



COMMERCE COMMISSION

**Standard Terms Determination for the designated service  
Telecom's unbundled copper local loop network co-location**

Decision 610

Determination under section 30M of the Telecommunications Act 2001

**The Commission:** Dr Ross Patterson  
Donal Curtin  
Anita Mazzoleni

**Date of Determination:** 7 November 2007

**CONFIDENTIAL MATERIAL IN THIS DETERMINATION IS CONTAINED IN  
SQUARE BRACKETS**

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## EXECUTIVE SUMMARY<sup>1</sup>

- i. The Unbundled Copper Local Loop Co-location service (Co-location service) provides co-location facilities for an Access Seeker's equipment, and access to the handover point, at Telecom's local telephone exchange for the purposes of providing access to, and interconnection with, Telecom's unbundled copper local loop network. This service is complementary to the Unbundled Copper Local Loop service.
- ii. On 28 March 2007, the Commission initiated a standard terms determination process in relation to the designated access service Telecom's unbundled copper local loop co-location service. Telecom submitted a standard terms proposal, submissions, and cross-submissions were received.
- iii. On 21 September 2007, the Commission held a public conference to provide an opportunity for the Commission to seek additional information on particular aspects of the submissions.
- iv. In this final Standard Terms Determination, the Commission has determined the price and non-price terms for the Co-location service. It contains sufficient terms to allow Telecom to make the service available to an Access Seeker without the need for the Access Seeker to enter into an agreement with Telecom for provision of the service. The key terms are summarised below.

### Price terms

- v. The Commission has retained its "price methodology" benchmarking approach, as described in its draft determination, in determining the initial price as required by the Act, and has applied this methodology to both co-location builds and floor space rental zones.
- vi. Accordingly, the Commission has determined that the geographic monthly rental price zones are:

Zone A	\$20 per m <sup>2</sup>
Zone B	\$14 per m <sup>2</sup>
Zone C	\$11 per m <sup>2</sup>

- vii. The Commission has also determined a number of other prices for the ancillary services that support the Co-location service.

### Non-price terms

- viii. In determining the non-price terms, the Commission has generally adopted:

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<sup>1</sup> This executive summary does not form part of the Commission's Standard Terms Determination Standard Terms for Telecom's unbundled copper local loop co-location service

- the non-price terms that were unanimously recommended by the Telecommunications Carriers Forum (TCF) and only made changes to those recommendations where there was a compelling reason to do so;
- those changes to the non-price terms included in Telecom's cross submission on the draft STD and which the Commission believes dealt with Access Seekers' concerns; and
- those non-price terms where there are well established Telecom operational systems in place (e.g. fault prioritisation) which would be expensive to adjust. The Commission has only made changes where there is a clear benefit, given that Access Seekers and Telecom Retail will ultimately receive equivalent service levels through the operational separation process.

### **Cabinetisation**

- ix. The Commission acknowledges that, during the life of this determination, copper local loops from the exchange will be replaced by copper local loops from distribution cabinets in the street. Accordingly, provision has been made for Access Seekers to receive sufficient notice of any planned cabinetisation within an exchange area, for use in their service and investment planning.
- x. Under the Co-location STD, Telecom is required to provide Access Seekers with:
  - an initial notice of cabinetisation for the first 24 months;
  - a cabinetisation notice at least 24 months before any other cabinetisation takes place (i.e. that was not addressed in the initial notice), and,
  - a rolling three year forecast of its cabinetisation plans on each six month anniversary of the determination date.
- xi. The notices must set out Telecom's cabinetisation plans on a per exchange basis (including the suburbs affected and the number or percentage of MPFs that will be affected) and explain the effect on any Access Seekers in receipt of the Co-location service.
- xii. In some circumstances, such as where there is a material risk to the Co-location service, Telecom may amend these notices or may cabinetise a part of its network by giving less than 24 months notice. In these events and if requested by the Access Seeker, Telecom must pay for the transfer of the Access Seeker's customers to other Telecom services.

Commercially sensitive information cited in this determination was provided subject to an order made under section 15(i) of the Act and section 100 of the Commerce Act 1986. The confidentiality order in relation to the standard terms determination process for Telecom's unbundled copper local loop network (the Order) is dated 14 June 2007 and is available on the Commission's website.

Information in relation to Telecom's restricted information is denoted as [TNZRI]. Access seeker's restricted information is denoted in a similar way, for example, TelstraClear restricted information is labelled [TCLRI]. Commission only information is denoted as [COI].

All restricted and Commission only information is subject to the Order and has been extracted from the public version of this determination.

Key documents are available on the Commission's website at:

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/UnbundledLocalLoopCoLocationService/DecisionsList.aspx>

## THE DETERMINATION FRAMEWORK

1. This standard terms determination ('STD') for Telecom's unbundled copper local loop network co-location ('Co-location') comprises this decision and the appended:
  - Co-location Terms comprising:
    - (a) Co-location General Terms
    - (b) Schedule 1 - Co-location Service Description
    - (c) Schedule 2 - Co-location Price List
    - (d) Schedule 3 - Co-location Service Level Terms
    - (e) Schedule 4 - Co-location Operations Manual
    - (f) Schedule 5 - Access Terms
  - Implementation Plan.

### Purpose

2. In making an STD, the Commission must consider the purpose set out in section 18 of the Telecommunications Act 2001 ('the Act'). Section 18 describes the purpose of Part 2 and Schedules 1, 3, and 3A as follows:

#### 18 Purpose

- (1) The purpose of this Part and Schedules 1 to 3 is to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.
- (2) In determining whether or not, or the extent to which, any act or omission will result, or will be likely to result, in competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand, the efficiencies that will result, or will be likely to result, from that act or omission must be considered.
- (3) Except as otherwise expressly provided, nothing in this Act limits the application of this section.
- (4) Subsection (3) is for the avoidance of doubt.

3. Section 19 of the Act directs the Commission to consider, when making a determination under Part 2, to satisfy itself that the determination best gives, or is likely to best give, effect to the purpose set out in section 18. Section 19 states:

#### 19 Commission and Minister must consider purpose set out in section 18 and additional matters

If the Commission or the Minister (as the case may be) is required under this Part or any of Schedules 1, 3, and 3A to make a recommendation, determination, or a decision, the Commission or the Minister must—

- (a) consider the purpose set out in section 18; and

(b) if applicable, consider the additional matters set out in Schedule 1 regarding the application of section 18; and

(c) make the recommendation, determination, or decision that the Commission or Minister considers best gives, or is likely to best give, effect to the purpose set out in section 18.

### **Determination process**

4. On 28 March 2007, the Commission initiated a standard terms determination process in relation to the designated access service “Telecom’s unbundled copper local loop network co-location” under section 30C of the Act.
5. The Commission conducted a scoping workshop on 5 April 2007. The workshop was open to all parties to the standard terms determination. The purpose of the workshop was to provide the Commission with information to assist it in specifying:
  - a reasonable period of time within which Telecom must submit a standard terms proposal (**‘STP’**) under section 30F: and
  - any additional requirements for that STP under 30F(2).
6. The Commission gave written notice to Telecom on 16 April 2007 requiring it to submit to the Commission, a STP by 12 June 2007 that complied with section 30G of the Act. In the notice, the Commission specified a number of additional requirements that Telecom was required to provide in its STP. The Commission did not require the STP to address the supply of a co-location service in the distribution cabinet (or equivalent facility).
7. On 12 June 2007, Telecom submitted an STP for this designated access service. Interested parties were invited to submit on this STP.
8. On 22 June 2007, the Commission wrote to interested parties respect of the Commission’s preliminary view that in limited circumstances a price methodology rather than a price quantum may be benchmarked. Submissions were received from Telecom, Vodafone/ihug, CallPlus, Orcon and TelstraClear on 6 July 2007.
9. On 28 June 2007, submissions on the STP were received from Telecom, Orcon/CallPlus, TelstraClear, Vodafone/ihug, InternetNZ, MediaLab, and Vector Communications.
10. On 31 July 2007 the Commission issued its draft STD in accordance with section 30K of the Act. Submissions were received on 29 August 2007 from Telecom, Orcon/Kordia/CallPlus, TelstraClear, Vodafone/ihug, InternetNZ, MediaLab, Rural Women NZ, Selwyn Community Council, TUANZ and Vector Communications. On 12 September 2007, cross-submissions were received from Telecom, Orcon/Kordia/CallPlus, TelstraClear, Vodafone/ihug, InternetNZ, TUANZ and Vector Communications.
11. On 21 September 2007, the Commission held a conference, pursuant to section 30L of the Act, to provide an opportunity for the Commission to seek additional information on particular aspects of the submissions and to provide interested parties with an



opportunity to give a brief overview of their position, by presenting opening and closing submissions.

