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Stephen Gale
Telecommunications Commissioner
Commerce Commission
PO Box 2351
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14 May 2014

Dear Stephen

NOTICE OF NEW UBA SERVICE VARIANTS

In accordance with the terms of the UBA Standard Terms Determination (**STD**), as varied by Decision 693, Chorus advises that it intends to offer two UBA service variants - a Commercial ADSL service, and a Commercial VDSL service (together the **Commercial UBA Services**). These Commercial UBA Services will sit alongside the regulated UBA STD services. Notice under 10.1.3 of the UBA STD General Terms, and the service description of the two services, are attached.

The introduction of the Commercial UBA Services is an important step in Chorus' progression as an open access wholesale-only operator following demerger – investing in and providing commercial services that respond to our customers' needs. It is also consistent with the Commission's expectation that Chorus will offer commercial services.¹ The Commission has also noted that the objectives of regulation can either be achieved through direct regulatory interventions or:

*"through incentivising parties to reach the kind of commercial agreements which would be expected of a competitive market, avoiding the cost of the regulatory process and accelerating the delivery of benefits to end-users"*²

The Commercial Services have a number of key features that distinguish them from the regulated UBA STD services. For example, both the Commercial UBA Services will have a commitment to a minimum downstream average throughput of 5 Mbps during a 15 minute period. This compares to the requirements of the UBA STD of 32kbps. While the Commercial UBA Services have other distinguishing features, in its previous consideration of a commercial UBA variant, the Commission concluded that a more onerous throughput obligation was sufficient to differentiate the commercial service from the regulated service.³

The Commercial UBA Services will be supported by investment in the aggregation network between the DSLAM and the handover point (specifically a new Alcatel-Lucent Extensible Routing System) and dynamic line management, amongst other things.

¹ The Commission in its UBA STD determination stated that "new wholesale services should be able to offer new UBA services commercially to its customers or to access seekers on a commercial basis but considers that Telecom must give prior notice of the new UBA services. Following the notice, the Commission may amend the UBA terms to include the new UBA service." UBA STD, Decision 611, 12 December 2007, paragraph 340

² Final Decision of the Commerce Commission on the request for a Review/Clarification of the application of the UBA STD to VDSL technology (Review/Clarification Decision), 16 April 2010, paragraph 13

³ Final Decision of the Commerce Commission on the applicability of the UBA STD to Telecom's Wholesale VDSL2 Service, 20 December 2010, paragraph 5, paragraph 12

The Commercial UBA Services will continue to sit alongside the regulated UBA STD services, providing our customers (retail service providers (**RSPs**)) with a set of differentiated service offers that can be used to meet end-user requirements.

As outlined in paragraph 19 of Decision 693⁴, the notice procedure is designed to allow the Commission to:

- Examine any new service description for a new UBA Variant to satisfy itself whether the new service falls within the service definition of the UBA STD; and
- If it does not, determine whether it is appropriate to institute a review under section 30R of the Act to consider whether to amend the UBA Service Description or other terms to capture the new DSL service.

In relation to the former, the Commercial UBA Services are differentiated and fall outside the UBA STD.

In relation to the latter, the introduction of the Commercial UBA Services will enhance the status quo by introducing services that deliver higher quality services at similar prices to those offered today. Chorus is also supplying services to all customers on an open access non-discriminatory basis. In its annual monitoring report, the Commission recognised that the broadband market was one of the most competitive in New Zealand. New Zealand also has one of the highest rates of broadband growth in the OECD and high broadband penetration. There is no evidence of a market failure that would justify a section 30R review being initiated.

Chorus is required to give at least 20 working days advance notice of the commercial variant. The Commercial UBA Services will be announced to the market today and, following a 60 day consultation period, will be available from September assuming appropriate interest from RSPs. A copy of the attached notice will be published on Chorus' website today.

When the Commission last received a notice under clause 10.1.3 of the UBA Standard Terms Determination General Terms, it promptly consulted on whether the new services fell within the service definition of the UBA STD, and whether it was necessary to institute a review under section 30R. We request that the Commission consider and respond to this Notice at the earliest opportunity to enable Chorus to continue with the Commercial UBA Services.

The notice sets out the information required to be provided under the STD. The **attachment** to this letter explains:

- the principles underpinning the STD commercial variant process;
- why the Commercial UBA Services fall outside the scope of the STD; and
- why there are no grounds to instigate a section 30R review.

Anna Moodie is our primary contact and available to assist the Commission with any queries.

Yours sincerely



Vanessa Oakley
General Counsel & Company Secretary

⁴ Final Determination of the STDs on Telecom's UBA Service, Decision 693, 10 May 2010

ATTACHMENT

The principles underpinning the commercial variant process

The Commission has, in previous decisions, set out the philosophy underpinning this notice process, and the factors necessary for a service to fall outside the STD service description.

In October 2009 Telecom Wholesale sought a clarification or review of the UBA STD in relation to the application of the STD to its proposed wholesale VDSL2 service (WVS). The approach the Commission takes to assessing whether a new variant is caught by the UBA STD, and if not whether it should be, is illustrated by its consideration of that application.

