service. We agree with the UBA Opinion that these proposed changes would result in "significant modifications to the UBA service as it was envisaged by Decisions 568, 582 and 611".²⁶
27. Any potential uncertainty regarding whether improvements to the service in the future are covered by the STD (or are sufficiently material to take it outside the regulated service) can be addressed through the "new variant" notification process (which Boost is currently subject to). Moreover, to the extent there is any residual uncertainty created by a "living" document such as the STD, that is the very purpose of the Commission's power of clarification.
28. We discuss two of Chorus' proposed changes (to throughput and VDSL) in more detail in the following sections.

Proposed cap on throughput

29. There is no express provision in the STD that gives Chorus the ability to actively manage throughput. Yet, as set out in the UBA Opinion, it appears that Chorus' proposed changes would (among other detrimental impacts):²⁷
- (a) constrain end-user throughput even where network capacity was available; and
- (b) result in a regulated UBA service that risks becoming constrained by Chorus' current view of reasonable usage.

²⁵ UBA STD General Terms at clause 2.2.1.

²⁶ UBA Opinion at paragraph 10(h).

²⁷ UBA Opinion at paragraph 10(c).

30. We consider that considerable caution should be exercised before interpreting the STD such that it would permit Chorus to restrict throughput and cap the development of the regulated service over time. We note that:
- (a) Chorus' proposed changes are premised on its view that that its only (relevant) obligation under the STD is to provide a minimum throughput of 32 kbps. For example, it has argued that:²⁸

[w]hile Chorus may exceed that service level in practice, **that does not form part of the statutory service standard that Chorus is obliged to provide.** [emphasis added]
 - (b) That cannot be a correct interpretation of this aspect of the UBA STD. On that basis, it would be open to Chorus to unilaterally determine what service level it chooses to provide from time to time, above the 32 kbps "floor". For example, it could "choose", at any time, a cap much lower than has been provided in recent years.²⁹ Indeed, taking Chorus' position to its logical end point, on its case, it would be open to it 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:
 - (c) That such an approach is inconsistent with how the STD is intended to operate is also reflected by the very fact that Chorus is not proposing to take the "cap" back to anything near what it now says is the limit of its throughput obligation.
 - (d) Chorus' approach is also inconsistent with the nature and purpose of the UBA STD, and the context in which it was determined. Importantly, although the STD provides for a minimum throughput level (32 kbps), it is clear that the standards set out in the STD in relation to throughput are minimum standards, or a "floor", only and not a target; and that all parties have proceeded on the basis that performance levels in practice would be much higher than this for many years since the STD came into force. Even in 2005, before the current STD was developed, it was acknowledged that actual performance levels were generally much better than this.³⁰ Further, as we understand it, average throughput has progressively increased since 2006, and today is in excess of 200kbps.
31. It is also relevant to note that Chorus does not agree that its proposed changes will reduce the quality of the regulated service, and suggests that its changes will mean that the regulated UBA service will remain fit for purpose as "a basic service suitable for activities such as internet browsing".³¹ However, the development of the UBA STD makes it clear that Chorus' narrow interpretation of what is "fit for purpose" is not

²⁸ See, for example: Chorus' *Submission in response to the Commerce Commission's issues paper relating to assessing Chorus' new UBA variants - Boost HD and Boost VDSL (7 July 2014)*, 18 July 2014 at paragraph B2.

²⁹ The UBA Opinion states that on Chorus' approach, "the regulated UBA service would in effect be defined and constrained by Chorus' view of reasonable usage at mid-2014" (at paragraph 10(c)(iii)). While we think that arbitrary choice by Chorus is itself inconsistent with the UBA STD, the situation is, on Chorus' position, actually worse than that. Chorus' actions to impose a cap of 250 kbps, later changed to 300 kbps, would not be "defining" the regulated UBA service, but would, on Chorus' approach, simply reflect Chorus choosing, at this time, to provide a service that *exceeds* the regulated service requirements for throughput (by a significant margin).

³⁰ See Commerce Commission *Determination on the application for determination for access to and interconnection with Telecom's fixed PDN service 'Bitstream Access'* (Decision 568), 20 December 2005 at paragraph 123.

