

CallPlus Limited

Cross-submission on the Commerce Commission’s Issues Paper: Assessing Chorus’ new UBA variants – Boost HD and Boost VDSL

Public Version

1ST August 2014



Overview

1. Thank you for the opportunity to comment on the submissions on the Commerce Commission’s Issues Paper: Assessing Chorus’ new UBA variants – Boost HD and Boost VDSL (**Issues Paper**). This cross-submission is made by CallPlus Limited (**CallPlus**).
2. CallPlus supports the request made by Telecom for an investigation under s156O of the Telecommunications Act (**Act**), and is happy to assist the Commission with its investigation. Relatedly, we submit that the Commission may wish to consider preparatory work for a s30R review of the STD on 1 December 2014.
3. We have reviewed the submissions on the Issues Paper. In this cross-submission we make three main points:
 - a) We agree with the submissions of Telecom, InternetNZ, Wigley & Company Solicitors and Kordia that **the Boost variants are sufficiently similar to the regulated service such that they fall within the STD**.
 - b) We agree with Vodafone’s submission that Chorus should finalise its industry consultation and commercial offering before requiring the Commission to reach any conclusion on the Boost variants. **Parties cannot properly submit on a proposal that is changing by the week, and Chorus itself appears undecided on**. Arguably a new notice is required.
 - c) **Chorus overstates its rights as a regulated access provider and fails to identify the real harm from the Proposal**. In particular, Chorus fails to:
 - provide a compelling legal basis for maintaining its (incorrect) view that it can unilaterally withdraw and/or artificially constrain the regulated service (or a part of it);
 - quantify the costs associated with continuing to invest in the regulated service on a “business as usual” basis; and
 - appreciate the real impacts of its proposed changes to the regulated service, and how this may fall unevenly on different RSPs and their end-users.
4. We note Chorus’ letter “*confirming the status of the Boost proposals*” (**Letter**), which was published on the Commission’s website 24 hours before cross-submissions were due. The Letter appears to simply clarify the “current” proposal (which has already been submitted on) rather than finalise the key attributes of the Boost variants. While the status of the Letter (in terms of the formal submission process) is unclear, we do not consider that its content changes the views expressed in our submission or this cross-submission in any material way.
5. Please direct any questions in relation to this cross-submission to: -

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The Boost variants are sufficiently similar to the regulated service such that they fall within the STD

6. We have already submitted that the Boost variants appear to fall within the service description of the STD and recommended that the Commission confirm that position.¹ Submissions from Telecom, InternetNZ, Wigley & Company Solicitors and Kordia support this view. Vodafone has also alluded to this, noting that the Boost service commitments “*may not be sufficient to provide a sufficient distinction between the regulated services.*”² For completeness, the Letter does not change that view.
7. We agree with Telecom’s analysis of the features of the Boost variants in para 61 of its submission. In particular, we agree with Telecom’s conclusion (at para 59) that it is “*difficult to identify the innovation brought by the [Boost variants] service performance.*”

Parties cannot properly submit on a proposal that is changing by the week, and Chorus itself appears undecided on

8. We agree with a theme of Vodafone’s submission that it is difficult to assess the merits of the Boost variants (and the proposed changes to the regulated service) as they are a “moving feast”. Chorus should have fully consulted on and finalised the form of the Boost variants before making its “New UBA Variant” notification.
9. Key attributes of the Boost variants have not yet been finalised (as noted, the Letter only confirms the “current” proposal), and Chorus appears to be “testing the waters” before committing to any firm view.³ It has become abundantly clear that Chorus itself is unsure about whether it is permitted to do what it intends to do. The notification given by Chorus on 14 May no longer accurately describes the Boost variants so a new **formal** notice may be required, and the timeframe for consideration reset.
10. However, consistent with our view set out in para 6 of this cross-submission that the Boost variants fall within the STD, we do not consider that the Boost variants satisfy the definition of “New UBA Variant” in the STD (as they are in fact “*described in the UBA Service Description*”)⁴ therefore arguably a notice of new UBA variants was never required.

Chorus overstates its rights as a regulated access provider and fails to identify the real harm from the Proposal

11. Chorus continues to maintain that the Act and the STD do not prevent it from “defining” the regulated service,⁵ and that it is free to choose the technology by which it provides that service.⁶ That is an incorrect interpretation of the law, reading in rights which clearly do not exist. Chorus’

¹ See para 55 of our submission on the Issues Paper.

² Vodafone’s submission, footnote 3.

³ For example, see the last sentence of paragraph 2 of the Letter where Chorus notes it “*will wait for the Commission’s guidance before confirming the Boost offers.*”

⁴ “New UBA Variant” is defined on page 6 of the UBA General Terms as “a digital subscriber line enabled service as described in the description of service for Chorus’ unbundled bitstream access service in Subpart 1 of Part 2 of Schedule 1 of the Act and that **is not described in the UBA Service Description.**” [emphasis added].

⁵ Boost Update, 10 July 2014, p31.

⁶ Chorus’ submission, para B33. As noted in para 17 of this cross-submission, once VDSL is offered as part of the regulated service, it cannot be unilaterally withdrawn.

