

## CallPlus Limited

# Submission on the Commerce Commission's Issues Paper: Assessing Chorus' new UBA variants – Boost HD and Boost VDSL

18TH July 2014



## A. OVERVIEW

1. Thank you for the opportunity to comment on the Commission's Issues Paper: Assessing Chorus' new UBA variants – Boost HD and Boost VDSL (**Boost variants**), dated 7 July 2014 (**Issues Paper**). This submission is made by CallPlus Limited, New Zealand's third largest fixed line carrier and operator of a number of brands in the retail and wholesale market including CallPlus, Flip, Orcon and Slingshot.
2. It seems clear that the real issue here does not so much relate to the new Boost variants, but the significant changes to the current regulated UBA service (**regulated service**). Chorus proposes to artificially constrain the regulated service and (potentially) withdraw the regulated VDSL service. Those changes are not legally permitted, and would seem to clearly breach the UBA STD (**STD**), giving rise to enforcement action under the Telecommunications Act 2001 (**Act**). They would mean the regulated service would not, **by design**, meet the growing demand of the average consumer. This is a cause for serious concern.
3. The overall proposal represents a 'carrot and stick' approach to force substitution from a degraded regulated service to the unregulated Boost variants, and appears to be a cynical attempt to avoid regulation. (The introduction of the Boost variants, the proposed withdrawal of the regulated VDSL service and the proposed artificial constraining of the regulated service are collectively referred to as "**the Proposal**".) This will inevitably lead to the Boost variants becoming the 'de facto' access service, with the regulated service being consigned to a niche, or simply not consumed at all. That cannot be the intention of the regulatory regime, and would produce outcomes that are inconsistent with the Act's purposes.
4. Chorus has a monopoly and RSPs need access to a regulated bitstream service that is 'fit for purpose' for the majority of consumers. That service must, at a minimum:
  - Keep pace with technology improvements (software, network and CPE), which are continually driving more capacity, faster speeds and lower costs over the same physical network.
  - Keep up with the needs of general consumers in order to meet demand as it evolves in a rapidly developing global industry.
  - Keep up with international best practice and performance
5. Provided those requirements are met, CallPlus encourages commercial variants that respond to RSP requests, are offered on an equivalent basis (so as not to distort the market), and which complement the regulated service by adding meaningful core enhancements to allow RSPs to innovate or develop new services. CallPlus does not

accept that the real reason for the introduction of the new variants is in response to customer demand. Nor is the Proposal consistent with the legitimate introduction of new products to stimulate or anticipate demand. Rather, this initiative is supply side-led where the driver is clearly to protect Chorus' balance sheet, as a reaction to the anticipated reductions in the price of UBA from 1 December.

6. The Proposal cannot be for the long-term benefit of end-users and would, if permitted, undermine the regulatory regime. In particular, the adverse changes to the regulated service are inconsistent with Chorus' explicit obligation to provide the regulated service in good faith and in a way that is consistent with international best practice.
7. In conclusion, the Proposal represents a fundamental change in the market – not necessarily because of the introduction of the Boost variants, but because of the combination of the Boost variants with the adverse changes to the regulated service. Those changes would degrade the performance of the regulated service, rendering it unfit for purpose.
8. We respond to the Commission's specific questions in section B,<sup>1</sup> and provide some further commentary on the application of the legal and regulatory regime to the Proposal in section C of this submission.
9. Please direct any questions in relation to this submission to: -

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<sup>1</sup> We note the difficulty in answering the Commission's questions about the Boost variants in a vacuum, as the real harm is evident when they are considered in the context of Chorus' proposed changes to the regulated service.

## B. RESPONSES TO THE COMMISSION'S QUESTIONS

### ***16.1 – Are there any aspects of Chorus' proposal which we have not covered, or have covered inaccurately?***

10. The Commission's summary of the Proposal is generally consistent with our understanding of the facts (to the extent they are clear). As the Commission is likely aware, following the Issues Paper being published, Chorus seems to have softened its approach and is adopting a "wait and see" approach as to whether or not it will withdraw VDSL as a regulated service.<sup>2</sup> But Chorus is not at liberty to unilaterally make this determination, and can only terminate the supply of a regulated service on the limited grounds set out in clause 36.5 of the STD (none of which apply). (For completeness, we note that Chorus is not permitted to degrade a regulated service, as explained further below.)

