



31 August 2005

Osmond Borthwick  
Manager  
Network Access  
Commerce Commission  
44-52 The Terrace  
Wellington  
New Zealand

By EMAIL

Dear Osmond,

**TelstraClear Wholesale Bitstream – OSS Matters**

1. This letter provides TelstraClear's comments on the OSS matters contained in Telecom's 16 August response to the Commission's questions following the July technical workshop and seeks to establish a transparent and equivalent wholesale service.

*Question 6(i) Telecom to provide information on the process where a customer is reassigned back from a commercial UBS service provided by a third party access seeker to a retail Jetstream service*

2. Telecom states in its response that transitions from a commercial UBS service back to a Telecom retail Jetstream service are not done via eOR for broadband and rather are done manually. Telecom goes on to state that this process is slower and not comparable with the transition from Jetstream to UBS.
3. As TelstraClear has set out in previous submissions, our key concern is that OSS delivery ensures that there is no material difference in the experience of an end customer of a wholesale provider as opposed to an end customer of Telecom retail. The impact of OSS processes on the end-customer experience when the end user is moving back to Telecom can affect general public perceptions about the competitive process and, therefore, indirectly impact competitors. However, the benchmark for assessing the equivalence of customer experience between Telecom retail services and competitor services supplied using wholesale bitstream service should not be Telecom's winback process. The relevant point of comparison must be Telecom's downstream retail processes and, particularly in a market where Telecom and competitors are competing for new customers, the Telecom retail processes for new connections.

4. For this reason we have suggested that KPI measures be established to ensure that the end customer experience for provisioning and for fault repair is not materially different. Such reporting will mean that the equivalence of current processes is tested and the impact of any process changes is measured.

*Question 6(ii) Telecom to confirm when eOR for broadband test environment would be available*

5. Telecom states that it will make a test environment available for the B2B part of eOR for Broadband and will investigate the feasibility of a test environment of the current online version.
6. As set out in previous submissions, a test environment is important to TelstraClear for testing and training purposes. We welcome Telecom's statement that it will make such an environment available for the B2B solution. TelstraClear would also wish a test environment to be available for the online version, or at least dummy logins to ensure training does not need to take place using live orders.

*Question 6(iii) Telecom to provide eOR for broadband documentation*

7. TelstraClear welcomes the OOT User Guide document provided.

*Question 6(vi) Telecom to provide views on whether an independent facilitator/mediator/arbitrator in respect to OSS would be appropriate, and how such a mechanism would operate*

8. Telecom argues that the Act provides a specific process by which a determination may be clarified or amended and that the Commission does not have additional powers to revert matters back to the Commission. In Telecom's view, sections 58, 59 and 61 are the appropriate way to resolve future OSS issues. Telecom also says that the Commission's general power over its own procedures under section 9(6) does not give the Commission power to require the appointment of a third party to mediate disputes between the parties.
9. While TelstraClear has consistently argued that the Commission's powers under section 9(6) would support a mediation role, those powers are not necessarily the only source of power to support the appointment of a facilitator in relation to OSS design and implementation. The nature and extent of the Commission's powers are informed by what it is doing under Part 2 of the Act. The Commission is determining supply terms which substitute for contractual supply terms which the parties were unable to agree. This is illustrated by the threshold requirements to a determination: parties can only seek a determination if they "would otherwise....have an agreement for the supply of the [relevant] service [and] reasonable attempts to negotiate the terms of supply of the service [have been made]".
10. The Commission has broad powers, within its jurisdictional boundaries, to determine terms of supply which the Commission believes will best serve the long term interests of end users. While the Commission, given its policy role, is not limited to anticipating the supply terms which might have been commercially agreed, supply terms which are found in commercial agreements

provide the Commission with some guidance on what is practicable and appropriate.