12. Key documents and transcripts are available on the Commission's website at:

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/UnbundledLocalLoopService/DecisionsList1.aspx>

### The service description

13. This STD concerns the designated access service of "Telecom's unbundled copper local loop network co-location" as set out in subpart 1 of Part 2 of Schedule 1 of the Act. This service is defined as follows:

#### Telecom's unbundled copper local loop network co-location

*Description of service:*

A service (and its associated functions, including the associated functions of Telecom's operational support systems) that provides co-location facilities for an access seeker's equipment, and access to the handover point, at Telecom's local telephone exchange or distribution cabinet (or equivalent facility) for the purposes of providing access to, and interconnection with, Telecom's unbundled copper local loop network (including any necessary supporting equipment)

To avoid doubt, **access seeker's equipment** includes the equipment of any person other than the access seeker (including any line) if that equipment is being used to support the provision of backhaul for the access seeker

To avoid doubt, this service includes access to, and the use of, space in, on, or around Telecom's local telephone exchange or distribution cabinet (or equivalent facility) for the purposes of installing and maintaining the access seeker's equipment

*Conditions:*

Any of the following:]

- (a) an application for a determination by the access seeker of the service is pending in respect of Telecom's unbundled copper local loop network; or
- (b) a standard terms development process has been initiated under subpart 2A of Part 2 in respect of Telecom's unbundled copper local loop network; or
- (c) the access seeker of the service is a party to a determination under section 27 that has not expired, or is a party to a standard terms determination under section 30M, in respect of Telecom's unbundled copper local loop network; or
- (d) an agreement for Telecom's unbundled copper local loop network (or similar unbundled local loop network service) is in force between the access seeker of the service and Telecom

*Access provider:*

Telecom

<i>Access seeker:</i>	A service provider who seeks access to the service
<i>Access principles:</i>	The standard access principles set out in clause 5
<i>Limits on access principles:</i>	The limits set out in clause 6 and the additional limit of the interests of other service providers who are co-located in the relevant facilities
<i>Initial pricing principle:</i>	Benchmarking against prices for similar services in comparable countries that use a forward-looking cost-based pricing method
<i>Final pricing principle:</i>	TSLRIC
<i>Requirement referred to in section 45 for final pricing principle:</i>	Nil
<i>Additional matters that must be considered regarding application of section 18</i>	Nil

### **Statutory requirements for an STD**

14. The Commission makes this STD in accordance with sections 30M, 30O, 30P and 30Q of the Act.
15. In this STD, section 30P(1)(a) and (b) do not apply and, therefore, the Commission has determined the prices in accordance with the applicable initial pricing principle for the designated access service of “Telecom’s unbundled copper local loop network co-location” (section 30P(1)(c)).
16. Section 30O specifies the matters to be included in the final STD as follows:

#### **30O Matters to be included in standard terms determination: general**

- (1) A standard terms determination must—
  - (a) specify sufficient terms to allow, without the need for the access seeker to enter into an agreement with the access provider, the designated access service or specified service to be made available within the time frames specified under paragraph (b); and
  - (b) state the time frames within which the access provider must make the service available to—
    - (i) every person who is already an access seeker when the standard terms determination is made; and
    - (ii) every person who becomes an access seeker after the standard terms determination is made; and
  - (c) specify the reasons for the standard terms determination; and

- (d) specify the terms and conditions (if any) on which the standard terms determination is made; and
  - (e) specify the actions (if any) that a party to the standard terms determination must take or refrain from taking.
- (2) To avoid doubt, a standard terms determination may also include, without limitation, terms concerning any or all of the following matters:
- (a) dispute resolution procedures:
  - (b) the consequences of a breach of the determination (including provision for set-off or withholding rights, or liquidated damages):
  - (c) suspension and termination of the service:
  - (d) procedures for, or restrictions on, assignment of the service.
- (3) The Commission must identify which of the terms (if any) specified in a standard terms determination are allowed to be varied, on an application made under section 30V by a party to that determination, under a residual terms determination.

### **Timeframe for supply to access seekers**

17. The Commission is required by section 30O(1)(b) to specify in the STD, the timeframes within which the access provider must make the service available to:
- every person who is already an access seeker at the time the STD is made; and
  - every person who becomes an access seeker after the STD is made.
18. The timeframes within which Telecom must make the service available are contained in the Implementation Plan in Appendix A.

### **Telecom as Access Seeker**

19. In its draft STD the Commission indicated its preliminary view that, in respect of Telecom<sup>2</sup> as the Access Provider of the Co-location designated access service, the Act does not contemplate that the Access Provider and Access Seeker are intended to be the same organisation. Telecom submitted that its business units qualify as eligible Access Seekers under the Act and that in the absence of such status, Telecom Wholesale will have no voice to amend STDs whilst Access Seekers do have a 'voice'.
20. Orcon, Kordia and Callplus agreed with the Commission's preliminary view. TelstraClear agreed with the Commission's preliminary view in its submissions and disagreed in its cross submissions.
21. While the Commission notes that it is not required by the Act to give a view on this issue as it is ultimately a matter of statutory interpretation, the Commission maintains its preliminary view and in the interests of clarity makes the following points:

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<sup>2</sup> Defined as Telecom Corporation of New Zealand and includes any of its subsidiaries, section 5 Telecommunications Act 2001.

- The Access Provider, in addition to Access Seekers has a ‘voice’ in respect of any changes to an STD. Telecom, defined broadly as the Telecom Corporation of New Zealand (which includes Telecom Wholesale) is the Access Provider.
- Operational Separation does not establish Telecom business units as separate legal entities. This would only be achieved by structural separation or subsequent sale of a business unit.
- The Commission consults interested parties if they are materially affected by a change and so if necessary may consult specifically with Telecom Wholesale.
- The scheme and purpose of the Act support the view that in respect of UCLL and Co-location, an Access Seeker and Access Provider cannot concurrently be the same legal entity.
- Telecom’s draft Separation Undertakings exclude Telecom from the definition of Access Seeker.<sup>3</sup>

### **Access principles and limits on those principles**

22. Clauses 5 and 6 of Schedule 1 to the Act apply in relation to this designated access service. They provide:

#### **5 Standard access principles for designated access services and specified services**

The following standard access principles apply to designated access services and specified services:

- principle 1*: the access provider must provide the service to the access seeker in a timely manner;
- principle 2*: the service must be supplied to a standard that is consistent with international best practice;
- principle 3*: the access provider must provide the service on terms and conditions (excluding price) that are consistent with those terms and conditions on which the access provider provides the service to itself;
- principle 4*: the access provider must, if requested, provide an access seeker with information about a designated access service or specified service at the same level of detail, and within the same time frame, that the access provider would provide that information had it been requested by one of its own business units.

#### **6 Limits on application of standard access principles set out in clause 5**

- Principles 1 to 4 set out in clause 5 are limited by the following factors:
  - reasonable technical and operational practicability having regard to the access provider’s network;
  - network security and safety;
  - existing legal duties on the access provider to provide a defined level of service to users of the service;
  - the inability, or likely inability, of the access seeker to comply with any reasonable conditions on which the service is supplied;
  - any request for a lesser standard of service from an access seeker

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<sup>3</sup> Telecom Draft Separation Undertaking, 25 October 2007, clause 1.1.

- (2) Principle 4 set out in clause 5 –
  - (a) does not extend to any information about identifiable individual customers of the access provider; and
  - (b) is subject to the requirement that any confidential information provided to the access seeker, in accordance with that principle, must be kept confidential to that access seeker.

23. The Commission has taken these principles and limits into account when making the STD along with sections 18 and 19 of the Act.

### **Compliance with standard access principle 3**

24. Clause 2.3 of the Co-location General Terms incorporates the access principles and the limits on those access principles from clauses 5 and 6 of Schedule 1 to the Act.

25. Access principle 3 requires that Telecom provide the Co-location service on terms and conditions (excluding price) that are consistent with those terms and conditions on which it provides the service to itself.

26. Telecom provided a high level explanation in its submissions as to how it will ensure consistency under this principle.

