



29 July 2005

Rachel McLauchlan
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Legal Services Branch
Commerce Commission
44-52 The Terrace
Wellington
New Zealand

By EMAIL

Dear Rachel,

TelstraClear Wholesale Bitstream Application - TelstraClear response to “new material” presented by Telecom at Workshop

1. We refer to the Commission’s email dated 26 July 2005, requesting submissions from TelstraClear as to whether the Commission should uphold other parties objections made to “new material” presented by Telecom at the UBS Workshop.¹ This letter also refers to the Commission’s letter to Telecom dated 11 July 2005 and Telecom’s letter to the Commission dated 14 July 2005.
2. TelstraClear does not object to the admissibility of the “new material” provided by Telecom at the workshop, nor the figure of 69,000 first referred to by Telecom at the conference on 4-5 July 2005. However, TelstraClear considers that little if any weight should be placed on Telecom’s “new information”. In the sections that follow, we will address:
 - a. the claim by Telecom that 69,000 of its customers will lose access to Telecom’s broadband service if it is required to provide an unconstrained (or high PIR constrained) wholesale bitstream service to TelstraClear and other access seekers; and
 - b. TelstraClear’s concerns about specific slides presented by Telecom at the workshop.

Telecom claim that 69,000 customers will lose broadband connectivity

3. TelstraClear considers that little or no weight can be given to Telecom’s unsubstantiated claim that a significant number of actual or potential broadband customers (said to be as high as 69,000) will be adversely affected if

¹ Technical Bitstream Application and OSS Workshop, dated 21-22 July 2005.

Telecom is required to supply an unconstrained (or high PIR constrained) wholesale bitstream service to access seekers.

4. Telecom has consistently failed to provide any substantiation of the 69,000 figure, despite being provided with several opportunities to do so during the last month. As the Commission will recall, Telecom first sought to introduce this figure at the Conference. Commissioner Webb invited Telecom to provide proper evidence to substantiate this claim and when it could not do so, excluded the number from the Conference.
5. The Commission's letter to Telecom dated 11 July 2005 re-iterated its concern that Telecom's claim lacked proper foundation. The letter also noted that at the conference Commissioner Webb acknowledged that the "*impact of reach remains a critical issue*" and "*expressly left open how reach might be addressed in a technical workshop, if necessary*".
6. In Telecom's letter to the Commission dated 14 July 2005, Telecom stated that "*back up data can and will be provided at the workshop.*" At the workshop, Commission staff ruled that "*material be included in the record and that the Commission will make a decision post these proceedings as to its admissibility.*"²
7. Telecom claimed that it brought its expert Dr Lee Garth to the workshop "*specifically to discuss*" the robustness of the figure of 69,000 customers.³ However, neither Telecom nor Dr Garth provided any corroborative evidence to substantiate Telecom's claim. Information was introduced by Telecom's Dr Milner, but this was provided at a very high level and without detailed substantiation of the 69,000 figure.
8. Telecom's failure to provide an adequate foundation for its claim has two specific consequences:
 - a. The allegation of a loss of service to up to 69,000 customers remains unsubstantiated and therefore cannot be relied on by the Commission as having probative value. TelstraClear refers to *Ithaca (Custodians) Ltd v Perry Corporation* 35 [2004] 1 NZLR 731, 767-768. In *Ithaca*, the Court of Appeal held that the failure of a party to call a witness might allow an inference to be drawn that the missing evidence would not have helped that party's case. This could only occur where the party would be expected to call the witness, where the evidence would explain or elucidate a particular matter required to be explained or elucidated, and the absence of the witness was unexplained. Where an explanation or elucidation is required to be given, an inference that the evidence would not have helped a party's case is inevitably an inference that the evidence would have harmed it; and
 - b. The lack of corroborative evidence and supporting data to establish an evidential foundation for the claim, together with the lateness of the introduction of this claim by Telecom has prejudiced the other parties, including TelstraClear. Without timely access to the corroborative evidence and supporting data, TelstraClear has not had a proper

² Mr Osmond Borthwick, Commerce Commission, Workshop Transcript 21 July 2005.

³ Ms Anne Callinan, Telecom, Workshop Transcript, 21 July 2005.

opportunity to respond to Telecom's claim. It will be evident from the discussion at the Conference and at the workshop that the questions about the level of noise at the network edge, the causal link between noise and higher speed services and the measures which can be taken to manage interference can involve assumptions and calculations that are neither straightforward nor uncontroversial between the parties. TelstraClear's technical experts need access to the underlying methodology, assumptions and data used by Telecom to model the impact of customers in order for them to make a meaningful response. There simply isn't an adequate factual basis for TelstraClear to analyse and respond to this claim.

9. Telecom has had numerous opportunities to address the impact on its customers of the supply of unconstrained (or high PIR constrained) wholesale bitstream service to access seekers – including the submission, cross submission, conference and workshop stages of the Commission's wholesale bitstream determination proceedings. Telecom has failed to do so in a proper and timely manner. Accordingly, TelstraClear considers that the Commission can place no weight on Telecom's claim.
10. On this basis, it would be improper for Telecom to be allowed further opportunity to substantiate its 69,000 claim and the Commission should assess the weight to be placed on it on the material currently before the Commission. To do otherwise would be to further usurp the timeframes for the Commission to make determinations.