“blinkered” approach overlooks the real harm that its proposal will cause, apparently ignoring the concerns that have been raised by RSPs (ie its own customers).

12. We also consider that Chorus makes a number of misleading representations with respect to its proposed constraint of the regulated service. These include its comments that:

- a) traffic management “*will ensure that regulated UBA performs in line with (and slightly above) the level of service provided by Chorus today*”⁷ – this clearly ignores the fact that demand for copper services has and will continue to grow. More importantly, it ignores the fact that our customers (and those of other RSPs) will be adversely impacted on day one.
- b) traffic management “*establishes a performance floor*”⁸ – clearly an artificial cap, in the context of growing demand, establishes a performance “ceiling” rather than a “floor”.
- c) “*there has been no suggestion that traffic management is anything other than a universally accepted tool for prudently managing a network...in accordance with international best practice*”⁹ – we have already submitted that the STD does not provide any ability to traffic manage, and Chorus has not provided any credible evidence to suggest that such an ability should be implied in these circumstances.

13. With respect to para 11c above, we acknowledge that from a practical perspective traffic management may **in certain circumstances** be appropriate (for example, traffic management of the BUBA ATM platform due to actual physical limitations). Traffic management generally occurs in components of a network where there are physical bottlenecks – often in the core or backhaul part of the network. That is a very different situation to applying **artificial** constraints to a copper loop, eg from a DSLAM to a home. BUBA and EUBA, in the manner they operate today, are good examples of best practice. As noted above, one has traffic management where it is clearly needed due to actual physical constraints (ATM only), the other doesn’t need it. To make things worse, artificially introducing such constraints causes unnecessary complications, such as the need for multiple handovers.

14. In short, even if the STD expressly provided for traffic management or “throttling” (which it does not), Chorus has failed to provide any credible evidence that traffic management is appropriate or legally permitted in **these** circumstances. Accordingly, we reject Chorus’ suggestion that its proposed traffic management would be consistent with international best practice.

15. We expand on some of the shortcomings of Chorus’ submission below.

Chorus fails to provide a compelling legal basis for maintaining its (incorrect) view that it can unilaterally withdraw and/or artificially constrain the regulated service (or a part of it)

16. We have already submitted that Chorus is not permitted to unilaterally withdraw or constrain the regulated service (or a part of it) under the STD, Act, or otherwise. That position is strongly supported by Telecom, InternetNZ, Wigley & Company Solicitors, Kordia, Trustpower and TUANZ in their respective submissions. We have not been convinced otherwise by Chorus’ submission.

⁷ Chorus’ submission, para 6.

⁸ Chorus’ submission, para B23.

⁹ Chorus’ submission, para B26.1.

17. VDSL is clearly part of the regulated service – that is not disputed by Chorus.¹⁰ Chorus introduced it under the STD in 2013 as a different product to the one the Commission concluded (on the facts) fell outside the STD in 2010. As soon as Chorus commenced using VDSL technology to provide the regulated service, it was bound to do so in compliance with the terms of the STD. Chorus has explicitly acknowledged this fact in para B39 of its submission.¹¹ As we have already submitted, those terms do not permit Chorus to unilaterally withdraw or constrain the regulated service (or a part of it).¹²
18. This is supported by submissions made by Telecom, InternetNZ and Wigley & Company Solicitors that the STD requires Chorus to provide the regulated service on a “full speed” or “FS/FS” basis,¹³ and that neither the STD nor the Act permits Chorus to downgrade the performance of the regulated service below that FS/FS standard. As noted in para 11c above, there is no explicit power to do this – so we question why Chorus argues that it can imply such a power?
19. We disagree with Chorus’ view that the supposed “alternative interpretation” of the FS/FS definition would mean that “*once Chorus has invested to install VDSL technology, Chorus would be in breach of the STD unless it instantaneously migrates every end-user to VDSL.*”¹⁴ Clearly an access seeker can request an ADSL service based on the preference of its end-user, even where VDSL is available.¹⁵

Chorus fails to quantify the costs associated with continuing to invest in the regulated service on a “business as usual” basis

20. Having indicated that cost is a factor for not continuing to augment its network to meet customer demand,¹⁶ it is incumbent on Chorus to quantify those claims. This is especially so given Chorus acknowledges the fact that investment in regulated and non-regulated services is essentially “one in the same” as they will be provided over the same network resource.¹⁷ Chorus further demonstrates that the cost of continued investment in the regulated service is artificial by commenting that “*it is not the case that Chorus thinks about investment in discrete silos of regulated UBA services and the new UBA variants. The requirements will be viewed in the aggregate...*”¹⁸
21. It has been suggested that “*the UBA STD does not specifically commit Chorus to undertaking ongoing and open ended investment in the regulated UBA service*” and that it does “*not think such an obligation should be read in*” as doing so would “*operate to prevent Chorus from*

¹⁰ We disagree with Vodafone’s “acknowledgement” at para G1 of its submission that the VDSL service was “*not formally brought within the ambit of regulation (as required by Part 2 of the Act).*” By not following the “New UBA Variant” process set out in clause 10 of the UBA General Terms, Chorus acknowledged that the current VDSL service fell within the STD service description and therefore that process was not required.

