

# Issue Paper: Assessing Chorus's new UBA Variant – submission on behalf of InternetNZ

**14 July 2014**

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## 1. Summary

### **Chorus cannot shape or throttle regulated UBA**

- 1.1 The STD includes specific legal interpretation principles: for example, the STD terms are to be interpreted where necessary in light of the original STD decision. However, generally, it is not necessary to rely on those interpretation principles as the STD General Terms and schedules are unambiguous.
- 1.2 Chorus appears to assume that the only relevant UBA STD obligation is the 32 kbps minimum throughput. That is not correct. There is an express requirement on Chorus in the UBA STD service description to achieve “maximum downstream [and upstream] line speed”, the only relevant exception being to meet Interference Management Plan requirements.
- 1.3 Over the full footprint of the regulated UBA service – it is important to be clear what that footprint is as Chorus appear to confuse the issue – such maximum line speeds must be achieved. Chorus is not permitted to traffic manage the regulated service, and that includes traffic managing the service at handover or any other points.
- 1.4 The 32 kbps minimum throughput does not erode the maximum line speed obligation. That is as a matter of straightforward interpretation: the two obligations can stand alongside each other. In any event, the blanket 32 kbps minimum throughput is designed to meet the relatively low speeds and performance over a sizeable percentage of connections, such as where speed attenuates due to long copper lengths, or where ATM based UBA is provided. Maximum line speeds apply to those services too, but they are much slower.
- 1.5 Not only does the STD service description state this maximum line speed requirement but the issue received primary focus in the STD decision. The full speed/full speed requirement was key to the decision.
- 1.6 Therefore, Chorus cannot limit regulated UBA to 250kbps per circuit or any other speed. It must configure to allow maximum line speeds subject only to the requirements of the Interference Management Plan.
- 1.7 Chorus also cannot, as it intends, have regulated UBA traffic passing over the handover point, or anywhere else in the service, separately from Boost traffic. As the regulated UBA service description states:

*“Basic UBA Service traffic will not be distinguishable from other traffic supplied at the same Handover Point,*

- 1.8 Parties are not precluded from pursuing this and other issues where they have not previously exercised their rights. The STD contains a “No Waiver” clause. Chorus also appears to face, on this and other issues, substantial damages exposure, with uncapped liability. As developed below, unnecessarily forcing RSPs to pay another \$5 per month for essentially a similar service raises substantial monetary concerns.
- 1.9 As with some other issues in this submission, the ultimate decider is not the Commission. That is the court (by enforcement action under the Telecommunications Act) and/or the arbitrator under the STD terms. But these issues are outlined here as:

- (a) They overlap with the issues immediately before the Commission; and
- (b) The Commission has the discretion under s 156O to bring enforcement proceedings against Chorus for breach of the UBA STD (for example, as to throttling back the speed and throughput of the regulated service). It may assist the parties to have initial indications of position from the Commission, as that may avoid protracted dispute. That is so even though the parties also have the separate right to bring such proceedings in court, plus they can seek injunctive relief from the court as well as arbitration awards including for damages.

**Chorus cannot withdraw (or traffic manage) the regulated VDSL service**

- 1.10 As noted above, Chorus must provide maximum upstream and downstream line speeds, the only material exception being factors beyond “the performance capability of the DSLAM”.
- 1.11 Most DSLAMs have VDSL “performance capability”. Chorus cannot unilaterally elect only to use ADSL2+ where the DSLAM, and the line, are VDSL suitable. Chorus must achieve maximum line speeds achievable over the DSLAM and that is via the VDSL card for suitable lines. The service description says “the performance capability of the DSLAM”, which includes VDSL, not “performance capability of the ADSL2+ card”.
- 1.12 The Commission incorrectly came to a different view on this when applying the STD in 2010, by concluding that Chorus had a choice.
- 1.13 However, as above:
  - (a) the ultimate decider of this issue is the court and/or the arbitrator, not the Commission (and the ultimate decider is not bound by the ex post facto interpretation by the Commission);
  - (b) the parties have not irrevocably waived their rights due to the “No Waiver” clause; they can enforce the obligation to supply VDSL, as can the Commission;
  - (c) if Chorus withdraws the VDSL service (including as it originally planned in mid 2013 in response to UFB rollout), that will be in breach of the STD such that damages liability is uncapped; and
  - (d) in any event, the position has changed from 2010, such that the regulated UBA service should be provided by VDSL even if that was not the case in 2010.
- 1.14 We raise a number of other arguments against Chorus taking VDSL out of the regulated service. For example the commitments by Chorus last year not to withdraw the service save in response to UFB rollout create an estoppel. Chorus even stated: “...*withdrawal of the service **will not be part of the initial business rules.***” (the underlined bold words are in the original). Yet it appears that Chorus propose they will withdraw the service, for ulterior purposes unrelated to what it committed to last year, and contrary to such a categorical statement. This is a classic case where estoppel applies (in lieu of there being enforceable rights in the STD which is the assumption for an estoppel case).