27. On 26 September 2007 the Minister of Communications made the Telecommunications (Operational Separation) Determination 2007 (**‘Operational Separation Determination’**). This provides further requirements with which the separation plan under Part 2A of the Act must comply and are in addition to those requirements in section 69D of the Act. Clause 9 of the Operational Separation Determination states that:

In this determination, unless the context otherwise requires, **equivalence of inputs** or **EOI**—

- (a) means that, if Telecom is required to provide a relevant service to an access seeker,—
  - (i) Telecom must provide the access seeker and Telecom itself with the same service; and
  - (ii) Telecom must deliver that service to the access seeker and to Telecom itself on the same timescales and on the same terms and conditions (including price and service levels); and
  - (iii) Telecom must deliver that service to the access seeker and to Telecom itself by means of the same systems and processes (including operational support processes); and
  - (iv) Telecom must provide the access seeker and Telecom itself with the same commercial information about those services, systems, and processes; and
- (b) includes, if Telecom is required to provide a relevant service to an access seeker, the use by Telecom of services, systems, and processes that access seekers must be able to use in the same way, and with the same degree of reliability and performance, as those services, systems, and processes are used by Telecom; and
- (c) is subject to clause 8.

28. Accordingly, the Commission considers that the implementation of full equivalence of inputs (EOI) under Part 2A will largely subsume the operation of access principle 3.

That is, when services are provided on an EOI basis it follows that those services will be provided on the basis of consistent non-price terms.

29. As outlined in the Operational Separation Determination (and Telecom's draft Separation Undertakings), there will be a staged approach towards full EOI. During this transition before full EOI, access principle 3 - the requirement for consistent terms and conditions (excluding price) - remains relevant. As such, there may be occasion to compare Telecom's internal service provision with the service provided to Access Seekers to check for consistency in the non-price terms and conditions, for example in relation to SLAs..
30. The Commission therefore does not consider that arguments made by Telecom that there may be inconsistent application of the Co-location STD and operational separation are sound.

### **Information disclosure**

31. Clause 2.3 of the Co-location General Terms incorporates the access principles as the guiding principles of supply. As such, the Commission may require Telecom, in accordance with section 69ZC, to prepare and disclose information about the operation and behaviour of any part of its business that provides prescribed designated or specified services.
32. The Commission may require Telecom to adopt, in the preparation or compilation of that information, any methodology that the Commission requires. The Commission may also require other information disclosure as further set out in section 69ZC of the Act. The purpose of such disclosure is specified in section 69ZC(1)(b) as follows:
  - (b) for the purpose of enabling monitoring of , and facilitating compliance with, prescribed 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.
33. At this stage the Commission does not intend to seek information disclosure pursuant to section 69ZC as part of this determination, but may do so in the future.

### **Amendments to an STD**

34. The Act provides a range of mechanisms to amend a STD including:
  - a review under section 30R;
  - a Residual Terms Determination under section 30ZB;
  - a pricing review determination under section 51;
  - a clarification under section 58;
  - and a reconsideration under section 59.
35. Section 30R allows the Commission, on its own initiative, to commence a review at any time of all or any of the terms of an STD. After review, the Commission may replace an STD, or vary, add, or delete any of its terms, if it considers it necessary to do so. The review can also address aspects of a service not covered in an initial STD

and update the terms of an STD to reflect regulatory or technological change.

36. Apart from the requirements in section 30R, the Commission may conduct the review in a manner and within a timeframe as the Commission thinks fit. This enables the Commission to assess the appropriate form and degree of consultation on a case by case basis.<sup>4</sup> However, the Commission will give notice in the Government Gazette. The Commission expects that, if there is unanimous agreement in the Telecommunications Carriers Forum for a particular change, the consultation process is likely to be very short and completed quickly.

### **Variation of terms under a residual terms determination**

37. The Commission is required by section 30O(3) of the Act to identify which of the terms (if any) specified in a STD are allowed to be varied on an application for a residual terms determination ('RTD') made under section 30V.
38. An RTD is an alternative to a private bilateral agreement or to generic changes to an entire STD.<sup>5</sup> It is only in respect of a RTD that there is a limit on which terms may be varied. All terms may still be varied by parties as part of a private commercial agreement<sup>6</sup> or by the Commission when clarifying or reviewing an STD.
39. In the draft Co-location STD, the Commission proposed that the terms in the following schedules and plan should not be variable:
- Schedule 1 Co-location Service Description;
  - Schedule 2 Co-location Price List;
  - Implementation Plan.
40. Submissions from Telecom and Access Seekers indicated a preference for variability of *all* terms or variability of *no* terms. The key reason to support this view was the relationship between service levels (Schedule 3 Service Level Terms) and the prices (Schedule 2 Price List).
41. The Commission has considered these submissions and what is likely to give best effect to section 18 of the Act. Its starting point is that consumers would best be served with maximum flexibility, and accordingly, all terms should be variable for the purpose of an RTD unless there is a good reason otherwise.
42. In some areas certainty outweighs flexibility. For example, as the Implementation Plan has immediate effect and then falls away after a period of time, it is appropriate that no regulated variation of bilateral arrangements via the RTD process take place during that stage. In addition, clauses should not be variable, if to do so would undermine the scheme and purpose of the Act.

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<sup>4</sup> This can be contrasted with the process under section 59(3) of the Act which requires that a reconsideration determination follow the same process as followed for the initial determination.

<sup>5</sup> Other amendments to an STD can occur via other provisions such as pricing under s42 in the Telecommunications Act 2001

<sup>6</sup> However Access Seeker's may not apply a RTD if prevented by the 18 month rule. See sections 30W and 30S(2) Telecommunications Act 2001.

43. On this basis, the Commission has determined that all terms may be varied for an RTD application made under section 30V by a party to the Co-location STD, apart from those listed below:

Co-location General Terms

- a) Section 2 - Guiding Principles
- b) Clause 8.3 – Rights not excluded
- c) Clause 8.4 - Amendment
- d) Clause 10.1 – (in section 10 – Change mechanism for Co-location Operations Manual and Co-location Service Level Terms)
- e) Section 39 - Disputes

Schedule 1 Co-location Service Description

- f) Clause 1.2 (in section 1 – The Co-location Service)

Schedule 2 Co-location Price List

- g) Service Component 1.1 – Co-location New Exchange
- h) Service Component 1.2 – Co-location New Row
- i) Service Component 2.1 – Co-location Floor Space
- j) Service Component 2.3 – Co-location Cable Service

Implementation Plan

- k) All clauses

**Operational separation**

44. Telecom submits<sup>7</sup> that its STP was prepared amidst significant uncertainty for Telecom and the industry given pending separation in accordance with Part 2A of the Act. This submission was made on the basis that the future Telecom organisational structure and operating environment within which the service (and its associated functions) will be provided, was unknown. Telecom's submissions noted that the pending operational separation undertakings will be legally binding on it. Accordingly, Telecom proposed that, if anything in the STD proves to be inconsistent with any requirement in either of those documents, Telecom will have no option but to seek amendment to the STD in order to give effect to the separation determination/plan and that it should not be liable under the Standard terms for such inconsistencies.
45. Following Telecom's submission the Minister of Communications has made the Operational Separation Determination and Telecom has submitted its draft Separation Undertakings. As indicated in paragraph 28 above, the Commission considers that requirements from the operational separation undertakings are likely to subsume the 'consistency' requirements of the Co-location STD so that when services are provided on an EOI basis it follows that those services will be provided on the basis of consistent non-price terms.
46. The Commission also notes that there are a range of established mechanisms under the Act to allow amendments to a STD should the need arise. On this basis, therefore, it is

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<sup>7</sup> Telecom's Standard Terms Proposal, 12 June 2007, paragraphs 37 and 38



inappropriate to provide a broad exclusion of liability as proposed in Telecoms Co-location STP. In light of Telecom's subsequent concern as to the ambiguity of the words 'have regard' and the range of pre-existing mechanisms under the Act to amend a STD, the Commission has removed section 47 from the Co-location General Terms.

### **Breach of an STD**

47. The Co-location STD provides a range of dispute resolution procedures.<sup>8</sup> However, the STD does not prevent any party from seeking remedies available to it under the Act.<sup>9</sup>
48. Under section 156N(b) of the Act an STD is an enforceable matter. As such, Telecom and/or Access Seeker may make a written complaint to the Commission alleging a breach of the STD. The Commission must then decide what action, if any, to take, including whether to take action in the High Court.<sup>10</sup> Telecom and/or the Access Seeker may also take action High Court under section 156P(1) of the Act.
49. On the application of the Commission, the High Court may, in addition to any other remedies, order a pecuniary penalty if there has been a breach of the STD and that the amount of any compensatory damages that can be awarded will be less than the commercial gain resulting from the breach.<sup>11</sup>

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<sup>8</sup> See section 39 Co-location General Terms

<sup>9</sup> See clause 39.13 Co-location General Terms

<sup>10</sup> See sections 156O, 156P, 156Q and 156R of the Act

<sup>11</sup> See section 156Q(2) and 156(R) of the Act.