### ***16.2 – What innovation(s) do the new UBA variants bring to the broadband market?***

11. The majority of the Boost features are either 'minor enhancements' (ie the sort of thing that should be happening anyhow, such as improved pre-qualifications and proactive reporting) or readying homes for fibre which is clearly in Chorus' own interests.

12. The current regulated EUBA (0) service generally meets the needs of the average consumer today, including streaming 'on demand' video. As technology evolves (CPE, software and network) it is reasonable to expect that, absent any artificial constraints, technology improvements will mean that the regulated service will continue to evolve and be capable of meeting growing requirements (as it has since its introduction). This is consistent with a natural progression of broadband technology and services in line with international trends and best practice.

13. **For the typical consumer of the regulated service, the Boost throughput commitment offers little meaningful differentiation.** In our view, RSPs will be unable to justify a premium from general consumers for a service that simply offers a higher throughput commitment. The market understands speed at the basic level of ADSL, VDSL & Fibre, but throughput is too esoteric and relies on end-to-end performance, of which Chorus is simply a component.

14. CallPlus is not averse to truly complementary commercial variants, particularly against the backdrop of potential regulation for such services should it be necessary. There is

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<sup>2</sup> See Chorus' Boost Update (Dialogue July 2014).

a niche of consumers who are heavy users of HD services, and can't get fibre, who may be interested in a retail service which could use the Boost variants as a component. However in order to create such a service, RSPs would have to invest in their own networks and systems and, likely, create a content subscription service. That is a far from trivial set of components to pull together.

15. Not all RSPs will seek to target that niche or be able to bring together the service components. That becomes problematic and creates market distortion if Boost (which is charged at a premium) becomes the de-facto service for the general consumer due to the regulated service being artificially constrained. That impacts competition and is not in the long-term benefit of consumers.
16. CallPlus supports Chorus offering to amortise the install fees into the monthly charge. This is useful in spreading costs, and in particular assists smaller RSPs. However, in itself, this isn't a reason for a variant being distinguished from the regulated service. Further, if Chorus is prepared to offer this for its Boost variants, it should make it available as an overlay on all services (including the regulated service) as a surcharge.

### **16.3 – What is the expected level of demand for the new UBA variants?**

17. This is not a service that RSPs in general have requested. Chorus have said they can see a "need", that it's an opportunity and they are looking to stimulate content delivery. While that may be their view, the Proposal remains supply side-driven, so it is not so much a question of whether there is legitimate demand, but rather whether the Proposal constitutes a "forced" migration.
18. While Boost's throughput commitment may appeal to an RSP if they have a 'high end HD content service', this is currently a small segment of the consumer market and we would anticipate take up overall would be small in the foreseeable future (absent any constraint to the existing regulated service). This is a significant investment for an RSP, presenting significant hurdles which many RSPs could not overcome.
19. Slingshot and many other RSPs' average bandwidth usage on the regulated services today is significantly more than the 250kbps cap industry average that Chorus is proposing. Furthermore current demand is forecast to almost double in the next 12 months. If Chorus is permitted to constrain the regulated service, Boost will be the only bitstream service that meets general consumer demand, regardless of whether they are users of a HD video content service at prime time. Essentially, Chorus will create "artificial demand" for the Boost variants.

20. Given the complexities of running multiple variants of the bitstream service (and the prospect of underutilised network assets and over-committed bandwidth contracts), there is a strong case to simply migrate to Boost despite potentially being unable to extract a premium from general consumers.

**16.4 – To what extent do you consider the new UBA variants as substitutes or complements to the regulated UBA?**

21. Introduced on their own in different circumstances, the Boost variants might be seen as complementary services. In time they might then become at least partial substitutes. However, if taken together with the proposed artificial constraints (ie when looking at the Proposal), they would become an inevitable, forced substitute. If Chorus were permitted to constrain the regulated service (which we submit it clearly is not), then the degraded regulated service will rapidly be substituted by the Boost variants as this will be the only viable option for the future and avoids considerable short term pain.

22. To reiterate the points above:

- Consumer demand for bandwidth has increased since the inception of the internet, and is currently forecast to double in 12 months.
- Chorus is proposing to 'freeze' the bandwidth allocation of customers at today's "industry average" level – well below the current usage of many RSPs.
- That means that, by design, the regulated service will not keep up with consumer demand.