- 1.15 As the leading case on estoppel states: *“The broad rationale of estoppel is to prevent a party from going back on his word....when it would be unconscionable to do so.”* It is apparent, for example from the multiple statements by Chorus at the Commission workshop as to its reasons for introducing Boost, which, it is expected, will be confirmed by the Commission’s s 98 enquiries, that Chorus has ulterior objectives in introducing Boost and traffic managing regulated UBA plus removing VDSL from the regulated service.

**Are the Boost services outside the UBA regulated service description?**

- 1.16 When analysed fully, we conclude that, over the UBA footprint, the Boost service adds little to the regulated UBA service. Boost is supplied only over the lines that would support the same level of service via regulated UBA. If a line does not reach Boost speeds, it is non-qualifying, but a regulated UBA service over the same line will perform just as well as the Boost service over the UBA footprint. That assumes of course that Chorus cannot, under the STD, traffic manage regulated UBA services.

**Should the Commission regulate Boost?**

- 1.17 If the regulated services are compliant (eg UBA is not traffic managed and VDSL is supplied via the regulated service), regulation may not be required. The additional cost of Boost is likely to see it having low uptake, as it is not genuinely innovative and does not attract premium value.
- 1.18 Otherwise, there ought be regulation. The fact that Chorus does not face competitive constraints on what it is doing (seemingly, structuring regulated and Boost services for ulterior purposes) implies that regulation is necessary.
- 1.19 In any event, if the Commission concludes that value added services beyond the UBA footprint mean this service is not a service within the STD, there ought be regulation.

**2. Interpreting the UBA STD**

- 2.1 The STD is, in its structure and approach, similar to contract terms on which telecommunications services are contractually provided. It is however, an instrument created pursuant to statute. As such, contract interpretation principles would not automatically apply, such as interpretation in context, having regard to purpose within the matrix of facts.
- 2.2 Additionally, the Interpretation Act 1999 does not apply as to interpretation (such as in relation to ascertaining meaning pursuant to s 5),<sup>1</sup> save, probably, as to interpretation of words also used in the legislation.<sup>2</sup>
- 2.3 However, while it is likely that a court would apply interpretation principles that overlap with contract and legislation interpretation principles, the position is materially answered anyway by the Guiding Principles in the General Terms in the UBA STD:

**2 Guiding Principles**

2.1 The UBA Standard Terms Determination is designed to meet the purposes set out in the Act, and in particular, section 18 of the Act. The

<sup>1</sup> The STD is not an “enactment” as defined in the Act

<sup>2</sup> Section 34 Interpretation Act 1999

UBA Terms are to be interpreted in light of the Commission's decision report and the purposes.

2.2 The Parties must:

2.2.1 carry out their obligations under the UBA Terms in good faith and in furtherance of those purposes; and

2.2.2 ensure that they and their employees, subcontractors and agents do all things reasonably necessary, including executing any additional documents or instruments, to give full effect to the UBA Terms.

2.3 The standard access principles under clause 5 of schedule 1 to the Act apply to the UBA Service and all of Chorus' obligations under the UBA Terms subject to the limits on the application of those principles under the Act.

2.4 Therefore, material interpretation principles include:

- (a) The UBA terms are to be interpreted in light of Decision 611, namely the UBA STD decision;
- (b) The UBA terms are to be interpreted in light of s 18;
- (c) The Parties including Chorus must carry out their obligations under the UBA terms in good faith and in furtherance of those terms. While there is some debate as to the extent to which good faith obligations can be enforced, the courts would give effect to the good faith obligation to the extent that is possible.<sup>3</sup>
- (d) Subject to the limitations in cl 6 of Schedule 1 of the Telecommunications Act, the service is to be supplied to a standard that is consistent with international best practice. That means that the STD is to be interpreted, where appropriate, having regard to international best practice. That does not call for rote application of such practice, and in any event, there are the carve-outs at clause 6 Sch 1 of the Act.