## SERVICE DESCRIPTION

50. The Co-location service is described in Appendix A, Schedule 1 Co-location Service Description as follows:

The Co-location Service is a service (and its associated functions, including the associated functions of Telecom's operational support systems) that provides co-location facilities for an Access Seeker's equipment, and access to the handover point, at Telecom's local telephone exchange (referred to below simply as Telecom's exchange) for the purposes of providing access to, and interconnection with, Telecom's unbundled copper local loop network (including any necessary supporting equipment).

51. With the exception of the reference to "or distribution cabinet", the wording replicates the description of service in the Act. The reference to "distribution cabinet" is not included because the Commission decided, following consultation with interested parties, not to include co-location at distribution cabinets at that stage. The Co-location Service in Appendix A, Schedule 1 is then further expanded upon as follows:

The handover point is the Handover Distribution Point ('**HDP**') block located on the Main Distribution Frame ('**MDF**').

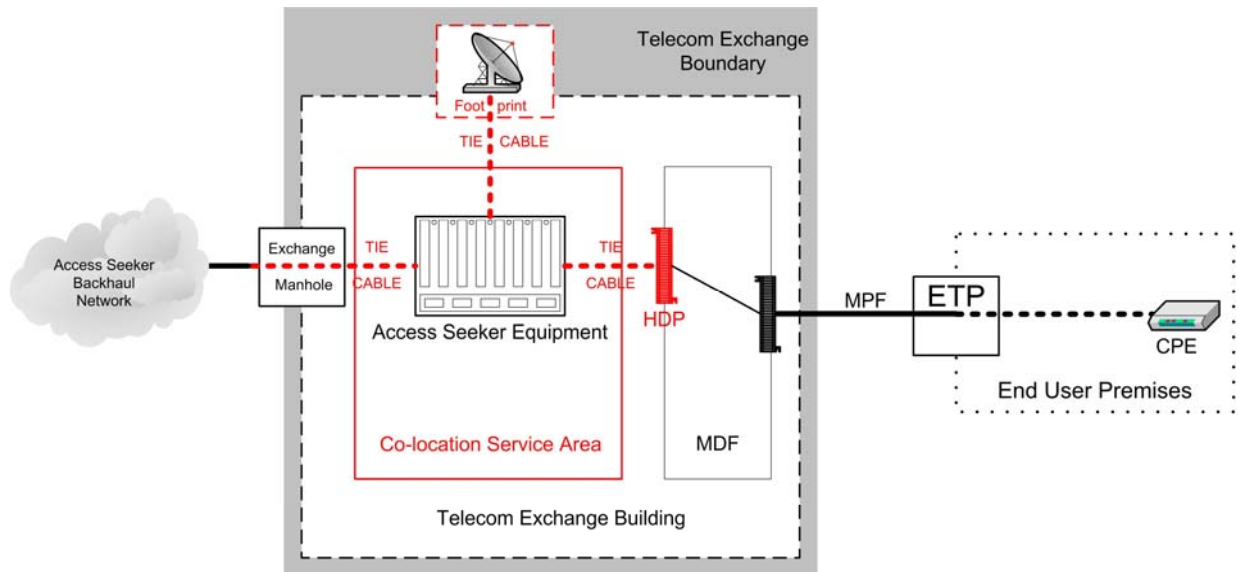
The Access Seeker can combine the Co-location Service with interconnection, and backhaul for the UCLL Service offered by Telecom (or with the Access Seeker's own network or wholesale services provided by other providers) to deliver a service to End Users.

52. The Co-location Service specifically excludes:<sup>12</sup>
- access to, and the use of, space in, on, or around any location apart from Telecom's exchange;
  - housing Access Seeker equipment (including any necessary supporting equipment) that is not approved by Telecom under the Co-location Operations Manual;
  - housing Access Seeker equipment that is used wholly or partly for a purpose other than providing:
    - access to, and interconnection with Telecom's unbundled copper local loop ('**UCLL**') network; or
    - backhaul for the UCLL service;
  - the UCLL service;
  - unconditional rights of access to exchanges; and
  - the unbundled copper local loop network backhaul service which is an optional additional service.

53. A diagram of the Co-location Service is shown below:

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<sup>12</sup> Note this is not intended to be an exhaustive list of exclusions or to limit what is excluded from the Co-location Service.



HDP – handover distribution point  
MPF – metallic path facility

MDF – main distribution frame  
ETP – external termination point

## CORE CHARGES

### Introduction

54. This section sets out the Commission's approach to the calculation of the core charges. It also provides an explanation and reasons for the core charges determined. The charges themselves are provided in the Co-location Price List in Appendix A.

### Co-location transaction charges

#### *Co-location New Exchange and New Row – Price list 1.1 and 1.2*

55. These charges are incurred to prepare co-location space for Access Seekers. The number of Access Seekers wanting to co-locate in an exchange and the amount of available space within that given exchange will determine the magnitude of the Telecom Build and the required Service Component i.e. 1.1 or 1.2.
56. Telecom's Build will be customised to each exchange and may include items such as power feed enhancement (DC), cable tray and rack construction, seismic rack mounts, set up of a new row, and project management.
57. The Commission recognised the limitations of a benchmarked co-location price and, on 22 June 2007<sup>13</sup>, requested parties' views on a price methodology approach. The parties' views supported the Commission's preliminary view on co-location pricing. Accordingly, the Commission elected to benchmark a price methodology for Service Components 1.1 and 1.2.
58. The Commission has benchmarked a price methodology from Openreach in the UK<sup>14</sup> that prescribes how Access Seekers share build costs for exchange-based co-location. Accordingly, the Commission is satisfied its approach incorporates a similar service in a comparable country, and therefore meets the IPP requirements. The methodology required minor adjustment to allow for minimum efficient build constraints that may require Telecom to build in addition to existing Access Seeker orders<sup>15</sup>.
59. Telecom submitted that the capital cost of any co-location space that was additional to current requirements, and was created through prudent investment and efficient build decisions, should be borne by existing and subsequent Access Seekers co-locating in the exchange.
60. The Commission supports Telecom's recovery of capital costs in cases where efficient exchange builds exceed the existing incremental order(s). The Service Components that meet this criterion are 1.1 and 1.2.
61. Service Components 1.3 (Co-location Room Works) and 4.1 (Capacity Upgrade), whilst involving degrees of exchange build, relate to Access Seekers who are already

<sup>13</sup> Commerce Commission, *Unbundled Local Loop Co-location Service - Proposed approach to the Initial Pricing Principle – Request for comment*, page 3 paragraph 18, Letter, 22 June 2007

<sup>14</sup> British Telecom, *Revised ANF Agreement: Part IIA*, page 11 clause 5.11, Issue 3.0, 27/05/05

<sup>15</sup> Sum payable = total cost of the Works ÷ number of Access Seekers, was replaced with, Sum payable = modern equivalent value of the asset x proportion of the asset used by the Access Seeker

co-located and are of a responsive and incremental nature. Telecom will be fully compensated on completion and payment of these services, removing the need for any future capital cost recovery. The charge mechanisms for these services are discussed in the Sundry Charges section of this report under Co-location transaction charges.

62. Telecom submitted that given an appropriate capital cost contribution, as part of a wider capitalisation model, it would be prepared to act as a bank on behalf of Access Seekers. A capitalisation model<sup>16</sup> was proposed by PricewaterhouseCoopers (PWC) on behalf of Telecom.
63. Access Seekers indicated at the UCLL Co-location Conference<sup>17</sup> that they accepted Telecom's capitalisation model in principle, subject to the Commission setting an appropriate rate of return variable for calculating capital cost.
64. The Commission has determined to adopt the PWC model in conjunction with benchmarking the necessary input variables.
65. The rate of return variable (r) has been identified as the sole benchmark required. In benchmarking this variable, the Commission has identified a rate of return on capital variable set by Ofcom in respect of BT's access network as being relevant and appropriate for the Co-location Service<sup>18</sup>. Ofcom used a rate of return of 10%.
66. For the avoidance of doubt, the use of the benchmark rate of return (10%) is confined to the IPP for the Co-location Service. The Commission notes that the appropriate rate of return on capital would be reconsidered as part of any application for a pricing review.