23. Chorus' proposal to use an industry average for bandwidth allocation per user will have different and disproportionate impacts on RSPs and their end users. That is critically important when considering likely competitive effects of the Proposal (which may also be relevant from a Commerce Act perspective). Challenger brands, Slingshot, Orcon and many other RSPs, have significantly higher usage than Telecom (we would estimate between 60-100% higher). These RSP's will be more adversely impacted at the outset, facing increasingly diminished capacity per user compared with current levels, and therefore a significant degradation of service. Again, this is in the context of continually increasing demand. The result will be increased costs of service and loss of customers.

24. After Chorus advised that the VDSL service was provided under the STD, RSPs have embraced VDSL and it is now the largest growing service in the market. This adds accentuates the issue as it is logical that with faster speeds consumers will use more

bandwidth. If an RSP sells a customer onto regulated VDSL but Chorus is progressively degrading the underlying bitstream service the result will be unhappy consumers.

25. Most RSPs would therefore be forced to purchase Boost VDSL. That's clearly Chorus' intent as signalled by its announcements that it would progressively withdraw regulated VDSL. (These points raise broader issues, such as whether a forced migration meets *any* efficiency goal.)

26. The adverse changes to the regulated service create a 'stick' that on its own would be sufficient to result in the majority of RSPs having to move customers away from the regulated service. But Chorus is also applying a further mix of 'carrot and stick' to ensure substitution from the proposed 'diminished' regulated service to Boost. To briefly expand:

- Chorus will only offer to spread the installation (connection and transfer) charges on the commercial services.
- If an RSP is considering consuming both regulated and Boost services they have to build two handovers – it's unavoidable. However if the RSP moves all its customers to a Boost handover to make it easier Chorus will allow up to 20% of customers to qualify for the regulated price making a single handover more practical.
- RSPs can move individual services from the regulated service to Boost at no charge, but a transfer fee may apply to move back to the regulated service.
- Enhancements such as improved reporting and prequalification tools are only available on the commercial service.

27. A single service is simpler. There are a lot of reasons for an RSP to settle on a single service to avoid layering cost. It adds significant complexity and cost to an RSP to handle multiple variants of a service. Pre-qualification, fulfilment and fault systems and processes all have to be changed. Marketing & customer service costs are incurred to handle the extra level of complexity. Telecom have stated that it costs them approximately \$7 million to add a new service.

**16.5 – To what extent will the proposed changes to regulated UBA:**

**16.5.1 – impact on your business; and**

**16.5.2 – influence the take-up of new UBA variants?**

28. Many of the impacts on our business have already been covered, along with the reasons why the Boost variants will become the de-facto access service if Chorus is allowed to constrain the regulated service.

29. However, although the Proposal would effectively force migration, Chorus has not confirmed its price for the Boost variants from 1 December. (With a soft launch of the Boost variants and other changes to the regulated service planned for 1 September, Chorus would have a 3 month window whereby the regulated services are degraded and the future price of the Boost variants is unclear.) This is inconsistent with a normal commercial situation where there are competitive alternatives.
30. This situation could only exist with a monopoly supplier, and is an abuse of that power. Objectively there must be questions whether the Proposal, with its focus on fibre enablement/transition, is designed to reduce competition from copper, raising section 36 Commerce Act issues.<sup>3</sup>
31. **Chorus like any business should have a view on their costs, so we question why Chorus cannot confirm a price for Boost.** The most obvious answer seems to be that Boosts' primary purpose and design is to extract an unspecified premium over the regulated service (whose price post-1 December is under appeal) rather than covering the cost of the additional features.
32. In addition to the issues already outlined, RSPs have their own networks to operate. Chorus operates the local component. It is a normal part of network planning to anticipate volume changes well in advance and negotiate the necessary supply contracts and make the necessary changes to their network well in advance of consumer demand.
33. CallPlus and other RSPs have already made commitments and investments in anticipation of bandwidth demand increasing (almost doubling each year) as well as committing up to 2 years ahead on contracts for items such as international bandwidth.
34. If Chorus artificially constrains the regulated service and RSPs do not move to the Boost variants then RSPs will be left with underutilised network assets and over committed supply contracts. This represents a significant and wasted cost (again raising broader efficiency concerns).