### 3. Can Chorus shape the traffic over the regulated UBA service?

3.1 Chorus relies on the minimum throughput commitment of 32 kbps as justification for shaping the traffic over the UBA service. It seems to assume, but wrongly, that there is no other relevant speed and QoS commitment.

3.2 It is important to be clear about the extent and detail of the regulated UBA service. Starting with the description of the service in Schedule 1 of the Act, it is a service that has two delivery points: (a) the end user and (b) the first data switch other than the DSLAM (FDS). It is not a service that extends beyond the FDS on the access seeker's side of the service. Even if it did, the conclusion of the Courts and/or the arbitrator in deciding whether Chorus can shape the UBA service would remain the same. (We explain below why ultimately this is a court and/or arbitrator decision, not a Commission decision (assuming no regulatory action such as an s 30R review)).

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<sup>3</sup> See for example *Carter Holt Harvey v Carroll Logging CA 204/03*; 21 November 2003 at [19]. See also Para 6.3.3.(i) in *Burrows, etc, Law of Contract in New Zealand* (5<sup>th</sup> edition)

3.3 We have emphasised the need for that clarity as there may be some confusion created by the interplay between the regulated UBA services and the commercial services connected to the regulated UBA services. Additionally, Chorus is confusing the issues as well (see for example the conflation of performance over the regulated UBA footprint and the other elements of the path through to national and international peering points on Page 28 of the Chorus *Boost Update – Dialogue July 2014*. At issue is the regulated UBA footprint only).

3.4 Clause 3.6 in the Sch 2 UBA STD Service Description states (highlighting added):

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.

3.5 Clause 3.7 and 3.8 go on to describe factors that affect those maximum upstream and downstream line speeds. There is no factor, or permissible factor, enabling traffic management (such as shaping and throttling) unless required by the Interference Management Plan. The other factors all apply regardless, such as line quality and length, wiring condition at the end users' premises etc

3.6 There is, therefore, a clear speed requirement in addition to the minimum 32 kbps throughput requirement. Subject only the exceptions in cl 3.7 and 3.8, the line speeds from the end user to the FDS must be the maximum upstream and downstream line speeds absent Interference Management Plan adjustments. Chorus cannot elect to shape the traffic.

3.7 It is clear that those maximum speeds apply also on the paths on the exchange side of the copper lines, up to the delivery point on the access seeker's side of the service at the FDS:

- (a) The decision to have the maximum line speed service, also known as full speed/full speed or FS/FS, followed from the Commission's rejection of Telecom's request that the UBA STD contain a FS/128kb/s variant as well as a FS/FS service. A throttled service was squarely under consideration, given the UBS service description had a need for throttling and the replacement UBA service description did not expressly require throttling.
- (b) Any throttling or shaping of speeds to achieve the 128 kb/s occurs in practice on the Telecom/Chorus side of the copper path.
- (c) In any event, to require FS/FS over only the copper path would be nugatory and pointless if Telecom/Chorus could thereafter shape the traffic to those speeds over the rest of the footprint of the UBA STD service including at the handover point: a service is only as fast as its narrowest link. To give effect to the FS/FS decision, the regulated UBA service should be FS/FS throughout. The FS/128 option having been rejected (that is, a throttled alternative having been rejected), the full path between the service boundaries (between the end user and the FDS) must be FS/FS. Throttling (such as to 250kbps times number of circuits) is not an option. If for some reason there needs to be shaping of traffic on the access seeker's side of the UBA service footprint, that must be a concern to be addressed only there: shaping for that purpose of the UBA STD service is not permitted for that purpose.

- 3.8 It appears that Chorus is currently shaping the traffic to substantially below FS/FS. Except to the extent permitted by the Interference Management Plan – that would be in breach of its obligations under the UBA STD.
- 3.9 Thus, Chorus incorrectly states, at page 31 its *Boost Update – Dialogue July 2014*, that, “*Chorus can control the amount of bandwidth that is allocated to its network at the handover point*”. It is not permitted to do that under the UBA STD except to the extent permitted by the Interference Management Plan.
- 3.10 Therefore, Chorus cannot take the step it next refers to in that Update, by limiting the UBA service in this way:

“To provide a definition of the Basic UBA Service, Chorus proposes to traffic manage the network so that there is always 250kbps of bandwidth available times the number of circuits.”