### **Co-location recurring charges**

#### *Co-location Floor Space – Price list 2.1*

67. The Commission's preliminary view was that the relevant cost driver for space, whether within, on, or around an exchange, was the square metre property rental rate for a given geographic area.
68. In the draft STD, the Commission benchmarked a price methodology from Openreach<sup>19</sup> that set the charge for co-location floor space 'per square metre per annum'. The Commission's preliminary view was to sum the total area, internal, external, and cable space, and multiply by a geographic rate.
69. For the purposes of the draft STD, the Commission determined a charge for Co-location Floor Space by reference to rental charges for commercial office space throughout New Zealand. These charges were deemed to provide relevant data to

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<sup>16</sup> Telecom, *Cross-submissions on UCLL and Co-location draft Standard Terms Determination*, PricewaterhouseCoopers, Letter, 12 September 2007, pg 14-23

<sup>17</sup> Commerce Commission, *UCLL and UCLL Co-location Conference*, lines 20-27, pg 253, 21 September 2007

<sup>18</sup> Office of Communications, *Local loop unbundling: setting the fully unbundled rental charge ceiling and minor amendment to SMP conditions FA6 and FB6*, Statement, 30 November 2005, para 3.15

<sup>19</sup> Openreach, *Price List – Local Loop Unbundling – Plan & Build – Accommodation – 2.2.1*, [www.openreach.co.uk/orpg/pricing/llu/downloads/ORPL\\_LLU\\_Accom.htm](http://www.openreach.co.uk/orpg/pricing/llu/downloads/ORPL_LLU_Accom.htm), accessed 08/06/07.

input into the benchmarked methodology to determine the cost of floor space within an exchange building.

70. The use of commercial office space rental rates drew criticism from all parties during submissions on the draft STD. Orcon/Kordia/CallPlus contended that the opportunity cost of providing space in exchanges for co-located equipment is probably very low, and that office space is generally more expensive than other commercial space. Telecom took an opposing view in their submissions, but suggested that if office space rates were to be used, there was a need to further disaggregate the geographic zones to better reflect variations in rental rates and ensure that gross<sup>20</sup>, rather than net<sup>21</sup> rates were used.
71. The Commission is satisfied that the sample of property rates used in this exercise were gross rates, which as opposed to net rates, reflect the total cost of renting property space. The Commission expects that, as the sample is comprised of ‘asking rates’ (advertised offers), these rates will, if anything, have an upward bias over actual negotiated rates.
72. Discussion during the Co-location Conference<sup>22</sup> established that:
- parties concurred with the use of office space rates for IPP benchmarks;
  - a limited number of price zones was pragmatic for IPP benchmarks;
  - a multiplier that represents common exchange space, over and above the internal footprint, such as in the UK, was appropriate dependent on the benchmark starting point;
  - complex volume cable space calculations were beyond the scope of IPP benchmarking.
73. The Commission has benchmarked a price methodology from Openreach, as in the draft STD, for co-location space relating to the internal and external footprint. A new Service Component 2.3 has been created to address cable tray space and price benchmarks have been adopted from Openreach.
74. The Openreach price list<sup>23</sup> applies a multiplier of 3.85 to the co-location rental rate in order to ensure a contribution to shared and common space within the exchange. Accordingly, the Commission has applied this factor to the internal footprint space.
75. The Commission has determined to retain the geographic price zones proposed in the draft STD. While these zones will include some degree of averaging of rentals (and to that extent will mask small variations within each zone), the Commission considers

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<sup>20</sup> In a gross lease, the tenant pays a gross amount of rent, which the landlord can use to pay expenses or in any other way as the landlord sees fit.

<sup>21</sup> The net lease requires the tenant to pay, in addition to the fixed rent, some or all of the property expenses which normally would be paid by the property owner. These include expenses such as insurance, maintenance, repairs, utilities and other items.

<sup>22</sup> Commerce Commission, *UCLL and UCLL Co-location Conference*, 21 September 2007

<sup>23</sup> Openreach, *Price List – Local Loop Unbundling – Plan & Build – Accommodation – 2.2.1*, [www.openreach.co.uk/orpg/pricing/llu/downloads/ORPL\\_LLU\\_Accom.htm](http://www.openreach.co.uk/orpg/pricing/llu/downloads/ORPL_LLU_Accom.htm), accessed 08/06/07.

that this pricing structure is pragmatic and broadly reflects differences in rental rates throughout New Zealand<sup>24</sup>.

76. The geographic monthly rental price zones<sup>25</sup> have been set as follows:

- Zone A           \$20
- Zone B           \$14
- Zone C           \$11

77. The Commission notes the practical limitations on internal footprint size, and has adjusted the standard footprint area in line with Telecom's standard configuration, which is dictated by seismic features.

*Co-location Cable Space – Price list 2.3*

78. The Commission has chosen to benchmark cable space rental prices from Openreach<sup>26</sup>. Service Component 2.3 includes both internal and external tie cables. Openreach's internal tie cable prices do not discriminate on number of pairs in the cable. However, the external tie cable space charge is the average (mean) of a 100 and 500 pair cable rental. Their annual prices were converted into NZD using a PPP conversion rate<sup>27</sup> and then converted to monthly charges.

79. The monthly rental space charges per tie cable are as follows:

- Internal           \$3.86
- External          \$27.09

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<sup>24</sup> Similar considerations were also involved in relation to UCLL

<sup>25</sup> Section 8 of the Co-location Price List lists the geographic regions covered under each zone

<sup>26</sup> Openreach, *Price List – Local Loop Unbundling – Plan & Build – Tie Cables – 2.2.3*

<sup>27</sup> To the extent that this component measures a non-tradable good, PPP is more appropriate than exchange rate currency conversion

## **SUNDRY CHARGES**

### **Introduction**

80. This section provides reasons for the sundry prices determined. The changes themselves are provided in the Co-location Price List in Appendix A.

### **Margin for return on capital and risk**

81. These terms are shared with the UCLL Service and the discussion on them can be found in the UCLL STD (refer paragraphs 310-315).

### **Shared and common cost mark-up**

82. These terms are shared with the UCLL Service and the discussion on them can be found in the UCLL STD (refer paragraphs 316-330).

### **Price on Application**

83. These terms are shared with the UCLL Service and the discussion on them can be found in the UCLL STD (refer paragraphs 331-335).

### **Co-location transaction charges**

#### *Co-location Room Works and Capacity Upgrade – Price list 1.3 and 4.1*

84. Service Components 1.3 and 4.1 involve degrees of exchange build and primarily relate to Access Seekers who are already co-located and are of a responsive and incremental nature.
85. These services will be used on an on-going basis, but are unlikely to be required in order to take up the core Co-location Service. Accordingly, the Commission has, allowed these prices to be determined through Price on Application.

### **Network services transaction charges**

#### *Intra-exchange cable installation – Price list 5.1*

86. The Commission's preliminary view concerning tie cabling from the Handover Distribution Point (HDP) on the Main Distribution Frame out to Telecom's exchange manhole was that it constituted a backhaul service and should therefore be excluded from the Co-location Service.
87. Telecom, in conjunction with the TCF, submitted that intra-exchange cabling is not a backhaul service, as a copper tie cable does not amount to "transmission capacity" as envisaged by the service description in the Act.<sup>28</sup>
88. The Commission has reviewed the service description and submissions, and concluded that the installation of tie cabling from the HDP out to Telecom's exchange manhole is

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<sup>28</sup> Telecom, *Submissions on the UCLL and Co-location draft Standard Terms Determinations – Public Version*, pg 119, paras 88-89



part of the Co-location Service, as it enables Access Seekers to co-locate in premises other than a Telecom exchange.

89. The Commission notes the on-going rental space charge associated with intra-exchange cabling will be calculated under Service Component 2.3.

## NON-PRICE TERMS

### Introduction

90. In determining the non-price terms, the Commission has generally adopted:
- the non-price terms that were unanimously recommended by the TCF and only made changes to those recommendations where there was a compelling reason to do so;
  - those changes to the non-price terms included in Telecom's cross submission on the draft STD and which the Commission believes dealt with Access Seekers' concerns and led to a reasonable outcome; and
  - those non-price terms where there are well established Telecom operational systems in place (e.g. fault prioritisation) which would be expensive to adjust. The Commission has only made changes where there is a clear benefit, given that Access Seekers and Telecom Retail will ultimately receive equivalent service levels through the operational separation process.
91. In addition, the Commission has considered:
- The purpose in section 18 of the Act;
  - whether the terms represent a balance of Access Seekers' and the Access Provider's interests;
  - whether the terms are certain, clear and practically workable; and
  - whether the terms are consistent with general commercial practice (or whether it is necessary for terms to be consistent with general commercial practice).
92. The Commission took into account submissions from Telecom and the Access Seekers when considering the Co-location Terms. In some instances the Commission may agree with the general submission but does not consider the proposed alternative wording to be appropriate, in which case the Commission has made amendments using its own wording. The Commission has endeavoured to ensure that drafting is logical and coherent.
93. The following sections provide reasons for those substantial changes made to the Commission's draft Co-location Terms.