11. Expert mediation and dispute resolution clauses are commonly found in contracts involving an ongoing relationship between parties to avoid deadlock or more extreme outcomes such as termination. Previous supply agreements between Telecom and TelstraClear involved expert investigation, mediation and dispute resolution processes, including the agreed terms which formed part of the Commission's Interconnection Determination. Use of external expert advisors to resolve disputes is also particularly common in contracts involving the building or development of IT systems.
12. Therefore, in TelstraClear's view, the Commission's powers to determine the terms of supply under section 27 are sufficiently broad to enable it to require progression towards an electronic OSS solution, to establish a consultative process in its design and implementation and to provide for a process to resolve disputes with the assistance of a third party expert.
13. In any case, TelstraClear believes section 9(6) is broad enough to support the use of an expert facilitator to resolve disputes between access seekers and access providers. Parliament emphasized its preference for commercially negotiated outcomes over determinations by the Commission. There is no reason to believe that this objective falls away immediately on filing of an application under section 22. There is also no reason to believe that Parliament intended that the Commission was to have no role in exploring or facilitating the opportunities for a negotiated outcome as an alternative to a determination.
14. Telecom attempts to set up a Catch-22. Telecom argues that TelstraClear's proposal for a facilitator involves an impermissible delegation of the Commission's determination powers. On the other hand, Telecom argues that the Commission cannot provide for an escalation path back to itself because that would subvert sections 58 and 59, which, in Telecom's view, are the only avenues by which the Commission can remain involved with a determination after it has been made. TelstraClear considers that Telecom is incorrect on both counts.
15. Firstly, in the proposed OSS terms provided to the Commission on 16 August, TelstraClear is not proposing that the facilitator have power to make binding decisions. The facilitator would perform the role of mediator. If an agreement could not be reached, the dispute could be escalated to the Commission and the facilitator would provide the Commission with a report, which would not be binding on it.
16. Secondly, this escalation process does not, as Telecom alleges, subvert sections 58 and 59. There is no clarification involved or required because the original supply terms provide for the escalation to the Commission. A clarification, for example, would be required if there was some doubt about whether a particular issue fell within the escalation process set out in the supply terms.
17. The experience of determinations before the Commission demonstrates that it is often not practical for the Commission itself to determine the complete details of supply matters, either because the Commission does not have the expertise which the parties themselves have or because the implementation of the

Commission's requirements need to be worked through. In these situations, the Commission needs to set the high level principles or objectives and require that the parties work together to implement them. It would be unrealistic to expect no further disagreement between the parties in the course of implementation given the contested history between the parties.

18. Again, this is not an unusual problem in contractual agreements which establish an ongoing supply arrangement. Parties will establish the general principles or objectives of their relationship or of particular processes and require that they are to agree on the implementation. They then usually establish a specific process for escalation and expert mediation and determination of disputes in order to ensure that the ongoing relationship is not deadlocked (and to address the problem of enforceability before the courts of "agreement to agree" clauses). This combination of "agree to agree the details" and a binding dispute resolution process is a common feature of supply terms.
19. That is what TelstraClear is proposing here. Designating the Commission as the escalation point is appropriate, if not necessary, because of its role under the Act as the ultimate decision maker as to what best promotes the Act's objectives.
20. Telecom's approach would have a counterproductive effect. The Commission would need to determine terms of supply in much more detail than its current practice in order to ensure that the parties have a complete set of terms on which services are to be supplied. Otherwise, given that sections 58 and 59 may not accommodate the general escalation of implementation issues, the parties could be left without viable terms of supply. This is likely to make for a more complex and extended determination process than the quick process the Act contemplates.
21. Lastly, TelstraClear disagrees with Telecom's view that the Commission must provide the parties with a further opportunity to comment on the Commission's proposed terms of supply relating to OSS. The obligation of fair hearing does not mean that the Commission cannot determine terms unless it has first provided those exact terms to the parties for comment. Fair hearing requires that the parties have a reasonable opportunity to comment on the issues before the Commission and the views which each party puts to the Commission. The extent of the consultations which the Commission must undertake should also be read in the context of the expedited decision making process which the Act requires. Continuing rounds of consultation based on iterative draft determinations will inevitably delay the determinations by the Commission beyond the statutory timeframes (which have already been substantially exceeded in this case).
22. TelstraClear has been advocating the role of a third party facilitator during the course of these proceedings and its proposal for an expert facilitator has been clearly set out in its 16 August response to the Commission's questions following the technical workshop. The Commission clearly has given adequate opportunities for Telecom to comment on the involvement and role of a third party expert in the OSS process, including at the recent workshop and by this further opportunity to provide cross submissions on each other's 16 August submissions.

*Paragraph 7 – information passed in respect of regulatory proceedings*

23. Telecom states that no documentation was passed between the parties in respect of the regulatory proceeding. Documentation was passed in relation to the OSS proposed agreed terms, however Telecom considered that such documentation was commercial in confidence and therefore did not permit TelstraClear to share this documentation with the Commission.

**Conclusion**

24. TelstraClear would be happy to provide any further detail on the above that the Commission considers necessary.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Grant Forsyth', written over a horizontal line.

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cc: Vanessa Oakley, Telecom