- 3.11 Chorus cannot unilaterally “provide a definition of the Basic UBA Service.” It must comply with the STD and enable FS/FS speeds.
- 3.12 Chorus also states in the same paper (at Page 31):

Because Chorus does not deliver the end to end service and only provides part of it, it is challenging to define what Chorus should provide in order to deliver the Basic Service in accordance with the STD.

- 3.13 That continues the Chorus error of not addressing the service in question (the UBA service between end user and FDS), instead of the end to end service. It is not challenging to define what Chorus must provide over the UBA footprint. For a start, that is clearly stated in the service description.
- 3.14 Chorus go on to state, on the same page, “*Chorus can control the amount of bandwidth that is allocated in its network at the handover point*”. That also is not correct. Chorus cannot traffic manage that bandwidth.
- 3.15 If access seekers have nonetheless permitted this to occur and not objected to this course before, Chorus can now be required to provide the FS/FS service between the UBA service boundaries. Access seekers have not irrevocably waived their rights (and other parties have not waived rights anyway). That is because:
- (a) The UBA STD General Terms, in the clause 43 “No Waiver” provision, expressly state that: “*The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under the UBA Terms does not amount to a waiver*” unless the Party has waived that right in writing (which the Parties have not done). Therefore, Chorus can be required now to remove shaping and throttling forthwith even if parties have stood on their rights.
- (b) In addition to enforcement rights under the terms of the STD, including as to damages (via arbitration) and injunctive relief,<sup>4</sup> both the Commission and parties can seek enforcement of the FS/FS obligation by the Court, pursuant to s156N-156R of the Telecommunications Act.<sup>5</sup> Parties can

<sup>4</sup> UBA STD General Terms cl 17-19 and 37

<sup>5</sup> An STD is an “enforceable matter”: s 156N. The Commission can take action (s 156O-156P) and so can parties (s 156P) in addition to asking the Commission to do so (s 156O).



request the Commission to take enforcement action.<sup>6</sup> Plus the Commission can seek pecuniary penalties payable to the Crown.<sup>7</sup>

- 3.16 Such pecuniary penalties can be up to the value of Chorus's commercial gain, less compensatory damages awarded by the Court (note that damages awarded by an arbitrator under the STD General Terms are not referred to in the Act).
- 3.17 This appears to create considerable exposure for Chorus:
- (a) If, say, access seekers have little choice but to migrate customers to Boost, at an additional \$5 per month, and that is in breach, the commercial gain is considerable.
  - (b) On the other side of the equation, Compensatory damages recoverable by access seekers would, still on those assumptions, be uncapped, as there would be "wilful Default" by Chorus (as Chorus would know that the constrained service is non-compliant), meaning that the limits of liability in the General Terms at clause 18 would not apply.
  - (c) Parties may have remedies for damages back to when Chorus breached the obligation to provide FS/FS services (likewise as to VDSL services back to 2008, for the reasons outlined below), subject to any limitation period issue.

#### **4. Does the 32 kbps minimum average throughput affect those conclusions?**

- 4.1 The STD Service Description expressly requires FS/FS speeds. As a matter of basic interpretation, the fact that another part of the STD has a metric that is consistent with far lower speeds does not erode that commitment. It is just a minimum. The FS/FS commitment stands regardless and there is no interpretation principle upon which the clear meanings are changed. Additionally, the minimum throughput is a different metric from the FS/FS requirement, even though it overlaps. The 32 kbps minimum does not justify artificially shaping the traffic.
- 4.2 Shaping traffic to a minimum throughput also has the effect of dropping the service from the required FS/FS levels and that is not legally available to Chorus.
- 4.3 While that disposes of this issue, it is also noted that the 32 kbps minimum throughput metric recognises that the performance available over some connections is relatively low even if at FS/FS speeds. That may be due to factors such as performance attenuation due to copper line distance, through to reduced performance over Conklin DSLAMs in more remote areas, where the backhaul is limited to 2 Mb/s. Additionally, there are still some ATM connections in addition to Ethernet connections (the latter being BUBA connections named as EUBA0).
- 4.4 Thus one metric (32 kbps) accommodates all lines at FS/FS, both fast and slow. That is no reason justifying artificial shaping away from FS/FS.