## **Co-location General Terms**

94. The Commission has made a number of changes since the draft Co-location General Terms to ensure consistency between the General Terms and the applicable schedules, and to ensure consistency (to the extent applicable) between the UCLL and Co-location General Terms.

### *Section 1 - Definitions*

95. The Commission has changed certain definitions and inserted new defined terms. This is to provide clarification in some instances and to accommodate other changes made elsewhere in the Co-location General Terms.

### *Section 10 and Section 47 - Change mechanism for Operations Manual and Service Level Terms*

96. The Commission considers that any changes to the Co-location Terms in accordance with section 10 or section 47, whether proposed by an Access Seeker or Telecom, and whether voted upon by the Telecommunications Carriers' Forum or decided by an independent recommendation maker, should require the approval of the Commission. The Commission considers that its approval is necessary to ensure an outcome in accordance with section 18 of the Act. The Commission will advise whether a proposed change is approved or not within 10 Working Days of receipt of a proposed change.

### *Section 19 and 20 – Access Seeker's and Telecom's Liability*

97. The Commission has accepted that it is appropriate that liability of the parties is limited for not only defaults (as defined by the General Terms), but also for negligent acts or omissions, and breaches of statutory duty.
98. In addition, the Commission has accepted that it is an appropriate commercial position that the risk of Access Seeker liability for use of Telecom systems or software is not a risk that the Access Seeker can control, and therefore should appropriately sit outside the limitations and exclusions of liability.
99. The Commission considers that liability should be reciprocal to better balance the interests of Access Seekers and Telecom, and are fairer and more reasonable. The limitation on the liability was discussed at the UCLL and Co-location conferences.<sup>29</sup> It was generally agreed that, provided it was great enough to be effective, the quantum of the limitation was reasonably immaterial.
100. Accordingly, the Commission has raised the Co-location limitation to the \$50m figure originally proposed by Telecom.

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<sup>29</sup> 21 September 2007

*Section 23 - Outages*

101. In its draft STD, the Commission determined that Telecom must use all reasonable endeavours to conduct Planned Outages between midnight to 6.00 am. Telecom submit that this period should be 11.00 pm to 6.00 am as the Commission's draft view has a detrimental impact on staff and shortens the time they have available for rectify outages by an hour. Access Seekers generally consider 11.00 pm to 6.00 am to be reasonable although Vodafone/ihug propose that the 11.00 pm and midnight period should be limited to preparatory and low impact work as many end-users will still be using the services at this time.
102. The Commission considers that on balance, the period 11.00 pm to 6.00 am for Planned Outages is reasonable and notes that, as stated in clause 23.3.1, Telecom is also obliged to minimise any impact of Planned Outages to the extent practicable.

*Section 38 - Termination of supply (Cabinetisation)*

103. The Commission received submissions from Telecom and Access Seekers on the nature and extent of notice required in respect of Telecom's plans for cabinetisation, including terms provided by the TCF.
104. Telecom submitted that, based on discussions with the TCF it was agreed that cabinetisation forecasts and notices would provide Access Seekers with certainty in relation to their capital investment planning for the Co-location Service. It was acknowledged that the options for Access Seekers in this situation included either co-locating in a cabinet or transferring end users to Telecom's bitstream services.
105. There was a discussion of these issues at the Commission's conference<sup>30</sup> in which Access Seekers expressed their concern that:
- cabinetisation has the potential to strand Access Seekers' assets in an exchange; or
  - if Telecom overstates where it will cabinetise, Access Seekers could lose investment opportunities.
106. Telecom agreed with Access Seekers that it was important to distinguish between a binding notice and an indicative forecast, so that Access Seekers had reliable information upon which to base their investment decisions.
107. Accordingly, the Commission has determined in clauses 38.9-38.15 of the Co-location General Terms the basis on which Telecom must terminate supply of the Co-location service when replacing MPFs from an exchange with MPFs from a distribution cabinet (or equivalent facility).
108. Under the Co-location STD, Telecom is required to provide Access Seekers with:
- an initial notice of cabinetisation for the first 24 months;<sup>31</sup>

<sup>30</sup> See UCLL Conference, 20 September 2007, page 120.

<sup>31</sup> See paragraph 453 below and clause 3.1.4 of the Implementation Plan.

- a cabinetisation notice at least 24 months before any other cabinetisation takes place (i.e. that was not addressed in the initial notice), and,
  - a rolling three year forecast of its cabinetisation plans on each six month anniversary of the determination date.
109. The notices must set out Telecom’s cabinetisation plans on a per exchange basis (including the suburbs that will be affected and the number or percentage of MPFs that will be affected) and explain the effect on any Access Seekers in receipt of the Co-location service. Telecom may amend these notices in some circumstances, such as where there is a material risk to the Co-location service.<sup>32</sup>
110. Clause 38.12 explicitly requires Telecom to adhere to its notices and upon their expiry Telecom must complete the applicable cabinetisation within three months. For the avoidance of doubt, any breach of these requirements may give rise to a dispute and could constitute a breach of an enforceable matter under the Act.
111. Following discussion at the Conference, the Commission has also determined that if cabinetisation takes place in accordance with timeframes in the initial notice or the cabinetisation notice period (24 months), then Access Seekers will pay to transfer Access Seeker’s end users to other Telecom services. This is appropriate, as the key basis on which Access Seekers will have decided to invest will not have changed. In all other circumstances, such as where a notice period has been shortened, Telecom will bear the costs of transfer.

### **Co-location Service Description**

#### *Termination of Tie Cables on MDF – clause 2.5.3 and 2.5.4*

112. The Commission’s preliminary view was to accept the Vodafone/ihug submission by adding words from TCF Recommendation 4 (t) that were omitted in Telecom’s STP, clarifying whether HDP blocks were provided by Telecom.
113. Telecom submitted that this amendment did not fully rectify the ambiguity and proposed a complementary amendment to clause 2.5.3.
114. For clarity and consistency, the Commission has accepted Telecom’s proposed wording.

#### *Permitted Use – clause 2.6.3*

115. The Commission’s preliminary view was that housing Access Seeker equipment that is used wholly or partly for a purpose other than interconnection with, and backhaul for the UCLL Service be specifically excluded from the Co-location Service.
116. Vodafone/ihug submitted that, if transmission equipment already installed for an Access Seeker’s DSLAM could also be used for ICA and UBA interconnection,

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<sup>32</sup> See clause 38.11, UCLL General Terms.

equipment and co-location costs would be reduced, thus optimizing space within an exchange.

117. Vector submitted that co-location of supporting equipment designed to provide backhaul for the UCLL Service was intended, under the Act and the Standard Terms, to fall under the Co-location Service.
118. The Commission maintains its preliminary view that the Act restricts backhaul to UCLL usage, and then only if equipment is housed within the Access Seeker's Footprint. However, the Commission notes Telecom's willingness to accommodate co-location configurations outside of the regulated Service:

Telecom has developed a service to meet the requirements of the Act, and does not accept that the UCLL Co-location Service requires equipment to be housed in Telecom premises under the terms of the Co-location STD for any of:

- (a) access by Access Seekers to services other than the UCLL family of services; or
- (b) provision of backhaul for the UCLL Service by non Access Seekers (except when housed within an Access Seeker footprint); or
- (c) provision of backhaul for the UCLL Service to multiple Access Seekers; or
- (d) a combination of (a), (b), and (c).

To meet the needs of those organisations who wish to provide services similar to those described in (a) to (d) above Telecom does enter into commercial agreements, and will continue to do so.<sup>33</sup>

#### *Ladder of Investment – clause 3.6*

119. The Commission's preliminary view was that an Access Seeker's investment progression would be undermined if Telecom is allowed to give priority to the UBA Service over the Co-location Service.
120. Telecom submitted that, failure to give priority to UBA would actually cause a greater distortion to investment by prioritising UCLL Access Seekers, excluding Telecom, who have taken the UCLL option at the expense of smaller service providers, who will take UBA as they grow their customer base.
121. The Commission maintains its preliminary view, which is underpinned by section 18, that the long-term benefit of End Users will be enhanced through increased infrastructural competition and diversified product offerings at the retail level. Telecom is not allowed to give priority to one regulated service over another.

#### **Co-location Service Level Terms**

##### *Access Seeker Forecasts – clause 5*

122. The draft STD stated that if Access Seekers failed to provide Telecom with Co-location Forecasts 3 months in a row, or 3 times within any 6 month period, the Service Levels for site audits and quotes (service levels 1, 2, and 5) would not apply.

