



GOVERNMENT & INDUSTRY RELATIONS

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Douglas Webb
Telecommunications Commissioner
Commerce Commission
PO Box 2351
WELLINGTON

Dear Douglas

Telecom's new commercial unbundled bitstream service (UBS) offer

Thank you for your letter. You correctly note that Telecom has made a new commercial UBS offer to the industry and is currently in negotiations in respect of that offer. However, you are concerned that, on acceptance of the offer, the parties may be prevented from making an application for UBS under the Act.

I would confirm that our position is that acceptance of Telecom's commercial UBS (CUBS) would preclude an ISP from applying for the regulated UBS. I would note that we are in discussions with ISPs on a 512k uplink UBS service in conjunction with discussions with the CUBS. We have not bound these two together. That is, an ISP could accept the 512k UBS offer but apply to the Commission for the RUBS.

You refer to statements made by Telecom in 2004 on this issue. Telecom's view is that operators are now sufficiently informed to enter commercial negotiations and to choose whether to take a commercial arrangement with Telecom. The environment has substantially moved on from the somewhat uncertain one the Commission was concerned with in 2004. In particular, there is now a clear regulatory counterfactual against which the parties can measure any commercial offer. Accordingly, there is no longer, in the market today, the same apparent uncertainty from 2004 that Telecom co-operated with at that time.

If Telecom's commercial offers and negotiations are not satisfactory, there can be no doubt that operators are free to seek a regulated solution as an alternative to accepting a commercial offer. Telecom is acutely aware of this and is incented to make improved commercial offers to the industry.

Promotion of commercial agreements

The Telecommunications Act promotes commercial arrangements in the first instance by specifying in section 22 (c) that an applicant must have made reasonable attempts to negotiate before a regulatory application can be made. The Commission itself acknowledged this in Decision 568. Commercial operators are free to enter into commercial arrangements at any time and this has occurred on many occasions part way through a determination process as well.

There are no restrictions on in the Telecommunications Act as to what two market players may decide to agree in terms of services supplied or the terms of supply (section 22 (a) and (b) acknowledge this). If a commercial solution is not agreeable to both parties then there is a backstop available – an application can be made under section 20 of the Act.

The existence of the Telecommunications Act places additional incentives on parties to reach a commercial agreement, in line with the policy behind the Act. Parties take into account regulatory counterfactuals to inform commercial negotiations either before, during or after a regulatory outcome.

A well informed industry

The recent commercial offer which Telecom has made to the industry takes into account:

- (a) 12 months of public submissions on UBS;
- (b) the Commission's determination of the TelstraClear bitstream application before Christmas (Decision 568);
- (c) the commercial agreement between TelstraClear and Telecom in the new year (details of which were made publicly available); and
- (d) views from the industry on the new offer. (For example, some recent changes have been made in response to feedback from the industry.)

Telecom is not promoting the new commercial offer as being the same as the regulated service. Telecom has, however, taken into account the Commission's views Decision 568 – for example, there is no longer a residential and business distinction in the new offer. The industry is therefore very well informed on UBS and the alternatives that might be available in the commercial or regulatory space.

The issue of "unconstrained speed" is an issue which is not a feature of our CUBS offer, with a current maximum speed of 3.5 Mbit/s. As part of our general broadband planning and in particular with the introduction of ADSL2+, Telecom has decided that it will introduce a spectrum management plan. This will be designed to maximise the network performance across all customers. Obviously any spectrum management plan would apply equally to Telecom's retail and wholesale customers. As the Commission anticipated the introduction of a spectrum management plan in its Decision 568, this approach would further bring the CUBS and RUBS together. We intend to communicate our intention to implement a spectrum management plan to wholesale customers shortly.

The interplay of the commercial and regulatory worlds are important drivers on the marketplace. The market has moved significantly since 2004. We believe the position outlined in this letter is an appropriate one given the more mature and informed market of 2006.

If you have any issues with this response, we would appreciate the opportunity to discuss these issues with you.

Yours sincerely



Bruce Parkes
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