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<sup>6</sup> Section 156O

<sup>7</sup> Section 156Q-156R

## 5. The FS/FS interpretation is also consistent with the UBA STD Decision

5.1 It is submitted that the service description is straightforward in requiring Chorus to provide FS/FS over the full regulated footprint and that shaping is not available. However, the Decision makes this point even clearer as the Commission expressly envisaged the regulated service being suitable for high data uses of the service. As noted above, the STD decision is relevant to interpretation of the STD documents.

5.2 Chorus makes the following statements, and draws the wrong conclusions, at Page 31 of its *Boost Update – Dialogue July 2014* (highlighting added):

> This [250 kbps times number of circuits], today, gives the very good TrueNet results we see, and it will continue to do so for the applications that TrueNet test which **Chorus believes provides a good view of what an end user should expect to use the Basic UBA service for.**

> Chorus does acknowledge that the **250kbps will not be suitable for a provider that wishes to offer / encourage High Definition video streaming at prime time.**

> High demand for high definition content all at the same time requires much more than 250kbps.

5.3 However in its UBA STD Decision 627, the Commission made its decision to have only FS/FS (and not an FS/128 variant as well), on the basis of needing to have services accommodating services with high data requirements, such as symmetric content including video with symmetric requirements. That would extend to video conferencing with its symmetric two way needs with high speed requirements. For example the Commission said in its Decision:<sup>8</sup>

59. The Commission was of the view that a single internet-grade FS/FS Basic UBA service would best give effect to s 18, and that continuing to limit the upstream line speed of the Basic UBA service to 128 kbps would be unlikely to meet the changing needs of residential and SME broadband end-users where there is increasing use of symmetric web based applications such as social networking websites, video content, and increasing file sizes in general for residential and SME end-users.

5.4 Thus, it is not correct for Chorus to characterise the Basic UBA service as one targeted only at lower data requirements.

## 6. The FS/FS interpretation is also consistent with s 18

6.1 The FS/FS approach is also consistent with and gives effect to s 18. In its STD decision, the Commission went into some detail as to why it is more efficient, and better achieves s 18 objectives, to have a single service at FS/FS levels.

6.2 In this regard, for example, the Commission did not accept Telecom's argument that having a single UBA service would collapse retail services to only one type. Experience has shown the Commission to have been correct, as the retail market is characterised by multiple different types of broadband offerings based on bitstream.

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<sup>8</sup> At Para 59

6.3 We have noted this as, in its *Boost Update – Dialogue July 2014*, Chorus has a misconceived argument as to multiple types of broadband services overseas, which are said to justify having the regulated UBA and Boost split in New Zealand. But Chorus incorrectly relies only on retail service differentiation, quoting research it arranged. What might be relevant is differentiation at the wholesale input level not at the retail level. But that would be contrary to the experience in New Zealand, where a single type of bitstream service produces an array of retail service variants.

## 7. Can Chorus withdraw the regulated VDSL service added in 2013?

7.1 This ultimately is a matter for the court and/or the arbitrator rather than the Commission as the issue is whether Chorus is required to provide the service: that is an enforcement issue for the court and/or the arbitrator. However, the position is here outlined, in part as the Commission has the option of commencing enforcement proceedings against Chorus if so requested by a party.

7.2 Chorus in 2013 decided to include VDSL as a platform over which the regulated UBA service is provided. It committed to leaving the service in place until, at the earliest, UFB became an option in particular areas, no earlier than July 2015.

7.3 The UBA STD service description does not expressly specify whether ADSL, ADSL2+ or VDSL must be used. The Commission in 2010 concluded that Telecom could choose which platform to use where the options were available: if Telecom chose to supply the regulated service over VDSL, the Commission said that the regulated terms applied.