**17.1 – To what extent do you view the throughput requirements in the STD as a minimum?**

35. The 32kbps minimum throughput set out in the STD is a legacy minimum and no longer applicable. It has not been updated, nor has it represented throughput actually provided. As such it is clearly not an appropriate minimum. Nor, it is submitted, is it

<sup>3</sup> We note that analogies can be drawn with a recent investigation by the European Commission, where a French pharmaceutical company (and 5 producers of generic medicines) were fined for concluding a series of deals aimed at protecting the company's bestselling product from price competition. See [http://europa.eu/rapid/press-release\\_IP-14-799\\_en.htm](http://europa.eu/rapid/press-release_IP-14-799_en.htm).



the legal minimum any more. We consider that Chorus' minimum obligations are higher by virtue of its other legal and regulatory obligations. We further submit that the "minimum" must be no less than the minimum throughput currently provided. The purported minimum cannot be considered in a vacuum. It must be read in a far broader context, including the description of the maximum upstream and downstream line speeds in clause 3.6 of schedule 1 (UBA Service Description) of the STD.

36. To briefly expand:

- A "minimum" standard is a floor, an absolute "worst case" permitted at the relevant time. The acceptability of how often this floor is reached will necessarily evolve, especially in such a dynamic industry with increasing standards. A minimum is not a target, just as a traffic speed limit sets an absolute ceiling and is not a target.
- The "usual", or "norm", will be critically important. This will evolve and cannot be ignored in any discussion on minimum standards.

37. The role of the minimum must therefore be looked at in the context of relevant capabilities and standards at the time, subsequent technical developments, and what is, and becomes, usual standards expected by RSPs and end-users (including by virtue of past performance and / or representations).

38. More importantly, as noted the specified minimum throughput cannot be read alone. It is subject to broader legal and regulatory obligations including:

- Standard access principle 2 which requires that *"the service must be supplied to a standard that is consistent with international best practice"*;<sup>4</sup>
- Clause 3.6 of schedule 1 to the STD which imports a "maximum" speed requirement, stating that *"The Basic UBA Service available under this service description is a DSL enabled service which has a **maximum downstream line speed** for data traffic sent to the End User and a **maximum upstream line speed** for data traffic sent from the End User"* [emphasis added]; and
- The guiding principles of the STD which require that the parties must *"carry out their obligations under the UBA Terms in good faith and in furtherance of the purposes of the Act"*.<sup>5</sup>

39. Even if Chorus was not subject to these regulatory obligations, it would seem estopped from seeking to "give less" yet charge the same. There is an implied obligation to maintain the service, with failure to do so also arguably breaching the Fair Trading Act.

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<sup>4</sup> Section 5(a), subpart 2, part 1, schedule 1 of the Act. See section C for further comments on international best practice.

<sup>5</sup> See section C for further comments on the obligation to act in good faith.

40. Minimum requirements certainly are not an excuse for an access provider to artificially constrain a service that has previously been delivered in a way that meets customer (and end user) demand. Such constraints would represent a step backwards from what has become "business as usual". It is also inconsistent with Chorus' comments in its Boost Update (Dialogue July 2014) that its incentives are to "*continually invest in and improve copper and fibre services to meet [RSPs'] needs and the needs of [RSPs'] customers.*"

**18 – Are there any other questions or considerations that you think are relevant to our assessment of whether the proposed new UBA variants fall within the UBA Service Description?**

41. The Boost variants appear sufficiently similar to the regulated BUBA service such that they clearly fall within the STD, and we recommend that the Commission confirm this. The decision relied on by Chorus for keeping the Boost variants out of the STD is factually and legally distinguishable from the current circumstances. We discuss the considerations we consider relevant further in section C.

**14.1 – The extent of new investment required to offer the proposed new UBA variants**

42. While the Commission hasn't specifically asked for RSPs' views on the extent of new investment required, we thought it would be useful to comment on the investment that would likely be required by Chorus to offer the Boost throughput commitment.

43. CallPlus does not consider that there is any significant additional investment required by Chorus to offer the throughput commitment between the DSLAM and the First Data Switch (**FDS**). The Boost variants use **all** the same network elements as the regulated service. The only exception is the handover, and that is driven by the fact that it is only by separating handovers that Chorus is able to differentiate the traffic and apply the constraints to the regulated service. CallPlus does not consider that there is any significant cost in continuing to provide the regulated service as an unconstrained service.