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<sup>33</sup> Telecom, *Cross-submissions on UCLL and Co-location draft Standard Terms Determination – Detailed Submissions*, pg 28

123. As Co-location forecasting is on a quarterly basis, clause 5 would have rendered service levels 1, 2, and 5 inoperative. The Commission has removed all drafting that conflicts with section 7 of the Co-location Operations Manual.
124. The Commission notes that the accuracy of Co-location Forecasts may affect Telecom's ability to meet service levels 1, 2, and 5, and therefore Telecom should be entitled to a degree of service level relief in this event.

*Performance Penalty Holiday – clause 8*

125. In the draft STD, Access Seekers were not entitled to claim any Performance Penalties for the 2 month period immediately following the Determination Date.
126. The Commission has sought to better align the payment of Service Level penalties to the stages set out in the Implementation Plan (Soft Launch and Full Implementation). The Commission has determined that Performance Penalties are not required during the Soft Launch, as sufficient incentives exist (15 Builds during the Soft Launch period) and a “bedding down” period is appropriate.

*Appendix 1 – Telecom Build SLA 6*

127. The draft STD required Telecom to complete the Telecom Build within 2 weeks of the Access Seeker's requested service date as provided in their committed forecast.
128. Access Seekers and the Commission originally understood “committed” to carry obligations on both Access Seekers to place Orders, and Telecom to commence and deliver Builds.
129. The Commission has since clarified its understanding of co-location forecasting, finding that committed forecasts, in this instance, do not create obligations on either Access Seekers or Telecom (subject to section 5 of the Co-location Service Level Terms). Committed forecasting simply implies a greater degree of intent and accuracy than indicative forecasting.
130. Accordingly, the Commission expects parties to follow the Forecast/Order process as set out in the Co-location Operations Manual, reaching agreement on Build details, which will include requested service dates.
131. The Commission requires Telecom to meet all Firm Order dates (subject to clause 18.2.2 of the Co-location Operations Manual), as any delay is likely to result in Access Seekers remaining on the UBA Service. The tolerance level for this service level has been set to 100% to reflect this position.

*Appendix 1 – Fault Prioritisation SLA 11 and 12*

132. In the draft STD, the Commission proposed a three-tiered fault prioritisation regime which was broadly based on the number of End Users affected by a fault. Restoration times were dependent on whether the fault was in a metropolitan or rural area.

133. Telecom submitted that the Commission's key prioritisation variables did not correspond to the variables used in its existing fault prioritisation system. The number of affected End Users is only one of the prioritisation criteria Telecom employs in relation to fault restoration.
134. The Commission notes there was agreement at the UCLL and Co-location Conferences to the use of Telecom's existing fault prioritisation system on the basis of equivalence of service for Access Seekers and Telecom. The Commission has made the agreed changes to the fault restoration Service Levels to reflect this.

### *Appendix 3 – Performance Penalties*

135. In the draft STD, the Commission determined that Service Levels for full site audits (SLA 2), Telecom Build (SLA 6) and fault restoration (SLA 12) should be subject to performance penalties. However, the draft failed to specify the performance penalty associated with SLA 12.
136. The penalties proposed were subject to an escalating penalty regime to avoid the situation where following a service level default and one-off penalty, Telecom's incentives to restore service disappear, creating a service level 'black hole'. The Commission invited submissions on an escalating penalty regime.
137. Telecom submitted that an escalating penalty regime was unnecessary. However, if required by the Commission, they expressed a desire for such a regime to be simple and easy to administer.
138. The Commission, having re-assessed Service Levels in a Co-location context (i.e. low monthly Order volumes), has determined to remove escalating penalties, but tighten the penalty calculation to include all defaults, rather than just those that fall outside the Tolerance Level.
139. The Commission has tightened the penalty calculation through the use of averages, which removes the possibility of Telecom using the Tolerance Level to exclude their largest defaults. Clearly, this situation doesn't apply to SLA 6, which has a 100% Tolerance Level.
140. The \$1.85 penalty per End User in SLA 6 contains a compensatory component and a penalty component. The compensation component approximates the margin that Telecom receives from Access Seekers remaining on UBA services as opposed to UCLL/Co-location Services.

## **Co-location Operations Manual**

### *Service Level Requirements*

141. The Commission understands the strong link between the Operations Manual and Service Level Terms. The operational actions on which Telecom's service level performance will be assessed must be clear and explicit.



142. The Commission notes that the Co-location Operations Manual, as provided in the draft STD, did not specify all the actions on which SLA's<sup>34</sup> would be measured.
143. The Commission has aligned operational actions with performance measures through the addition of process-orientated drafting in both the Online Ordering and Tracking (OO&T) and Online Fault Management (OFM) sections of the Operations Manual.

*Access Seeker undertakes Telecom Build*

144. In the Co-location Conference, Access Seekers, notably TelstraClear and Kordia, raised the possibility of Access Seekers undertaking exchange builds in cases where Telecom lacked available resources, and cited the Telstra experience (TEBA) in Australia as supporting evidence.<sup>35</sup>
145. The Commission notes that the Australian example cited by Telstra, revolved around a commercial contract, negotiated between Telstra and Access Seekers, with strong linkages to a stringent forecasting process,
146. The Commission has determined to leave exchange build arrangements open to commercial negotiation, rather than incorporating conditions into this Determination.

*Telecom Acting as Bank – clause 15.6*

147. In the situation where a Telecom Build exceeds Access Seeker Orders due to efficient build techniques, the draft STD required the Access Seeker to pay for all of the Telecom Build and recover any additional costs from subsequent Access Seekers.
148. Telecom submitted that given an appropriate rate of return on capital, as part of a wider capitalisation model, it would be prepared to act as a bank on behalf of Access Seekers (the details of which are discussed in the Co-location Price List).
149. Access Seekers indicated at the Co-location Conference 21 September 2007 that they accepted of Telecom's proposal in principle, subject to an appropriate capital cost contribution.
150. The opportunity for Telecom to "gold-plate" or over-provision a given Build is subject to section 16 of the Co-location Operations Manual, which allows for discussion amongst the parties and dispute resolution procedures. To this end, the Commission is satisfied that this process provides sufficient safeguards.

*Acceptance of Telecom Quote – clause 17.1.3*

151. The Commission's preliminary view was that the Telecom Build should commence as soon as reasonably practicable following a Firm Order being placed, subject only to prioritisation.

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<sup>34</sup> SLA 3 – Order acknowledgement, SLA 4 – Notification of rejection, SLA 10 – Fault report receipt acknowledgement, SLA 11 – Notification of expected restoration time, SLA 12 – Meet notified expected restoration time, did not correspond to any explicit action specified in the Co-location Operations Manual.

<sup>35</sup> Commerce Commission, *UCLL and UCLL Co-location Conference*, pg 239-245, 21 September 2007

152. Telecom submitted that Telecom should be allowed to base its Build on Access Seeker RFS dates, rather than arbitrary Build Times (as stated under section 9 of the Implementation Plan).
153. The Commission understands that the Quote agreed to between Telecom and the Access Seeker (i.e. Firm Order) includes a date that should broadly align with the Access Seeker's RFS date. The Commission is therefore content to allow Telecom to organise its resources accordingly to meet agreed timeframes specified in the Firm Order. The Commission has amended clause 17.1.3 to reflect this position.

*Build Time – clause 18.2.2*

154. The draft STD specified conditions under which a Working Day would not count towards the Telecom Build.
155. Telecom accepted the draft STD drafting, but submitted that two additional clauses should be added to cover off Telecom's brown out period over Christmas-New Year, and any extreme weather event.
156. The Commission maintains the existing drafting, on the basis that brown outs should be foreseen by an experienced construction contractor (clause 18.2.2 (b)), and extreme weather events will be covered by Force Majeure Event as set out in the Co-location General Terms.

*Access Seeker Equipment – clause 36.1.1*

157. The draft STD contained provisions that specified the various standards all Access Seeker Equipment installed within an exchange must meet.
158. Vodafone/ihug submitted that they were unsure how equipment will be evaluated and whether local standards will take precedence over international, and suggested simplifying the clause using equivalence drafting.
159. Telecom accepted Vodafone/ihug's submission, but noted that Access Seekers will need to refer to Telecom's website to obtain information on equipment standards.
160. The Commission has adopted the drafting proposed by Vodafone/ihug.

*Power – clause 42.1.5*

161. The Commission amended the maximum allowable circuit breaker that can be used from 10 amp to 63 amp.
162. Telecom submitted that its drafting in the STP was misleading, stating the intention was to have a maximum circuit breaker of 63 amp and charge a usage fee in multiples of 16 amp.
163. The Commission has adopted the revised drafting provided by Telecom.