7.4 With respect, we consider that Telecom did not have that choice and the Commission erred. But, even assuming the Commission was correct then, the position has changed and Chorus no longer has the choice to use only ADSL2+ as VDSL is now mainstream and the primary technology internationally. That view is relevant, despite the Commission's earlier conclusions, as, ultimately, it is not for the Commission to decide whether Chorus has the option not to supply regulated VDSL: it is for the court and/or the arbitrator. As noted above, that parties have not sought to enforce this, and have accepted the position thus far, does not amount to waiver of rights in view of the No Waiver provision in the UBA STD General Terms.

7.5 Chorus's obligation under the UBA STD service description is to provide an "internet-grade 'best efforts' bitstream service." Contrary to the Commission's conclusion in 2010 that a 'best efforts' commitment is not enforceable,<sup>9</sup> that commitment is legally enforceable. The court and/or the arbitrator will give legal effect to this commitment. Chorus will be held to a lesser level of service than say, carrier grade or real time class of service, but, nonetheless there is a legally enforceable level of service. That flows from non-controversial and rudimentary interpretation principles. Courts and arbitrators will give meaning to provisions in legal documents such as this, rather than leaving them devoid of relevance and effect. After all, if the best efforts provision was not legally enforceable, what was the point of having it there in the first place: it would have no relevance.

7.6 Interpreting the STD applying best international practice, as required by the General Terms, VDSL is central to bitstream services internationally. Use of VDSL here would be international best practice. "Internet-grade" services nowadays (and we, say, back then) involve VDSL services where line lengths

<sup>9</sup> At Para 21 of 20 December 2010 decision on WVS

and quality permit. Notably 40% of new connections are VDSL not ADSL2+. To deliver internet grade best efforts requires VDSL.

### **The key and decisive point meaning Chorus must supply regulated VDSL**

- 7.7 The key and decisive point however is that the service description expressly provides that the lines must have maximum upstream and downstream line speeds, subject only, materially to “the performance capability of the DSLAM”.<sup>10</sup> Most or all of the DSLAMs have, at least, ADSL2+ and VDSL cards. Chorus cannot unilaterally choose not get the maximum line speeds available via a DSLAM by artificially choosing the slower card (of course over lines that are suitable for VDSL given, for example the service is available only over shorter distances). “The performance capability of the DSLAM” includes VDSL functionality. That is not controversial. Notably, it is the performance capability of the DSLAM that is specified, not the performance capability of, say, the ADSL2+ card in the DSLAM.
- 7.8 The point is illustrated by the following: Say Chorus unilaterally elected to use the ADSL card instead of either the ADSL2+ or the VDSL card. The performance attenuation would be so great that no party would accept that this would be a possible outcome under the STD. Just as, in practice, Chorus would not have that choice, nor does it have the option to artificially choose ADSL2+ instead of VDSL. Chorus must use the “performance capability of the DSLAM” to achieve maximum line speeds.

### **8. Chorus estopped from withdrawing VDSL from the regulated service**

- 8.1 We consider that the point in the prior paragraph answers this issue. But there is a further ground.
- 8.2 After consultation with access seekers, Chorus commenced making regulated UBA available over VDSL. In its *Update on VDSL* dated 7 May 2013, it confirmed, among other things that the sole basis for withdrawing the VDSL service would be the availability of fibre in relevant areas, commencing no earlier than July 2015. Chorus even emphasised in the Update that:

“Forced migration and withdrawal of the service **will not** be part of the initial business rules.” (the underlined bold is in the original)

- 8.3 Chorus has signalled now, to the contrary of those statements, that it will withdraw providing regulated UBA over VDSL. It wants to go back on the commitment it has made. As explained below, this appears to be happening for ulterior purposes.
- 8.4 Chorus is legally estopped from withdrawing the service in this way.<sup>11</sup> In the most cited authority on the point, Tipping J said in the Court of Appeal that earlier decisions of that court (highlighting added):<sup>12</sup>

“...have emphasised the element of unconscionability which runs through all manifestations of estoppel. **The broad rationale of estoppel, and this is not a test in itself, is to prevent a party from**

<sup>10</sup> Clause 3.6-3.8 Sch 1 UBA STD

<sup>11</sup> For the best summary of the principles applicable to estoppel see Butler (ed) *Equity and Trusts in New Zealand* (2<sup>nd</sup> edition) at Chapter 19 (written by Dr Every-Palmer)

