



COMMERCE COMMISSION

Decision Whether to Investigate the TelstraClear Application for Determination of Designated Access Services

Decision whether to investigate under Section 25 of the Telecommunications Act 2001 ('the Act') in the matter of an application for determination for designated access services under section 20 of the Act by:

TELSTRACLEAR LIMITED

The Commission:

Douglas Webb
Paula Rebstock
Shaan Stevens

Summary of Application:

TelstraClear Limited applied for a determination under section 20 in regard to (i) access to, and interconnection with, Telecom's fixed Public Data Network ('PDN'), and (ii) access to Telecom's fixed PDN backhaul service.

Decision:

The Commission has decided to investigate the TelstraClear Limited application for determination in so far as it concerns (i) access to, and interconnection with, Telecom's fixed PDN, and (ii) access to Telecom's fixed PDN backhaul service

Date of Decision:

25 November 2004

THE APPLICATION

1. On 4 November, TelstraClear Limited ('TelstraClear') filed with the Commerce Commission an application for determination of designated access services under section 20 (the 'Application').
2. Under section 10(1)(c)(ii), the Telecommunications Commissioner has requested that two other members of the Commission assist him in carrying out the Commission's functions under the Act in respect of the Application. Paula Rebstock and Shaan Stevens have been appointed by the Chair of the Commission for that purpose.
3. TelstraClear sought a determination by the Commission in regard to:
 - (i) access to, and interconnection with, Telecom's fixed PDN; and
 - (ii) access to Telecom's fixed PDN backhaul.

ASSESSMENT OF APPLICATION UNDER SECTION 20

4. The Commission cannot investigate an application under section 25 unless the applicant complies with the criteria under section 22. The Commission may also consider any other relevant matters in making such a decision to investigate.
5. Telecom and TelstraClear ('the parties') were invited to comment on the application in relation to section 22 and any other matters that may be considered relevant to the Commission's decision to investigate the matter further.
6. Telecom submits that there is a flaw in TelstraClear's application which should, in itself, lead the Commission to decide not to investigate the application. Telecom argues that the Application is 'framed in a way that requests a determination which would fall outside the designated service under the Act' and that '[i]f access were granted on the terms TelstraClear seeks, Telecom would in effect be required to provide a business grade service which will support functions that rely on a real time network capability'.¹
7. Telecom further submits that 'under section 20(1) an access seeker may only apply to the Commission for a determination in relation to a 'designated access service' or a 'specified service''. Telecom considers that the description of service for the wholesale bitstream service cannot be read in isolation and must be read in conjunction with the 'limits on access principles' relevant to that designated access service.²
8. Telecom submits that 'TelstraClear's application does not overtly request a business grade service which would support real time functions contrary to the specific limit on the access principles... [h]owever the combined effect of the price and non price terms and service specifications requested amounts to Telecom being required to provide a service which will support functions that rely on real time capability.'³ For this reason, Telecom submits that the Commission should decline to investigate the

¹ TelstraClear comments on the Application, 18 November 2001, p. 3

² *ibid.* p. 3

³ *ibid.*, p. 4

Application, so far as that application relates to the wholesale bitstream service.

9. The Commission is satisfied the Application identifies the designated access services for which a determination is sought. The Commission does not consider that it is practicable or desirable for it to reach a view at this stage whether the services requested include features that differ from the designated service description in the Act. That issue is most appropriately dealt with in the context of the Commission's consideration of the application, and the consultation undertaken by the Commission. At that time, the parties will be able to make submissions on the scope of the Application and the designated service.

ASSESSMENT OF APPLICATION UNDER SECTION 22

10. The Commission has reviewed the Application against the criteria specified in section 22. The Commission has examined the documents, materials and other evidence provided in support of the Application, and has considered the comments made by Telecom and TelstraClear on the Application.

SECTION 22(a)

11. Section 22(a) of the Act states that, despite section 20, no person may apply for a determination if –
 - (a) the persons who would otherwise be parties to the determination have an agreement for the supply of the service for part or all of the specified period of time.
12. TelstraClear submits that there is no current agreement between the parties to the determination for the supply of the requested services and the requested services are not supplied by Telecom to TelstraClear.⁴ Telecom does not provide any comment as to whether the parties have satisfied this requirement.
13. The Commission is satisfied that the Application complies with the requirements of section 22(a).

SECTION 22(b)

14. Section 22(b) of the Act states that despite section 20, no person may apply for a determination if -
 - (b) [the persons who would otherwise be parties to the determination] have agreed not to have any terms for the supply of the service determined by the Commission.
15. TelstraClear states that TelstraClear and Telecom have not agreed not to have any terms for the supply of the services determined by the Commission.⁵ In its

⁴ TelstraClear, Application for Determination of Designated Access Services, 4 November 2004, p. 4.

⁵ TelstraClear, Application for Determination of Designated Access Services, 4 November 2004, p. 4

submission, Telecom does not raise any jurisdictional issues under section 22(b) in relation to the application for the wholesale bitstream services.

16. Accordingly, the Commission is satisfied that the Application complies with the requirements of section 22(b).

SECTION 22(c)

17. Section 22(c) of the Act provides that, despite section 20, no person may apply for a determination if –

- (c) that person has not made reasonable attempts to negotiate the terms of supply of the service with the person who would otherwise be a party to the determination.

