

COMMERCE COMMISSION

Final Decision of the Commerce Commission on the applicability of the UBA STD to Telecom's Wholesale VDSL2 Service

Introduction

1. This document records the Commission's decision that the unbundled bitstream access standard terms determination (UBA STD) does not apply to Telecom's Wholesale VDSL2 Service (WVS), and that there are no grounds to commence a review under section 30R of the Telecommunications Act for the purpose of including WVS within the scope of the regulated service.
2. On 16 April 2010, the Commission determined that when the UBA service is delivered using VDSL technology, the price and non-price terms of the UBA STD (Decision 611) will apply. However, Telecom has the ability to develop new bitstream services using VDSL technology incorporating features not included in the regulated UBA Service Description, and offer these services on a commercial basis.
3. On 10 May 2010, the Commission clarified the UBA STD to require Telecom to provide the Commission with sufficient information about any proposed new UBA service, so the Commission could determine whether the new service was captured within the regulated UBA terms, and if not, whether there were grounds to include the new service as a regulated service through the section 30R review process.
4. On 15 October 2010, Telecom Wholesale provided the Commission with Notice of a new UBA Variant based on VDSL2 technology, the Wholesale VDSL2 Service (WVS). Submission and cross submissions were subsequently sought.

Commission Decision

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

6. The Commission has also determined there are no grounds to commence a review under section 30R of the Telecommunications Act, for the purpose of bring WVS within the scope of the regulated UBA product.

Reasons for decision

7. Telecom identified the features which differentiated WVS from the regulated UBA service as:
 - Faster download and upload;
 - Increased throughput;
 - Minimum speed and service warranties;
 - Dynamic line management; and
 - A new class of service “Premium Best Efforts”.

Faster download and upload

8. Telecom claim that WVS will have up to 2 x faster download and up to 7 x faster upload speeds than ADSL2+ services (BUBA and EUBA).
9. Submissions noted that VDSL2 is “simply another form of delivering DSL broadband service to a customer”¹ and that “faster downloads and uploads are simply the result of technology improvements just as ADSL2+ was faster than ADSL”².
10. The Commission does not agree that the upgrade to VDSL2 is equivalent to the move from ADSL to ADSL2+. However, as the UBA Service Description does not specify speed, the fact that the VDSL2 may have faster download and upload speeds than ADSL2+ does not of itself differentiate WVS from the regulated UBA service.

Increased throughput

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

Minimum speed and service warranties

13. Telecom warrants that the minimum line speed threshold for WVS will be 15Mbps downstream and 5Mbps upstream. If a line is connected and the line speed falls below these levels, then the service provider can make a warranty claim, and Telecom will provide compensation.

¹ Orcon submission, 17 November 2010

² CallPlus submission, 15 November 2010

14. Submissions suggested that these were not product features or enhancements, but rather prequalification tools and a refund mechanism.
15. The Commission believes these additional obligations on Telecom in the service description are significant, provide rights to end users that do not apply to the regulated UBA service, and are a sufficient differentiator to distinguish WVS from the regulated UBA service.

Dynamic Line Management

16. A feature of WVS which is not included in the UBA service Description is Dynamic Line Management (DLM). This feature optimises the line for speed and stability.
17. Submitters argued that that this was not a differentiator, but merely a standard traffic management and monitoring tool. .
18. The Commission's view is that the commitment to apply DLM to the service may not of itself sufficiently differentiate the service to take it outside the scope of the UBA STD, but rather facilitates the commitments given by telecom set out above.

A new class of service 'Premium Best Efforts'

19. Telecom proposes to introduce a premium best class of service with separate bandwidth allocation in early-mid 2011 as volume increases. , Telecom explained that "premium best efforts' is a prioritised service, superior to internet-grade best efforts, but not real time. It is not a consequence of VDSL2 technology. It is a service differentiator that is not available for regulated UBA and which will provide an end user with improved performance during times of congestion"³.
20. Submissions on this feature were mixed. One submitter acknowledged that "the ability to differentiate pricing for a guaranteed throughput service above and beyond the baseline 96kbit service should be treated separately"⁴.
21. As the premium best efforts class of service is not currently a feature of WVS, the Commission does not need to determine whether it alone would differentiate the service sufficiently from the regulated UBA service such that it would not fall within the UBA STD. However, The Commission's preliminary view on this issue is that as a best efforts commitment is not enforceable, it would not be sufficient for the service to fall outside the scope of the UBA STD.

Section 30R review

22. Having concluded that VWS falls outside the scope of the UBA STD, the Commission must determine whether there are grounds for seeking to extend the scope of the UBA STD to capture VWS, through the section 30R review process.
23. The Commission in its Final Decision on the application of the UBA STD to VDSL technology dated 16 April 2010, concluded that there was no evidence of market failure

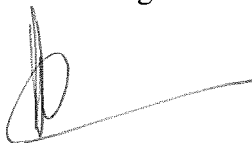
³ Telecom cross-submission, 30 November 2010

⁴ Orcon submission, 17 November 2010

in relation to VDSL services, and a section 30R review was unlikely to be appropriate where Telecom provided a wholesale VDSL2 service on equivalent terms to access seekers. Instead the Commission stated it would observe relevant markets, and consider a review only if competition issues arose which necessitated such action.

24. Telecom is making VWS available to access seekers to the same standard of equivalence as the regulated UBA and EUBA services. Accordingly, access seekers will receive the same service, and pay the same wholesale price, as Telecom Retail.
25. There has been much debate about the willingness of consumers to pay for upgraded broadband services. VWS guarantees higher service levels to consumers, at an increased price which Telecom has set commercially. Wholesale customers will take up the service only if their customers perceive added value in the enhanced service levels; if there is little uptake, Telecom will have to reconsider its pricing.
26. In the Commission's view, there are no grounds to commence a section 30R Review. It is appropriate that the market should determine the price for the enhanced service.

Dated at Wellington this 20th day of December 2010



Dr Ross Patterson
Telecommunication Commissioner
Commerce Commission