<sup>12</sup> *National Westminster v National Bank* [1996] 1 NZLR 548, 549

**going back on his word** (whether express or implied) when it would be unconscionable to do so.”

- 8.5 The elements of estoppel are:<sup>13</sup>
- (a) A belief or expectation created or encouraged through some action or representation, or omission to act, by the party against whom the estoppel is alleged;
  - (b) The belief or expectation has been reasonably relied upon by the party alleging the estoppel;
  - (c) Detriment will be suffered if the belief or expectation is departed from; and
  - (d) It would be unconscionable for the party against whom the estoppel is alleged to depart from the belief of expectation.
- 8.6 As noted above, around 40% of new UBA connections are over VDSL so VDSL is central to sales by access seekers to consumers. Chorus has clearly included the VDSL platform in its regulated UBA offerings. And access seekers have relied upon this. Detriment will be suffered if the regulated VDSL service is withdrawn. For example, access seekers have crafted their marketing campaigns and their retail prices around the VDSL regulated offering, and they have crafted their plans around the long term future with VDSL and migration to fibre from that platform.
- 8.7 It would be unconscionable for Chorus to go back on its word. The ulterior objectives of Chorus, outlined below, form part of this assessment.
- 8.8 Additionally, the General Terms, as outlined above, contain an express obligation on the parties to carry out their obligations under the UBA terms in good faith. That increases the obligation on parties not to act unconscionably.

## **9. Regulated UBA traffic cannot be separately traffic managed, as proposed by Chorus**

- 9.1 The Chorus *Boost Update – Dialogue July 2014* produced on Friday confirms Boost traffic will be traffic managed separately from regulated UBA traffic.
- 9.2 If that has the effect of reducing the speeds and performance over the regulated service, that would breach the performance obligations in the UBA STD. For example, maximum line speeds will not be available. However our understanding is that the separation of the traffic into two classes would occur at the handover point.
- 9.3 Such differential traffic management of Boost relative to regulated UBA is not permitted by cl 3.25 of the UBA STD service description and therefore Chorus would be in breach:

*“Basic UBA Service traffic will not be distinguishable from other traffic supplied at the same Handover Point, such as Unbundled Bitstream Service traffic”*

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<sup>13</sup> See Para 19.2 in Butler

**10. Are the Boost services outside the UBA STD service description?**

- 10.1 We submit they are not outside the UBA STD service description, when properly analysed. The Boost services appear to be little or no more than the current regulated services in relation to the components over the same footprint, assuming no artificial shaping of the regulated service (which as noted above is not available). The Boost services only become materially different over that footprint when, in breach of the STD, Chorus traffic manages the regulated service.
- 10.2 In short, Boost is only supplied over lines that would produce the same speeds and quality of service in any event under regulated UBA (assuming maximum line speeds and ADSL regulated services, in compliance with the STD). As Chorus says, “Lines that do not meet the Boost service commitment level will be described as non-qualifying”,<sup>14</sup> and therefore will be excluded from Boost. But if the same Boost customer was supplied over regulated UBA, without traffic management, and with the VDSL option where applicable, the speeds and quality of service would be just the same. Essentially, Chorus downselects to only lines that are Boost capable: once that is done, both Boost and regulated UBA over the same lines perform equally well. An expressly stated performance commitment makes no difference. This of course assumes that the regulated service is compliant as noted above.
- 10.3 As the Commission observed in its December 2010 WVS decision, dynamic line management does not take services such as Boost out of the scope of the STD. We will assume that for the rest of this section.
- 10.4 Only a percentage of Chorus’s copper lines are capable of achieving Boost’s speeds for ADSL2+ and VDSL respectively (for these services that are also internet grade best efforts services). Notably:
- (a) Copper lines that cannot achieve those speeds, after investigation by Chorus, are taken out of the Boost services;
  - (b) Chorus will generally not do remedial work on circuits to make them Boost compliant unless that is economically viable. (The commitment to manage faults appears largely the same for both regulated UBA and Boost customers).
- 10.5 Viewed this way, Chorus will only provide Boost services over lines that, under the UBA STD services without artificial shaping, would achieve those speeds anyway under the regulated service.
- 10.6 Given the regulated UBA and the Boost service options to a particular end user would use the same copper line, the same DSLAM and the same backhaul to the FDS, Boost in practice adds nothing to the actual quality of service. They are the same. The only difference is that Chorus would artificially constrain the speeds at the handover point. And that is not available under the STD.
- 10.7 Although in practice this makes no difference to the Boost service functionality, Boost is described as internet grade despite some talk of “commitments” in Friday’s Dialogue paper. But in the end the service would be the same under Boost or the regulated service, as to lines that qualify for Boost. The Emperor would appear to have no clothes. Put another way, regulated UBA would be just as capable of delivering HD video as Boost, over the down-selected Boost-

<sup>14</sup> Thursday’s Dialogue report at page 22

capable lines, as they would use the same network components and there would be no traffic management. Essentially, for another \$5 per month from December, the access seeker (and the end user) gets essentially the same thing over the same UBA footprint.

