

25 September 2013

Dr Stephen Gale
Telecommunications Commissioner
Commerce Commission

Dear Stephen

UBA price review – Our clients: InternetNZ, TUANZ and Consumer NZ

Dear Stephen

The confidential RSPs' letter to the Minister was made available last week under the OIA, confirming a shared view that a price of \$14 is suitable, although on terms that the UFB entry level products are improved.

On the second day of the conference –the day when this became public – Paul Brislen, on behalf of our clients, who were not consulted as to the letter, expressed considerable concern in the conference with that approach and made clear that they dissociated themselves from the approach, which they still do.

Notably, our clients are the consumer representatives, and they were concerned that they were excluded from decisions that must pivot around end-users: your decision is to be made of course with regard to the interests of end-users and therefore the submissions by our consumer-related clients take on particular significance.

Such an approach in the letter, and pressure by Government (even if only tacit), is irrelevant to the task for the Commission. Our clients will strongly support the Commission making its decision without regard to those views and pressures.

There are the issues expressed by our clients in their submission on the UBA Update Paper, such as in Para 8, including 8.3 (as to omission of information and analysis) and in Para 5 (as to s18). For example:¹

- the Commission has not consulted on s18,² as it said it would at the conference, and so there has been no valid consultation;
- the update, in proposing a novel approach, has excluded substantial information of which the Commission was aware, including submissions that had been made (for example, as to LTE);³

¹ These are only examples

² For example, it has disregarded submissions on this by our clients which could hardly have been made more clearly in submissions, opening written conference submissions and at the conference. There is a reference in the update to some submissions focussing on UCLL (by inference, these may be said to be irrelevant). We have not seen any submissions that have done this so this point is not understood.

³ See for example Para 8.1 and 8.3 of the submission on the update document,

- there is reliance on unsupported supposition and assertion instead of sufficient evidence.

The Commission must comply with public law and natural justice principles. Parties' review rights⁴ extend well beyond pure questions of law, as noted in numerous cases and in submissions on CallPlus' High Court appeal on an earlier bitstream decision. It is considered that the Commission, on that basis, cannot determine a price beyond the median between Sweden and Denmark,⁵ and to do so would not be permissible as a matter of law, public law and natural justice. Given the way the clear s18 submissions have not been dealt with despite them having been so clearly made, gives our clients no choice but to write in this manner: that is regretted. Also noted is the statutory duty to give reasons in the final decision: although that statutory obligation does not apply to the update paper,⁶ the omission of adequate reasons (and the fact that key matters were not dealt with) in the update indicate public law and natural justice concerns (for example, the authorities that confirm that omission of certain reasons is confirmatory of breach of natural justice as it shows the matter may not have been properly considered).

Yours sincerely



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⁴ Judicial review and s60 Telecommunications Act

⁵ or, if the evidence and analysis is sufficiently robust, the 75th percentile. See Para 8.4 of the submission on the update paper.

⁶ For example, in giving reasons for averaging the Swedish prices, the update does not give reasons: it only lists the parties' submissions, which is not giving reasons. It is considered that the tentative view on that issue is incorrect and in any event reasons must be given for the conclusion in the final decision.