The Commission set out its general approach to considering new variants, stressing dynamic efficiency considerations:

"The Commission considers that the dynamic efficiency benefits associated with investment in new technologies are significant. As the Commission noted in its discussion paper regarding regulatory decision making in the telecommunications sector (emphasis added):

*The Commission previously indicated that where a tension exists between short-term allocative efficiency and long-term dynamic efficiency, the Commission will give greater weight to the promotion of the latter. The Commission considers that this approach remains appropriate. **Ongoing innovation and efficient investment over time can deliver significant long-term benefits to end-users, and the adverse consequences of deterring or delaying such investment may be substantial.***

*As outlined in the draft decision, the Commission considers that dynamic efficiency considerations are particularly relevant in the present case. VDSL2 is an emerging technology which is capable of delivering significant benefits to end-users such as increased speeds and facilitation of the development of innovative new services. Therefore, it is important that both access providers and access seekers are faced with appropriate investment incentives when considering deployment of VDSL-based services."*⁵

The Commission also noted Telecom's submission that the concept of commercial variants "is consistent with the statement in the Commission's draft guidelines on regulatory decision making for the telecommunications sector that" the objectives of regulation can either be achieved through direct regulatory interventions or:

*"through incentivising parties to reach the kind of commercial agreements which would be expected of a competitive market, avoiding the cost of the regulatory process and accelerating the delivery of benefits to end-users"*⁶

Why the Commercial UBA Services fall outside the service definition of the UBA STD

The approach the Commission takes to assessing whether a new variant is caught by the UBA STD, and if not whether it should be, is also illustrated by its consideration of Telecom's WVS application.

Firstly, the Commission concluded no clarification or review of the STD was necessary for Telecom to offer a new UBA variant:

"Decision 611 sets out the price and non-price terms for the services defined in the decision. It requires Telecom to deliver those services (BUBA and three variants of EUBA) where Telecom has ADSL or ADSL2+, or any future version of DSL coverage. This requirement is, and was intended to be, neutral in terms of the form of DSL service provided.

The intent of the STD is clear. Telecom must provide access to BUBA and EUBA in accordance with the terms of the STD. The DSL technology which Telecom elects to use to deliver BUBA and EUBA is a decision for Telecom alone. There is no compulsion on Telecom to use VDSL to deliver the regulated BUBA and EUBA services, except where they have chosen to make it the only DSL technology available in an exchange or cabinet to deliver the regulated service.

⁵ Final Decision of the Commerce Commission on the request for a Review/Clarification of the application of the UBA STD to VDSL technology (Review/Clarification Decision), 16 April 2010, paragraph 31,32

⁶ *ibid*, paragraph 13

...

This does not mean, however, that Telecom cannot develop other services using VDSL technology and offer these services commercially. Decision 611 relates only to the services described in that decision, and the applicability of that decision will turn on the nature of the service being delivered, not the technology used to deliver it.”⁷

The Commission came to the view that WVS did not fall within the regulated UBA service description:

“...WVS incorporates a number of features not included in the regulated UBA Service Description. These features include an increase in the minimum average throughput from 32kbps to 96 kbps, and a warranty from Telecom that the minimum line speed thresholds will be 15Mbps download and 5Mbps upload, with compensation payable in the event this standard is not met. In the Commission’s view these more onerous obligations on Telecom are sufficient to differentiate WVS (sic) from the regulated UBA service.”⁸

The Commission considered five claimed differentiating features of WVS, faster download and upload, increased throughput, minimum speed and service warranties, dynamic line management and Premium Best efforts, and came to the following conclusions:

Faster download and upload

“...as the UBA Service Description does not specify speed, the fact that the VDSL2 may have faster download and upload speeds than ADSL2+ does not of itself differentiate WVS (sic) from the regulated UBA service.”⁹

Increased throughput

“Submitters suggested that higher throughput metrics alone were not a sufficient differentiator from UBA. The Commission does not agree. The UBA Service Description specifies 32kbps as a minimum, compared with 96kbps for WVS. Currently Telecom is providing an average throughput of 45kbps for the regulated UBA service, which is well above the minimum required, but significantly below the level required under WVS. The more onerous throughput obligation applying to WVS is sufficient to differentiate it from the regulated service.”¹⁰

Minimum speed warranties

“The Commission believes these additional obligations on Telecom in the service description are significant, provide rights to end users that do not apply to the regulated UBA service, and are a sufficient differentiator to distinguish WVS from the regulated UBA service.”¹¹

Dynamic line management

“The Commission’s view is that the commitment to apply DLM to the service may not of itself sufficiently differentiate the service to take it outside the scope of the UBA STD, but rather facilitates the commitments given by Telecom set out above.”¹²

Premium Best Efforts

“...‘premium best efforts’ is a prioritised service, superior to internet-grade best efforts, but not real time. It is not a consequence of VDSL2 technology. It is a service differentiator that is not available for regulated UBA and which will provide an end user with improved performance during times of congestion.