- 10.8 It is noted also that the Boost service description does not contain other metrics relevant to HD performance, beyond the speeds. This further implies that the service is the same as what regulated UBA should be.
- 10.9 Thus, the following description from page 12 of Thursday's dialogue paper does not appear to be correct:

Video of course can be consumed on Basic UBA service, it's just not guaranteed.  
Basic UBA will not support simultaneous HD Video Delivery to all customers –  
Boost will.

- 10.10 The reality is that regulated UBA over Boost-capable lines has just the same speed and quality of service as Boost delivered over that same line. What makes the difference would be Chorus's incorrect decision to stop regulated VDSL and to traffic manage regulated UBA. Absent that, the two services are the same over the UBA footprint, save that Boost customers pay a lot more for the same service.
- 10.11 There are some additional features beyond the footprint of the UBA services, but they are relatively modest, such as the extended handover points and the fibre ready VDSL installations. They do not appear to justify \$5 uplift per month.
- 10.12 The access seeker gets nothing else in addition, materially, over the UBA footprint.
- 10.13 Thus the VDSL and ADSL2+ Boost services are materially within the UBA STD, save for modest additional features outside the footprint of the STD

## **11. Should there be regulation of Boost?**

- 11.1 If the regulated UBA service is provided in compliance with the STD (eg maximum line speeds including via VDSL), the need for regulation of Boost is less. It appears that Boost, at the \$5 price point, would not be a particularly attractive service as the additional value is considerably less than \$5.
- 11.2 If however, the regulated service is traffic managed and/or regulated VDSL is removed, the argument to undertake an s 30 R review becomes compelling. Self-evidently, Chorus is not constrained by competition from essentially making the regulated UBA service unusable for many end-users by its configuration choices and by eliminating regulated VDSL contrary to the commitments it gave last year. For the reasons above, the Boost offering is not genuinely innovative such that, in the interests of dynamic efficiency, regulation should be withheld.
- 11.3 This is demonstrated by the explanations of the initiative at the Commission workshop, which starkly differ from what Chorus says in the Friday Dialogue paper. At least there was candour as to the reasons why Boost was launched including the need to derive funds from somewhere else in view of the restraint on the regulated copper pricing. It is expected that the Commission's s 98 questions will unearth reasons for the Boost initiative that have little to do with genuine innovation, etc. That includes in relation to the decision to pull VDSL from the regulated service.

- 11.4 We are also informed that the Boost service involves little additional expenditure by Chorus. For example, due to obsolescence and the parallel needs of UFB, Chorus had reached the point where it had to replace its Alcatel-Lucent Ethernet switches in any event: this was BAU expenditure in any event. It is also anticipated that Chorus would, under the STD and its broader obligations, be obliged to maintain and develop its copper service in any event. Further, to elect to provide largely BAU services to only one category (Boost) but not the regulated services, would be in breach of the STD and the broader Chorus obligations reflected in the Guiding Principles in the General Terms. Chorus's obligations are interpreted in overall context, having regard to purpose and commitments such as in relation to good faith and international best practice.
- 11.5 Additionally, if the Commission concludes that the add-ons to the Boost service such as the fibre capable VDSL equipment justify treating Boost as a separate service, the add-ons are so modest, and lacking in innovation, that there should be regulation.
- 11.6 In order to retain the integrity and effectiveness of the regulation, there ought to be a s 30 R review, especially if Chorus traffic manages the UBA regulated service and/or withdraws VDSL based regulated UBA.

If there is to be split bitstream service classes, that ought to be carefully further reviewed given the implications. While innovation is to be encouraged, thus far the need for additional service classes has not been demonstrated by Chorus. To the contrary.