44. The EUBA (0) service does not have the inherent technical limitations of the legacy ATM platform. The copper to the MSAN is unconstrained and the fibre is dark fibre point-to-point from the MSAN to the FDS. Port costs on the equipment at the handover are paid by the RSP. Adding additional capacity on dark fibre has no significant incremental cost.

45. If there is any cost justification for Chorus to seek to apply constraints to bandwidth then it is likely to be a backhaul issue. Those costs are likely incurred after the FDS, and therefore should be absorbed by a backhaul service, rather than used as a justification to constrain the regulated 'access' service.
46. Chorus are proposing to offer 26 handover points for Boost. That may be a good option to offer and may justify some premium for the Boost throughput. However RSPs want choices and that is the intent in the Act. If there are costs incurred from the FDS deeper into Chorus network then RSPs should have the option of picking up the service at the FDS to avoid any premium charge. This approach has underpinned the regulated services.
47. CallPlus has made significant investments in LLU and establishing points of presence in Chorus network and at the majority of first data switches. We wish to be able to aggregate traffic and manage our own backhaul if that avoids any costs which Chorus feel justify the incremental charge.

*This has direct implications for the UBA FPP determination*

48. CallPlus considers that the Commission will need to reflect on its approach to the FPP in light of the Proposal. Any costs that Chorus is trying to avoid by constraining the regulated service will be minimal and captured in the TSLRIC modelling. The only costs that Chorus may incur for continuing to offer the regulated service unconstrained are part of the normal network management process. We accept that occasionally additional capacity is required and additional fibre may need to be laid in trenches, however the cost of that (given the infrequency) will be minimal and should be captured as part of the forward looking TSLIRC cost modelling. There is a risk that Chorus could double recover any costs.
49. We also note that, with a 250kbps bandwidth cap per user it is likely that any efficient new entrant would build a mobile solution not a FTTH network. It's unclear to CallPlus how this new 'no investment, capped regulated service' is factored into the FPP process, although it clearly needs to be.
50. Perhaps, most tellingly, the fact that the price of Boost floats on the regulated access service highlights the fact that there is minimal cost associated with Boost and any price premium is artificial rather than cost based reflecting additional investment.

## **C. FURTHER COMMENTS FOR CONSIDERATION**

### ***Introduction***

51. In section B we responded to the Commission's specific questions. In this section C we focus on the application of the legal and regulatory regime to the Proposal. In summary:

- The Boost variants appear sufficiently similar to the regulated BUBA service such that they clearly fall within the STD. We recommend that the Commission confirm this position.
- Chorus is not permitted to unilaterally withdraw or artificially constrain the regulated service (or a part of it) under the STD, Act, or otherwise. To do so would breach the STD, raising grounds for an access seeker to initiate the complaints process under section 156O of the Act, or seek to enforce the STD directly in the High Court under section 156P of the Act.
- The Proposal appears to be a cynical attempt by Chorus to avoid regulation, reinforcing the need for Chorus to comply with its good faith obligations. Even if that were not the case, it would clearly result in competitive harm which is not for the long-term benefit of end-users. It also raises issues under the Commerce Act 1986.
- The Commission should consider utilising its section 69ZC information disclosure powers.
- To the extent that the Act does not apply, the competition division of the Commission would need to consider the issues under the Commerce Act.

52. Our reasoning on these points is set out below.

### ***The Boost variants appear sufficiently similar to the regulated BUBA service***

53. The Boost variants appear sufficiently similar to the regulated BUBA service such that they clearly fall within the STD. They are delivered over the same network elements as the current regulated service, and for the typical consumer there would be no meaningful difference.

54. It may be helpful for the Commission to confirm this view in writing. We do not consider that there is any need for a formal process for this. If Chorus was determined to proceed in any event, the Commission could notify Chorus that it would likely initiate a section 30R review to extend the scope of the STD to cover the Boost variants, if necessary, on 1 December 2014.