...The Commission’s preliminary view on this issue is 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.”¹³

The Commission concluded that the more onerous throughput obligation in the WVS (96kbps compared to 32kbps in the STD) was sufficient to differentiate it from the regulated service. It also

⁷ Final Decision of the Commerce Commission on the request for a Review/Clarification of the application of the UBA STD to VDSL technology (Review/Clarification Decision),16 April 2010, paragraphs 40 – 42

⁸ Final Decision of the Commerce Commission on the applicability of the UBA STD to Telecom’s Wholesale VDSL2 Service, 20 December 2010, paragraph 5

⁹ *ibid*, paragraph 10

¹⁰ *ibid*, paragraph 12

¹¹ *ibid*, paragraph 15

¹² *ibid*, paragraph 18

¹³ *ibid*, paragraph 21

considered that the minimum speed warranties were sufficient to distinguish WVS from the regulated service as they were significant, and provided enforceable rights to end users which were not found in the STD. On the other hand, the fact that line speed might be faster, dynamic line management optimised port performance, and a superior best efforts standard was to be applied were not sufficient, as these did not create enforceable obligations which provided rights to end users additional to those in the STD.

The service description of the Commercial UBA Services, as set out in the attached notice, includes:

- (a) A minimum downstream average throughput of 5Mbps during a 15 minute period, compared to 32kbps for the STD service (which was alone sufficient for the Commission to determine that WVS fell outside the STD terms);
- (b) If a qualifying copper line is not able to support this throughput speed, Chorus will investigate the issue at no cost to the customer and/or will allow the customer to change plans at no cost;
- (c) Installation is included in the monthly charge for both services, and house wiring (including fibre-ready wiring in Chorus UFB areas) is included in the monthly charges for the Commercial VDSL service;
- (d) Line Profile Optimisation (sometimes known as Dynamic Line Management) applies, when appropriate, to both services. (Chorus recognises that in the WVS decision, the Commission concluded that this additional feature in isolation "*may not of itself sufficiently differentiate the service to take it outside the scope of the UBA STD*".).

It is accordingly clear that the Commercial UBA Services do not fall within the service description in the UBA STD.

Why there are no grounds to instigate a section 30R review.

The Commission in its WVS decision discussed the factors to be considered in determining whether to instigate a section 30R review:

"The Commission notes the submission from Kordia arguing that further analysis is required before it can be concluded that dynamic efficiency considerations indicate that VDSL-based wholesale services should not be regulated in the early stages. However, the Commission notes that:

- (a) *VDSL2 deployment is in its infancy in New Zealand, with Telecom yet to launch VDSL2-based services;*
- (b) *TelstraClear is already offering retail VDSL2 services in the market; and*
- (c) *Telecom has committed to providing wholesale VDSL2-based bitstream service on a commercial basis.*

Therefore, at this stage there appears to be no evidence of market failure in relation to the supply of VDSL2 services.

*Given that Telecom has committed to provide a wholesale VDSL2 service on a commercial basis, and there is potential for competition to develop in the provision of VDSL2-based retail services, the Commission's view is that a section 30R review is not appropriate at the present time."*¹⁴

In essence, the Commission's conclusion was that absent any evidence of market failure, a section 30R review was not warranted. This approach is consistent with dynamic efficiency considerations.

In its December 2010 decision, the Commission then concluded that:

*"In the Commission's view, there are no grounds to commence a section 30R Review. It is appropriate that the market should determine the price for the enhanced service."*¹⁵

¹⁴ Final Decision of the Commerce Commission on the request for a Review/Clarification of the application of the UBA STD to VDSL technology (Review/Clarification Decision), 16 April 2010, paragraphs 33 - 35

The Commission's clear early guidance assisted the market.

In the case of the Commercial UBA Service there is no market failure to justify further regulatory intervention:

- As a consequence of the 2011 Amendments, Chorus will be providing the services to all its customers on a non-discriminatory basis and does not compete at the retail level;
- The UBA STD services remain available to its customers under the STD terms;
- The Commercial UBA Services provide greater choice to support retail differentiation which is to the long term benefit of end users;
- In the past three years, New Zealand has been one of the fastest growing broadband markets in the 32 countries of the OECD;
- New Zealand's broadband penetration is comfortably ahead of the OECD average and growing at a consistently faster rate. We are 15th in the OECD rankings – ahead of the United States and Japan, and up from 23rd 6 years ago;
- In 2013, 75% of homes had broadband (up from just 63% two years ago). The main reason given for not having broadband was "disinterest";
- The Commission concluded that the retail broadband market is one of the most competitive telecommunications markets in New Zealand; and
- The introduction of the Commercial UBA Services that enhance the status quo, demonstrates that there are incentives to deliver commercial solutions.

¹⁵ Final Decision of the Commerce Commission on the applicability of the UBA STD to Telecom's Wholesale VDSL2 Service, 20 December 2010, paragraph 26