³¹ Chorus *Submission in response to the Commerce Commission's issues paper relating to assessing Chorus' new UBA variants - Boost HD and Boost VDSL (7 July 2014)*, 18 July 2014 at paragraph 38.

consistent with the intention that the UBA service would meet the changing needs of residential and other broadband end-users where there was demand for an increasing range of uses (including, or particular relevance, video content) and increasing file sizes.³²

Proposed withdrawal of VDSL

32. As noted in the UBA Opinion, the Commission has previously stated that DSL technology would improve over time, and attempts to constrain the regulated service to particular technologies would risk the service becoming obsolete and ineffective through the introduction of new technology.³³
33. In other words, consistent with the service description in the Act, the STD was designed to be technology neutral to ensure that it could capture and apply to new "technology of choice" as operators naturally migrated to the next generation(s) of equipment over time.³⁴
34. There is no suggestion that the STD was designed to be technology neutral so that service providers had the ability to choose to provide the service over the most basic technology that was currently available in a way that would decrease, rather than increase, the performance of the service over time (particularly where that would not be consistent with end-user requirements for the service).
35. Further, in this case:
 - (a) Chorus itself chose to use VDSL technology to provide UBA at its current service levels under the STD, and retail service providers have subsequently developed service offerings to end-users using the VDSL-based regulatory UBA service (as discussed further in the following section); and
 - (b) at the same time as announcing the withdrawal of VDSL-based services as part of the regulated service, Chorus has proposed new commercial services that will utilise VDSL technology.
36. We agree with the UBA Opinion that the combined effect of these factors suggests that Chorus' motive in changing the way it carries out its obligations under the STD is to effectively "force" migrate retail service providers to the commercial (higher priced) services, such that a large number of end-users would not benefit from the service quality and price protections that regulation under the Act is designed to provide.³⁵

Good faith and the justified expectations of access seekers

37. Retail service providers (including, as we understand it, Spark) have reasonably relied on the standard of performance currently provided as part of the regulated service (at that price) to make investments in their own network equipment and to develop and provide retail services to end-users. This is relevant to the content of the good faith obligation outlined above (ie consistency with the justified expectations of the other parties). For example:

³² Commerce Commission *Standard Terms Determination for the designated service Telecom's unbundled bitstream access* (Decision 611), 12 December 2007 at paragraph 59.

³³ UBA Opinion at paragraph 9(d); Decision 582 at paragraphs [113]-[122].

³⁴ See eg Commerce Commission *Determination on the applications for determination for access to, and interconnection with, Telecom's fixed PDN* (Decision 582), 22 June 2006 at paragraph 119.

³⁵ UBA Opinion at paragraph 10(a) and (g).

- (a) Spark invested a significant sum of money to consume an unconstrained regulated UBA service over VDSL. We are instructed that a considerable proportion of this initial investment is likely to have been wasted if Chorus follows through with its proposed changes (including its proposed changes to how it treats the regulated service at the handover point).
- (b) You have also informed us that Spark's business case for consuming regulated UBA over VDSL would have been materially different had Chorus proposed at the time to implement a throughput "cap" of 300 kbps. On that basis, and in light of growth forecasts, it would have been observed that those caps could be expected to be hit at or around the early part of next year. In this context, it is inevitable that Spark would have approached the business case in a materially different way, and indeed may have taken a very different view on how, whether, and when to consume and market regulated UBA over VDSL.
- (c) Spark also positioned its marketing approach and overall customer proposition around VDSL as being a 'stepping stone' to fibre. The ability to present VDSL and fibre as a joint "customer proposition" meant that Spark's offering was "Ultra broadband", comprising both VDSL and fibre. Had a "cap" of 300 kbps always been proposed by Chorus, and it been known that Chorus would withdraw VDSL in circumstances not connected to the roll out of fibre, we are instructed that that marketing expenditure would have been significantly less than actually incurred (for example, television advertising in respect of the combined proposition being a particularly expensive area of expenditure), and the overall marketing positioning would have been quite different.
- (d) Further, had Spark known Chorus could make the changes it proposes, we understand that it would have built capability to enable it to consume multiple handovers at handover points. This would have permitted Spark to purchase a mix of commercial and regulated services, rather than being faced with a binary choice between the two. In this respect, we understand this confirms the assumption in the UBA Opinion that the proposed handover arrangements may create "all or nothing" incentives so that access seekers switch from the regulated service to the proposed commercial Boost services in bulk.³⁶
38. On the basis of the above, it appears likely that Spark's business strategies as a whole in relation to VDSL and fibre would have been very different if Chorus had always proposed the throughput cap and withdrawal of VDSL that it now seeks to implement. As such, it is difficult to see that the way Chorus proposes to carry out its obligations under the STD would be reasonable, in light of the justified expectations of access seekers about the way those obligations would be performed and in light of the section 18 purpose.
39. These matters may also be relevant to an estoppel argument, ie that Spark (and others) have reasonably relied to their detriment on the representations and conduct of Chorus to date in the provision of the regulated service. As flagged earlier, we have not explored this topic further in this opinion, which is focussed on a response to the interpretation points raised in the UBA Opinion. However, it is a point that we consider merits further attention. At least on our initial view and understanding of the facts, this argument might be particularly relevant to the case of VDSL where, at the time VDSL2 technology was made available by Chorus under the STD, Chorus indicated that the circumstances that would be relevant to the withdrawal of VDSL were set out in