Telecom Workshop slides

11. TelstraClear does not object to the admissibility of any of the slides presented by Telecom at the Workshop. We therefore withdraw the objections raised at the workshop. However, TelstraClear does have concerns about the probative value of the following slides submitted by Telecom at the workshop (Commerce Commission Workshop on UBS, Telecom New Zealand, 21/22 July 2005).
12. All of the slides referred to below are incomplete, lacking in foundation and/or unclear. For these reasons these slides have little or no probative value:
 - a. **Slide 7 – 'Long Loops'** - The information contained in this slide about the number of long lines by line attenuation level and area is new material. The slide fails to provide a complete picture. Information about the probability of the long loops failing (by attenuation range) is not provided, nor how this probability would be impacted by the introduction of an unconstrained or high PIR constrained wholesale bitstream service;
 - b. **Slide 18 - 'Fill vs Reach for a 25 pair binder'** - The information contained in this slide about the relationship between binder fill and line degradation at different line speeds is new material. The relevance of the information presented is unclear. The title of the slide and the commentary talk about 'reach', yet the degradation shown according to the number of users in a cable is in line speed. It is unclear whether Telecom is suggesting that any line speed impact would be on other customers' services. Further, the relationship modelled for the

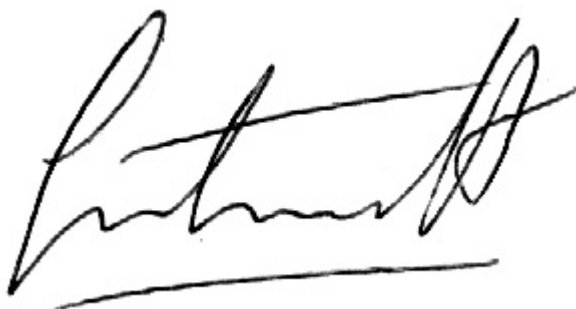
6Mb service, i.e., the line speed degradation, does not align with Telstra's experience and cannot be understood without further information;

- c. **Slide 39 - 'Power Spectral Density Impact of Turning Reed-Solomon Coding Off'** - The information contained in this slide about the impact of turning Reed-Solomon coding off is new material. It is unclear whether the graph is showing the relationship between power and reach for a single line or on average. We also note that the slide does not make explicit the impact of having Reed-Solomon coding off, which is small - 1.8dB - and may not affect power;
- d. **Slide 40 - 'Resynchronisation Event Frequency Caused by Turning Interleaving Off'** - The information contained in this slide about resynchronisation being more common with interleaving off is new material. The information presented is unclear. The axes have no scale and it is unclear whether the horizontal axis represents reach or time. If the latter, then we note that based on Telstra's experience in Australia, resynchronisation would not occur unless there was substantial noise over a long period of time (as opposed to very short noise bursts which Interleaving is designed to correct);
- e. **Slide 42 - 'Unstable lines with full interleaving'** - The information contained in this slide about the number of unstable lines by line attenuation in an Auckland exchange is new material. The slide does not present a complete picture. We note that the information is only presented for one exchange and is not necessarily indicative of Telecom's network. TelstraClear does not disagree that instability increases with line attenuation but notes that the slide does not provide any information about the causal relationship between interleaving being on or off and line instability;
- f. **Slide 45 - 'Unstable lines with full interleaving'** - The information contained in this slide about the number of unstable lines by line rate in an Auckland exchange is new material. The slide does not present a complete picture. The information is only presented for one exchange and is not necessarily indicative of Telecom's network. TelstraClear agrees that instability is not a function of line rate or speed. However, the slide does not provide any information about the causal relationship between interleaving being on or off and line instability; and
- g. **Slide 69 - 'Revised Fair & Workable Proposal'; Slide 63 - 'Fairness and Dimensioning: Existing Retail Services'; and Slide 64 - 'Commerce Commission Regulated UBS as defined in Para 16'** - The information contained in slide 69 about the proposed bit rate bands is new material. The measure on the horizontal axis is unclear - i.e., what is meant by congestion. If the horizontal axis is meant to measure utilisation, then we note that the relationship being mapped between bit rate and VP utilisation is not mapped in a way that accords with TelstraClear's understanding. This point also applies to slides 63 and 64.

Conclusion

13. The wholesale bitstream proceeding has been a long and exhaustive process. Telecom has been provided with ample opportunity to provide a detailed evidentiary foundation for the claim and theoretical points referred to above. Telecom has failed to do so. Accordingly, TelstraClear considers that:
- a. Telecom has not provided empirical support for its claim that 69,000 customers will be lost if it is required to provide an unconstrained (or high PIR constrained) wholesale bitstream service. The figure is an assertion without factual foundation and therefore has no probative value; and
 - b. the slides referred to above from Telecom's presentation are incomplete, lacking in foundation and/or unclear. Therefore the slides have little or no probative value. No reliable conclusions can be drawn from them, and the assertions and implications within them cannot be properly tested or responded to.

Yours sincerely,

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

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