55. In the following table we list the key features<sup>6</sup> of the Boost variants that Chorus claim “distinguish them from the regulated UBA services”, and comment on why each of those features is not a sufficient differentiator:

Boost feature	Comments
Service commitment	<p>The “service commitment” includes a minimum downstream/upstream line speed, and a higher minimum downstream average throughput compared to the UBA service description in the STD.</p> <p><i>Throughput:</i> We do not consider that a higher average throughput is a sufficient differentiator, especially considering there would be no meaningful difference for the majority of end-users. It is highly relevant that throughput is not used in RSPs’ marketing to consumers.</p> <p>With respect, we consider that the Commission incorrectly came to the opposite conclusion in 2010. A higher average throughput simply reflects current “norms” and evolving technology standards internationally since the STD came into force in 2007.</p> <p><i>Speed:</i> The Commission has previously correctly concluded that, since the STD does not specify minimum speeds, this is not, of itself, a sufficient differentiator.<sup>7</sup></p> <p>We also note that the Boost service commitment is on a “best efforts” basis. The Commission has previously correctly concluded that “as a best efforts commitment is not enforceable, it would not be sufficient for the service to fall outside the scope of the UBA STD.”<sup>8</sup></p>
Line profile optimisation	The Commission has previously correctly concluded that dynamic line management (also known as line profile optimisation), in itself, is not a sufficient differentiator. <sup>9</sup>
Fibre-ready connections for Boost VDSL	It is in Chorus’ own interests to provide fibre-ready connections, especially considering its stated intention to transition customers to fibre. This cannot credibly be a sufficient differentiator. This raises questions about Chorus’ rationale, and the likely competitive impacts from a Commerce Act perspective. <sup>10</sup>
No “real time” class of service	While this may be a requirement for the EUBA service, it is not a requirement for the BUBA service. It also appears that Chorus has purposefully sought to design a new class of service for the Boost variants so that they fell short of the EUBA service description.
Amortisation of installation charge	While this may be useful in spreading costs, it is not an additional “feature” of the service that would justify keeping the Boost variants outside the STD. It cannot credibly be a sufficient differentiator.
Improved pre-qualification & investigation of line capabilities (non-qualifying lines)	<p>These are merely improvements which are in Chorus’ best interest to offer, and cannot credibly be sufficient differentiators.</p> <p>Further, Chorus’ comments about “non-qualifying lines” are concerning.<sup>11</sup> If we assumed for arguments sake that the Boost variants did fall outside the STD by virtue of the service commitment (<b>which we do not think is correct</b>), Chorus appears to believe that it can still offer the Boost variants on non-qualifying lines as commercial services without the service commitment. If the distinguishing feature no longer exists, the service</p>

<sup>6</sup> See the attachment to Chorus’ cover letter “Notice of new UBA service variants” dated 14 May 2014, and appendix 2 of Chorus’ “Notice of new UBA variants under clause 10 of the UBA standard terms determination general terms” dated 14 May 2014 (**Appendix 2**).

<sup>7</sup> Final Decision of the Commerce Commission on the applicability of the UBA STD to Telecom’s Wholesale VDSL2 Service, 20 December 2010 (**WVS Decision**), para 10.

<sup>8</sup> WVS Decision, para 21.

<sup>9</sup> WVS Decision, para 18.

<sup>10</sup> We note that section 63 of the Act provides that Part 2 of the Commerce Act does not apply in respect of a standard terms determination (or any matter necessary for giving effect to it).

<sup>11</sup> Appendix 2, page 1.

	cannot be considered a commercial variant that can be offered outside the regulatory regime.
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56. Chorus' position relies heavily on the Commission's conclusions in the WVS Decision. However, that decision is factually and legally distinguishable from the current circumstances so is not relevant.

57. The WVS Decision was made at a time when the access provider was also an access seeker (ie Telecom was vertically integrated, albeit under operational separation). The practical effect being that wholesale decisions by Telecom's wholesale arm were (at least to an extent) influenced by its retail arm. The context therefore is materially different when considering efficiency ramifications. For example, the WVS Decision related to a demand-led initiative, and as such seems consistent with dynamic efficiency goals.<sup>12</sup> In contrast, the Proposal is a supply side-led initiative.

58. The Boost variants differ from the facts of the WVS Decision in a number of other material respects, for example:

- Chorus seeks to constrain the regulated UBA service and withdraw VDSL as a regulated service;
- It appears the purpose or effect of the Proposal could be to bypass regulation;
- VDSL is no longer an "emerging technology; and
- With regard to WVS, at that time the "conditions" for regulation of the UBA service as set out in schedule 1 of Act were not met. Since Chorus placed VDSL under the STD VDSL uptake has shown considerable growth.