³⁶ UBA Opinion at paragraph 10(f)(iii).

availability rules that focused on the withdrawal of VDSL as part of the transition to fibre services.³⁷

The Commission can exercise its regulatory powers to clarify or amend the STD

40. Although we consider the terms of the STD, properly interpreted, to be sufficiently clear, given the current debate in respect of the proper interpretation of the STD, it is open to the Commission to exercise its regulatory powers to avoid ongoing disputes and the potential for protracted legal action in respect of Chorus' proposed actions. This would resolve the matter in a timely fashion by putting it beyond doubt that Chorus' proposed actions are not consistent with the Act and the STD.
41. It is open to the Commission to use its power to clarify the STD under s 58 of the Act at any time (including when it has received a complaint under s 156O).
42. "Clarification" is not defined in the Act, but we note that:
- (a) The Commission has previously published guidelines setting out its interpretation of the power to clarify its determinations, and has indicated that:
 - (i) Any clarification made must best give, or be likely to best give, effect to s 18.³⁸
 - (ii) The term clarification can be "used to remove errors, or make a determination clearer, or less complex, ambiguous or obscure".³⁹
 - (iii) A clarification is "not limited to addressing minor slips or errors made in the determination", and substantive amendments can be made on a case by case basis.⁴⁰
 - (b) This interpretation of the clarification power is supported by changes made to the clarification power in the Act in 2006. The original clarification provision prevented a clarification from being made unless it was either not material to any person affected by the determination or was agreed to by all those persons (previously s 58(1)(b)). In 2006, this restriction was removed. We have not identified any legislative discussion that would shed light on why this restriction was removed, but it is reasonable to assume that its removal is consistent with the above scope of the clarification power.
43. In our view, exercising the clarification power in the current circumstances would be within the above scope, and within any reasonable interpretation of the Commission's clarification power in the Act:
- (a) A clarification would not amount to a material or substantive change to the UBA STD. Indeed, given the view that it is likely Chorus will breach the STD if it implements its proposed changes, a clarification designed to put that position beyond doubt cannot amount to a material change.

³⁷ Chorus "Information about Chorus VDSL", May 2013 at pages 4-6.

³⁸ Commerce Commission *Clarification of a Determination under section 58 Telecommunications Act 2001* (8 April 2010) at [11].

³⁹ Commerce Commission *Clarification of a Determination under section 58 Telecommunications Act 2001* (8 April 2010) at [11].

⁴⁰ Commerce Commission *Clarification of a Determination under section 58 Telecommunications Act 2001* (8 April 2010) at [12].

- (b) As discussed above, the market dynamics at the time the STD was developed made it unlikely that the service provider would seek to take the action currently proposed by Chorus. Combined with the presence of a clause that required parties to act in good faith and in further of the purposes of regulation, it is understandable that the STD does not specifically and expressly deal with such conduct.
 - (c) The clarification would simply require Chorus to maintain the historic and established approach to provision of the UBA Service.
 - (d) On the other hand, as we have discussed above, we agree with the UBA Opinion that Chorus' proposed changes would result in significant modifications to the regulated UBA service as it was envisaged by Decision 611 and its predecessors.
44. In these circumstances, it is open to the Commission to clarify what has always been (and was always intended to be) the requirements of the STD. Indeed, this would seem to be a prime example of the very purpose of the clarification power.