¹¹ “*If Chorus elects to deliver a regulated UBA service using VDSL technology, then it will be required to provide the service in accordance with the UBA STD, including clause 3.6.*”

¹² This applies equally to regulated services being provided via ADSL and VDSL.

¹³ Clause 3.6 of the UBA Service Description states “*The Basic UBA Service available under this service description is a DSL enabled service which has a **maximum downstream line speed** for data traffic sent to the End User and a **maximum upstream line speed** for data traffic sent from the End User” and “FS/FS” is defined in Decision 611 as “*the maximum downstream line speed and maximum upstream line speed **that the DSLAM can support.***” [emphasis added]*

¹⁴ Chorus’ submission, para B44.

¹⁵ This is consistent with clause 6(1)(e) of Subpart 2 of Part 1 of Schedule 1 of the Act which states that the standard access principles are limited by any request for a lesser standard of service from an access seeker.

¹⁶ Chorus’ submission, para 40.

¹⁷ Chorus’ submission, para B23.

¹⁸ Chorus’ submission, para 16.

*investing in any new and clearly distinct wholesale service that may support higher quality retail services.”¹⁹ We disagree, and consider this is an inherently inconsistent argument. Those comments seem to support a position where Chorus is entitled to discontinue investing in *regulated* copper in favour of investing in *non-regulated* copper, which cannot meet the purposes of the Act.²⁰*

22. Chorus is obliged to provide the regulated service in a way that is consistent with the guiding principles of the Act. In particular, Chorus must carry out its obligations in good faith, in furtherance of the s18 purposes, and must supply the regulated service to a standard that is consistent with international best practice. That necessarily involves continued investment in the regulated service to ensure it meets growing demand. We agree with Telecom that that continued investment to meet forecast and expected data growth is “*anticipated, and required, by the STD and the Act.*”²¹

23. To that extent, we agree with Telecom’s view that “[c]onventional application of TSLRIC modelling incorporates forecast demand growth into any TSLRIC model, and ensures the efficient costs necessary to meet that demand are recovered through the monthly TSLRIC price”.²² The appropriate place to address future investment in the regulated service is the FPP cost model.

24. Further, we reiterate our view that to the extent there is any cost justification for capacity constraints, those constraints should apply to the backhaul service rather than a bitstream access service.²³

Chorus fails to appreciate the real impacts of its proposed changes to the regulated service, and how this may fall unevenly on different RSPs and their end-users

25. With respect, it is disingenuous for Chorus to downplay or suggest that the impact of the changes on RSPs and end-users will be “*minimal*”.²⁴ Having reviewed the submissions, the Commission (and Chorus) should be well aware of the adverse impacts that the proposal will have on RSPs (ie Chorus’ customers) and competition.

26. Chorus’ blasé attitude towards the impacts its proposal will have in its customers and end-users is demonstrated by the fact that it:

- a) appears to ignore the expected growth in demand for regulated copper services (para 6 of its submission);
- b) bases its assumption that the regulated service will remain “fit for purpose” on its further assumption that end-users with high bandwidth use will subscribe to the Boost variants (para 38 of its submission) – we reiterate our view that Chorus’ proposal will effectively force RSPs and end-users to migrate to the Boost variants²⁵ (a concern that is shared by

¹⁹ Vodafone’s submission, para F7.

²⁰ This should be distinguished from a view that, over time, the relative investment levels between copper and fibre services will change. Chorus has acknowledged in para B23 of its submission that the regulated service and proposed Boost variants would be delivered over the same network resource.

²¹ Telecom’s submission, para 63.

²² Telecom’s submission, para 25.

²³ See paras 45-47 of our submission on the Issues Paper.

²⁴ See para B3.2 of Chorus’ submission: “*Even if VDSL is no longer used to deliver regulated UBA services, the impact on RSPs and end users will be minimal.*”

²⁵ See paras 3 & 17 of our submission on the Issues Paper.

other submitters). We also note the apparent difficulty in predicting demand for new products, as Chorus has acknowledged with respect to the low uptake of the EUBA variants and “WVS” in 2010;²⁶ and

- c) demeans the BUBA service by implying that its only purpose is for purely “*basic needs, such as internet browsing*” (para 8.1 of its submission).

27. We note that Telecom has submitted confidential evidence to the Commission on the number of its customers that are served by handover links that already exceed the proposed throughput level and will therefore immediately feel the impact of the artificial cap. We reiterate that “challenger” RSPs such as Slingshot, with different/higher end-user profiles, are likely to have a greater proportion of customers who will be adversely affected.

28. We also agree with comments from Vodafone that “[i]t is not acceptable for Chorus to undertake any action to the current UBA service that would materially degrade the service experience it delivers today”²⁷ and that “a decision by Chorus to unilaterally withdraw provision of the service would have a significant impact on industry (and end-users)”.²⁸

²⁶ See paras 14 & 15 of Chorus’ submission.

²⁷ Vodafone’s submission, para F1.

²⁸ Vodafone’s submission, para G1.