*Faults – clause 47 and 50*

164. Telecom provided revised drafting for Co-location faults that covers OFM training, costs, and availability, as well as the reporting of faults to the NOC.
165. Telecom found the faults process originally proposed in its STP did not fit with its service company's operational model, and therefore rendered it unworkable. The revised process is workable and will be familiar to existing wholesale customers<sup>36</sup>.
166. The Commission has adopted Telecom's submission with the understanding that unforeseen issues can be addressed and remedied by parties through the change mechanism as set out in section 10 of the Co-location General Terms.

*Escorted Access – clause 52.4*

167. The Commission adopted the TCF Working Party's<sup>37</sup> position for the draft STD, which allowed urgent access by specialist technical personnel into Telecom's exchanges.
168. Telecom's submission emphasised the one-off circumstances this provision sought to address, and whilst not rejecting the TCF Recommendation, proposed revised drafting to ensure the provision wouldn't be misused.
169. The Commission has reviewed the proposed drafting and is satisfied that in accepting Telecom's submission, it has not materially changed the access rights set out in the draft STD.

**Co-location Access Terms***General*

170. In the draft STD, the Commission determined to amend areas of conflict between the Access Terms and the General Terms, and give prevalence to the General Terms over the Access Terms.
171. Telecom submitted that the Access Terms were a specific set of rules that govern access and should prevail over the general rules found in the Co-location General Terms to the extent of any conflict. The Access Terms address specific risks to Telecom that giving access to its exchanges raises (for example, Access Seekers causing damage to Telecom's exchanges). Further, the assignment provisions in section 4 were clearly different to the assignment provisions in section 42 of the Co-location General Terms.<sup>38</sup>

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<sup>36</sup> Telecom, *Cross-submissions on UCLL and Co-location draft Standard Terms Determination – Detailed Submissions*, pg 132

<sup>37</sup> TCF. *TCF Paper – Recommendations for Final Agreement at the LLU Working Party Meeting on 14/15 May*, page 17, paragraph ee, 18 May 2007

<sup>38</sup> Telecom, *Cross-submissions on UCLL and Co-location draft Standard Terms Determination – Detailed Submissions*, pg 137

172. The Commission maintains its preliminary view that the Co-location General Terms should prevail over all other Schedules to the Determination. The ‘specific risks’ identified by Telecom regarding exchange access and assignment are addressed in the following section (Basic Rights and Obligations – clause 4.4).

*Basic Rights and Obligations – clause 4.4*

173. The Commission took the preliminary view to remove any reference to assignment from the Access Terms, as it was addressed appropriately in the General Terms, and the General Terms had prevalence.
174. Telecom submitted that it was particularly concerned with an Access Seeker’s ability to grant the rights in clauses 4.1 and 4.3 of the Co-location Access Terms, which are personal to the Access Seeker.<sup>39</sup>
175. Section 42 of the Co-location General Terms covers the assignment of both rights and obligations from one Access Seeker to another. The Commission notes the provisions in clause 7.1 of the General Terms, which states:

Telecom has no obligation to make the Co location Service available to the Access Seeker unless the prerequisites in this section 7 are satisfied at all times

176. Section 7 of the General Terms requires Access Seekers to comply with every applicable operational prerequisite, which includes:

Before the Operational Date and on an ongoing basis, the Access Seeker must have met the accreditation and security requirements for each person who will require unescorted access to the exchange to operate and maintain the Access Seeker Equipment on an ongoing basis.

177. The Commission is satisfied that the requirement for Access Seekers to maintain the prerequisite above provides sufficient safeguards and addresses the concerns raised by Telecom.

*Things the Access Seeker Must Do – clause 6.1.7*

178. The Commission preliminary view regarding Access Seeker compliance with Telecom inspections, maintenance, and general repairs was that these expenses were common cost items and Access Seekers would be paying indirectly for these expenses through common cost contributions contained in the Co-location Price List. The Commission sought to ensure that such expenses would not be double charged through explicit means.
179. Telecom submitted that the change the Commission made to the draft STD was not a standard provision in corporate or other property leases, claiming it is a core right of the landlord to inspect and ensure the tenant is complying with its obligations to the landlord. If Telecom were made to pay the Access Seeker’s reasonable costs to undertake this obligation, it would impose a cost disincentive on Telecom<sup>40</sup>.

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<sup>39</sup> Telecom, *Submissions on UCLL and Co-location draft Standard Terms Determinations*, para 158, page 131, Public Version, 29 August 2007

<sup>40</sup> Telecom, *Submissions on UCLL and Co-location draft Standard Terms Determinations*, para 161, page 132, Public Version, 29 August 2007

180. The Commission maintains its preliminary view that Telecom should not over-recover common costs, but understands Telecom's concern with regard to inspection obligations. Clause 6.1.7 has been revised accordingly.

*Things Telecom May Do or Will Do – clause 7.2*

181. The Commission's preliminary view was that Access Seekers should be entitled to written notice of any actions that are likely to have a material effect on the Access Seeker's rights under the Access Terms.
182. Telecom had no objection to the additions made to clause 7.2 in the draft STD. However, submitted that Telecom should not have to give one month's notice in respect of clause 7.2.1 as this may result in Telecom breaching an obligation at law.
183. The Commission notes that Telecom is covered for Force Majeure Events under clause 22.1.1 (c) of the Co-location General Terms, and therefore maintains the drafting as set out in the draft STD.

*Suspension (Disabling Service) – clause 8.1*

184. The Commission's preliminary view was that clause 8.1.2 was a reasonable provision during a suspension period.
185. Access Seeker submissions on the draft STD echoed their submissions on Telecom's STP, emphasising their concern regarding Telecom disabling Access Seeker Equipment. Access Seekers proposed that Telecom disable the power supply to Access Seeker Equipment, which has the same effect, but without the perceived risks.
186. Whilst parties accepted that suspension of Service was a last resort, there was agreement during the Co-location Conference 21 September 2007 that disabling the power supply was appropriate in this situation. Accordingly, the Commission has amended clause 8.2.1.

*Suspension (Charges) – clause 8.1*

187. The Commission preliminary view was that it is unreasonable for Access Seekers to continue to pay any Charges during suspension, and therefore removed the relevant clause from the Access Terms, allowing the suspension provisions within the General Terms to prevail.
188. Telecom submitted that as Access Seekers retain the full benefit of the Co-location Service during the period of suspension it is reasonable that they pay for that benefit. If Access Seeker's did not have to pay normal charges there is no incentive for the Access Seeker to quickly correct the breach.
189. The Commission maintains its preliminary view in regard to payment during suspension. Telecom's submission overlooks the fact that the Access Seeker can no longer provide services to End Users. The Commission holds that the benefits Access Seekers obtain through co-locating are severely diminished during suspension, and

that there are clear incentives for Access Seekers to remedy any breach that led to suspension of Service.

*Termination – clause 10.1*

190. The Commission elected to remove sub-clause 10.1.2 (d) from the draft STD, as in its preliminary view, Telecom obtained sufficient protection from the preceding three sub-clauses (a) to (c).
191. Telecom submitted that the sub-clause be reinstated as it is a basic property law obligation.
192. The Commission is satisfied that the submission provided by Telecom is reasonable and has reinstated the affected clause.

*Early Termination – clause 10.6*

193. Vodafone/ihug submits that Telecom should be liable for any loss suffered by the Access Seeker if Telecom terminates the Co-location Service under clause 10.4, and proposes wording to this effect.
194. Telecom agreed with the Vodafone/ihug submission in principle, however submitted that an indemnity in this instance was not appropriate as indemnities protect innocent contracting parties from third party claims where such third party claims relate to a default by the wrong-doing contracting party causing loss to the third party.
195. The Commission understands the need for this provision, which was missing from the draft STD, and has accepted the wording as proposed by Telecom.

## **IMPLEMENTATION PLAN**

196. There is one implementation plan for UCLL and Co-location. See discussion in the UCLL STD on this plan.

Dated this 7<sup>th</sup> day of November 2007



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Dr Ross Patterson  
Telecommunications Commissioner

## **APPENDIX A: UCLL CO-LOCATION DRAFT STANDARD TERMS DETERMINATION**

### **Co-location General Terms**

#### **Schedule 1: Co-location Service Description**

#### **Schedule 2: Co-location Price List**

#### **Schedule 3: Co-location Service Level Terms**

#### **Schedule 4: Co-location Operations Manual**

#### **Schedule 5: Co-location Access Terms**

### **Implementation Plan**