18. Section 22(c) requires an applicant for a determination to have demonstrated reasonable attempts in their negotiations. The Commission is therefore concerned only with the reasonableness of the attempts made by TelstraClear to negotiate the terms of supply.

19. The Application notes that TelstraClear had requested a higher speed wholesale UBS service from Telecom and also alternative non-price terms to those proposed in Telecom's standard 256kbps/128kbps UBS offer. TelstraClear notes that 'commercial negotiations with Telecom have been unsuccessful, with Telecom indicating that it is unwilling to negotiate terms, other than its standard offer, with TelstraClear'.⁶

20. In Telecom's submission, Telecom notes that '[it] is prepared to concede in relation to the present PDN Application that TelstraClear has made reasonable attempts to negotiate the terms of supply of UBS Services with Telecom'.⁷

21. Accordingly, the Commission is satisfied that TelstraClear, as the access seeker, has made reasonable attempts to negotiate terms of supply for the relevant designated access services.

SECTION 22(d)

22. Section 22(d) of the Act states that despite section 20, no person may apply for a determination if -

- (d) the applicable conditions in relation to the service (if any) have not been met.

Access to, and interconnection with, Telecom's fixed PDN

23. The designated service, access to, and interconnection with, Telecom's fixed PDN has the following conditions:

⁶ TelstraClear Application for Determination, 4 November 2004

⁷ Telecom, *TelstraClear Application for Determination*

That either –

- (a) Telecom faces limited, or is likely to face lessened, competition in a market for the service: or
 - (b) Telecom does not face limited, or is not likely to face lessened, competition for the service, and the Commission has decided to require that service to be wholesaled in that market.
24. TelstraClear submits that ‘in each of the markets in which TelstraClear seeks the right to supply of the Requested Services, Telecom faces limited or is likely to face lessened competition for the relevant services as Telecom is the only operator with ubiquitous network infrastructure capable of supplying the Requested Services in the relevant markets.’⁸
25. Telecom submits that the applicable conditions for a determination have not been met.⁹ Telecom considers that ‘TelstraClear’s market definition of there being a national market for the supply of bitstream services is incorrect as this issue was considered by the Commission in the LLU determination and the conclusion was that the geographic markets were by ESAs. Therefore any assertion of limited competition which follows from this (incorrect) market definition needs careful examination’.¹⁰
26. Telecom then submits that, as TelstraClear has not provided any threshold evidence which would suggest that competition in those 5 ESAs is now limited, Telecom requests that these ESAs are excluded from the outset to save all parties an unnecessary reconsideration of old ground.¹¹
27. The Commission considers that there is either a national or sub-national market for the relevant bitstream service. On either basis, the Commission considers that, as in large areas of New Zealand only Telecom has the network infrastructure to support bitstream services, Telecom faces limited competition in a relevant market.
28. The Commission notes that it is also the case that if there are markets in which Telecom does not face limited competition, the Commission may, at its discretion, require that access is provided to the services applied for. An evaluation of the merits or otherwise of requiring access in markets where Telecom does not face limited competition, should most appropriately occur during the course of the investigation.
29. Accordingly, the Commission is satisfied that the Application complies with section 22(d) in regard to access to, and interconnection with, Telecom’s fixed PDN.

Telecom’s fixed PDN backhaul

30. The designated service, Telecom’s fixed PDN backhaul, has the following conditions:

Both of the following:

⁸ TelstraClear, Application for Determination, 4 November 2004, p. 4

⁹ Telecom, Comment on Application for Determination, 18 November 2004, p. 5

¹⁰ *ibid*, p. 7

¹¹ Telecom, Comment on Application for Determination, 18 November 2004, p. 8

(a) one of the following:

- (i) an application for a determination by the access seeker of the service is pending in respect of access to, and interconnection with, Telecom's fixed PDN; or
- (ii) there must be a determination that has not expired in respect of access to, and interconnection with, Telecom's fixed PDN by the access seeker of the service: or
- (iii) the access seeker of the service and Telecom have an agreement relating to access to, and interconnection with, Telecom's fixed PDN:

(b) either –

- (i) Telecom faces limited, or is likely to face lessened, competition in a market for Telecom's fixed PDN backhaul; or
- (ii) Telecom does not face limited, or is not likely to face lessened, competition in a market for Telecom's fixed PDN backhaul, and the Commission has decided to require that the service to be wholesaled in that market.

31. The Commission is satisfied that both parts of the conditions in relation to Telecom's fixed PDN backhaul have been met.
32. Condition (a) is met. The Application also includes an application for a determination by the access seeker of the service in respect of access to, and interconnection with, Telecom's fixed PDN.
33. As is the case with 'access to, and interconnection with Telecom's fixed PDN', the Commission considers that there is either a national or sub-national market for the backhaul service. On either basis, the Commission considers that, as in large areas of New Zealand only Telecom has the network infrastructure to support bitstream backhaul services, Telecom faces limited competition in a relevant market.
34. The Commission is satisfied that the Application complies with section 22(d) in regard to access to Telecom's fixed PDN backhaul.

COMMISSION DECISION UNDER SECTION 25

35. The Commission is satisfied that the Application complies with the requirements of section 22 and will accordingly investigate the Application.

DATED this 25th day of November 2004



Douglas Webb
Telecommunications Commissioner
Commerce Commission