***Chorus is not permitted to unilaterally withdraw or artificially constrain the regulated service (or a part of it)***

59. Despite its assertions, Chorus has no legal right to unilaterally withdraw or artificially constrain the regulated service (or a part of it). This is not permitted under the STD, the Act, or otherwise. To take such actions would breach the STD (including the guiding principles) and give rise to grounds for an access seeker to initiate the complaints process under section 156O of the Act,<sup>13</sup> or seek to directly enforce the STD in the High Court under section 156P of the Act.

*Chorus is not permitted to withdraw the regulated VDSL service*

<sup>12</sup> We have noted in response question 16.4 that the Proposal may not in fact meet any efficiency goals. This is relevant for any assessment under section 18(2) of the Act.

<sup>13</sup> If an access seeker complains of an alleged breach of the STD by Chorus to the Commission, the Commission could ultimately decide to bring enforcement action against Chorus in the High Court.

60. Chorus has clearly stated that its current VDSL service is regulated under the STD,<sup>14</sup> and the Commission appears to have accepted this fact.<sup>15</sup> Chorus' VDSL service is therefore governed by the terms of the STD.

61. Clause 36.5 of the STD provides limited rights for Chorus to terminate the regulated service (or part of it), none of which apply here. Further, the Commission has previously confirmed that "[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."<sup>16</sup>

*Chorus is not permitted to artificially constrain the regulated service*

62. The STD does not provide a right for Chorus to artificially constrain the regulated service. (We note that Ethernet-based services do not have the same technical limitations as the legacy ATM platform that is currently capacity-constrained.)

*The guiding principles of the STD prevent withdrawal and degradation*

63. In addition to having no legal right to withdraw or artificially constrain the regulated service, Chorus must carry out its obligations under the STD in good faith and in furtherance of the purposes of the Act, especially section 18. Chorus is also obliged to supply the regulated service to a standard that is consistent with international best practice.<sup>17</sup> These are the guiding principles of the STD.<sup>18</sup>

- *Good faith*: Obligations to act in "good faith" include dealing with other parties honestly, fairly, and without hidden or ulterior motives, so as to not diminish the right of the other party to receive relevant benefits. Examples of parties not acting in good faith could include claiming the benefit of a technical excuse, or using specific contractual terms in isolation in order to refuse to perform a contractual obligation.

Here, Chorus appears to be seeking to use technical arguments to avoid their commercial and regulatory obligations. They appear to have designed a "new product" to avoid regulation, rather than to respond to RSP/end-user demand. As noted in section B, the Proposal does not appear to be in good faith, especially with the apparent objective of forced migration. Similarly, Chorus has relied on a "technical" argument about minimum throughput when that reference is accepted by all parties as an anachronism and does not match the service actually provided.

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<sup>14</sup> At the UBA price review conference, 12-13 June 2013, Anna Moodie noted that "[a] key to the Commission's decision in 2010 for excluding VDSL was that Telecom wholesale's original VDSL product had a speed guarantee attached to it. The [June 2013 VDSL2 service] that we've relaunched doesn't have that speed guarantee anymore and we couldn't credibly keep it out of the STD once it meets the service description of the STD." (page 100). See also Chorus' 15 May 2013 media release "Chorus launches mass market VDSL product as step towards fibre".

<sup>15</sup> Paragraph 10 of the Issues Paper.

<sup>16</sup> Standard Terms Determination for the designated service Telecom's unbundled bitstream access, Decision 611, 12 December 2007 (**Decision 611**), para 346.

<sup>17</sup> Standard access principle 2 of the Act.

<sup>18</sup> STD General Terms, clause 2 (Guiding Principles).

A level of cynicism may also be appropriate to good faith when these moves are proposed in the 3 year grandfathering/moratorium period, which was designed to protect all parties.

- *International best practice*: “International best practice” while not defined in the Act or the STD, necessarily implies generally accepted international standards of technical, commercial and regulatory practice in the telecommunications industry. International best practice is not static. Technical and commercial best practice must surely mean that an access provider continues to provide services on a “business as usual” basis, rather than downgrading them (at least until there is a clear and sufficient level of substitution from a legacy service). Similarly, regulatory best practice cannot permit an access provider to unilaterally (and adversely) vary the basis on which it supplies the regulated service. That necessarily includes maintaining services at accepted norms.

64. Chorus' proposal to constrain the regulated service and withdraw the regulated VDSL service, without any legal right to do so, clearly breaches the guiding principles of the STD.

***Chorus' proposed actions, taken together, are a cynical attempt to avoid the regulatory regime by forcing migration to non-regulated services***

65. It is important to bear in mind that a comprehensive regulatory regime applies, which was designed to ensure there are no gaps in relation to the regulation of designated services.<sup>19</sup> That regime includes the section 18 purpose (ie to promote competition for the long-term benefit of end users), the standard access principles of the Act, Decision 611, and the STD. There is both a hierarchy of obligations here as well as a broader obligation to ensure that the overall regulatory intent is best met, and the Act provides for a number of regulatory processes to ensure the Commission has the tools it needs to address any “gaps”.

66. The Telecommunications (TSO, Broadband and Other Matters) Amendment Act 2011 (**TAA**) provides for a three year “freezing” period in relation to the UBA. This freezing period was intended to be for the benefit of all parties, to preserve the “status quo” and to maintain continuity for a transitional period following the structural separation of Telecom.<sup>20</sup> Chorus' Proposal is inconsistent with this legislative intent and purpose.

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<sup>19</sup> Any service falling within the service description in schedule 1 of the Act is capable of being regulated under an STD or a section 27 bilateral determination. Commercial variants may exist, but only to the extent that access seekers agree to purchase those services on commercial terms, or the Commission has decided that (consistent with the regulatory purpose, and depending on the context) it is appropriate for the variant to sit alongside the regulatory regime. The Act provides various options for the Commission (or an access seeker) to address a situation where the current form of the STD needs to be clarified or expanded to cover new variants, if appropriate.

<sup>20</sup> For example, the stated purpose for the “grandfathering” of the wholesale price before separation day was to protect access seekers who have contracted retail obligations in reliance on the UBA wholesale price. Supplementary Order Paper No 204, 16 February 2011, page 76.



It is inappropriate for Chorus to “game” the regulatory framework to avoid a service being regulated. Clearly after the freezing period has lapsed, the Commission has an even broader range of powers to address these issues.

67. Constraining the regulated UBA services, in itself, is concerning. That would result in a diminished experience for end users when compared to a counterfactual of “business as usual” improvements. Doing so in combination with the Boost variants, where the intention is clearly to migrate end users off the regulated service, frustrates the entire regulatory framework, and has the potential to harm competition.

***The Commission should consider utilising its section 69ZC information disclosure powers***

68. We submit that, given the concerns raised by the Proposal, the Commission should consider utilising its powers under section 69ZC of the Act. Section 69ZC is specifically *“for the purpose of enabling monitoring of, and facilitating compliance with, prescribed applicable access principles— (i) that are incorporated in any determination, approved code, or registered undertaking; and (ii) with which the access provider is required to comply.”*

69. Given Chorus' apparent intention to not comply with its obligations under the STD, it may be useful to consider whether Chorus should be required to disclose further details. For example there may need to be greater disclosure of *“performance measures and statistics (for example, response times, technical performance, and service quality details)”* relating to UBA services (e.g. usual throughput); greater detail (and over a longer term) may also be required regarding *“plans and forecasts”* and *“network capacity information”*. It may also be useful to get information on what *“policies and methodologies”* Chorus will apply to its cost models if it proceeds with the Proposals.

***To the extent that the Act does not apply, the competition division of the Commission would need to consider the issues under the Commerce Act***

70. Section 63 (Application of Commerce Act 1986), provides that *“Part 2 of the Commerce Act 1986 does not apply in respect of a determination made under this Part or any matter necessary for giving effect to a determination made under this Part.”*

71. Clearly then, the Commerce Act is relevant to the extent that there is no STD, i.e. to any relevant conduct which does not form part of an STD, or to the extent that the Proposal falls outside the STD. In other words if Chorus's arguments are correct then it loses the benefit of the disapplication of the Commerce Act.

72. As noted Chorus is a monopolist, meaning both that its conduct falls to be considered under section 36 of the Commerce Act and that any arrangements it enters into could well have the purpose or effects prohibited under s 27 of the Commerce Act (namely a substantial lessening of competition). It also seems reasonably apparent that the Proposal constitutes a "*taking advantage*" of substantial market power as its conduct would not occur in a workably competitive market (i.e. applying a counterfactual or comparative test).
73. The issues then would be what is the (objective) purpose (subjectively informed) and what are the likely effects of the Proposal?