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Regulatory & Competition Counsel

18 November 2004

Commerce Commission  
P O Box 2351  
WELLINGTON

For: Osmond Borthwick

### TELSTRACLEAR APPLICATION FOR DETERMINATION

1. We refer to your letter of 4 November 2004 seeking written comment from Telecom pursuant to section 24(c) of the Telecommunications Act 2001 (the "Act") in relation to an application by TelstraClear Limited ("TelstraClear") for access to and interconnection with Telecom's Public Data Network and access to Telecom's Public Data Network backhaul (the "PDN Application").
2. Specifically the Commerce Commission has asked that Telecom address the application criteria specified at section 22 of the Act as well as "*any other matters Telecom considers relevant to the Commission's decision to investigate the matter further*".
3. This response will deal with:
  - 3.1 jurisdictional issues under sections 20, 22(d) and 22(c) in relation to the application for the wholesale bitstream services;
  - 3.2 the application for backhaul;
  - 3.3 confidentiality; and
  - 3.4 Telecom's concluding comments.
4. To the extent that Telecom's comments on this preliminary issue of whether the Commission should investigate touch upon substantive issues, Telecom reserves its rights to amplify or amend the high level points it has been able to make in this letter within the short timeframe for a response.

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**SECTION 20(1)**

5. Before considering the s22 criteria there is a more fundamental flaw in TelstraClear's application which should, in itself, lead the Commission to decide not to investigate.
6. In short, TelstraClear's application is framed in a way that requests a determination which would fall outside the designated service under the Act. If 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. Thus, TelstraClear's application seeks to side step the rationale behind the Commission's own decision in the LLU determination and the resulting description of the designated service.
7. Specifically, TelstraClear's application is at odds with the Commission's decision to limit regulation to internet grade rather than business grade ADSL bitstream to ensure that Telecom is incentivised to invest in business grade services without fear of cherry picking (LLU para 754). The Commission has recognised in the past that designating a business grade quality of services would enable access seekers to share the benefits of the future features of Telecom's NGN (LLU para 804). The Commission decided not to designate business grade services - yet this is essentially what TelstraClear's application seeks.<sup>1</sup> This has very significant implications for Telecom's NGN investment.
8. This point is now expanded on.
9. TelstraClear's PDN Application is made pursuant to section 20(1) of the Act. Section 20(1) provides:

*"An access seeker or an access provider of a designated access service or specified service may apply to the Commission for a determination of all or some of the terms on which the service must be supplied during the period of time specified in the application."*
10. 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".
11. TelstraClear seeks to rely on the following designated access services:

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<sup>1</sup> This is despite the fact that TelstraClear has already previously sought to have business grade services designated (LLU, para 215).

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- 11.1 the designated access service called "access to, and interconnection with, Telecom's PDN for the supply by TelstraClear to residential and business customers" ("wholesale bitstream service"); and
- 11.2 the designated access service called "access to Telecom's PDN backhaul" ("backhaul service").
12. These designated access services are described in Schedule 1 of the Act at Subpart 1 of part 2.
13. The wholesale bitstream service is described in Schedule 1 as:
- "An asymmetric digital subscriber line enabled service (and its associated functions, including the associated functions of Telecom's operational support systems) that enables **access** to, and interconnection with, that part of Telecom's fixed PDN that connects an end-user's building (or, in the case of commercial buildings, the building distribution frames) to Telecom's first asynchronous transfer mode (ATM) data switch or equivalent facility other than a digital subscriber line access multiplexer (DSLAM)." (Emphasis added.)*
14. However, 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.
15. The specific limits on access principles relevant to the wholesale bitstream service are:
- "(a) the service requires a maximum upstream throughput rate of 128 kbps for data traffic sent from the end-user; and*
- (b) the service requires a downstream throughput rate for data traffic sent to the end-user that must—*
- (i) not be less than 32 kbps; and*
- (ii) have an average of not less than 256 kbps; and*
- (c) the service is not required to support any function that relies on real time network capability; and*
- (d) Telecom is only required to provide access to the trunk side of Telecom's first ATM data switch or equivalent facility (for which purpose a DSLAM is not an equivalent facility)."*

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16. 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 in (c) above. However 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 network capability.
17. The combined effect of:
- 17.1 paragraph 16.1 of the price terms (with no per megabyte charge);
  - 17.2 paragraph 16.2 of the non price terms (with no usage limits on downloads for individual or aggregated wholesale bitstream services);
  - 17.3 TelstraClear's requirements on rate shaping; and
  - 17.4 the jitter, latency, delay variation, packet loss, contention ratio and interleaving minimum service specifications:
- is to require Telecom to provide TelstraClear with an unconstrained and managed service which is significantly better than the internet grade ADSL service which has been designated.
18. The wholesale bitstream service is also subject to a number of general limits on the application of the standard access principles set out in clause 6 of Subpart 2 of Part 1 of Schedule 1. These are:
- "(a) reasonable technical and operational practicability having regard to the access provider's network:*
  - (b) network security and safety:*
  - (c) existing legal duties on the access provider to provide a defined level of service to users of the service:*
  - (d) the inability, or likely inability, of the access seeker to comply with any reasonable conditions on which the service is supplied:*
  - (e) any request for a lesser standard of service from an access seeker."*
19. Contrary to the general pricing principle in (a) above, the service requested by TelstraClear is outside of Telecom's reasonable

technical and operational capabilities having regard to Telecom's network.

20. In 16.2 (d) of TelstraClear's application it asks for the parties to implement a "*phase programme to achieve sufficient direct electronic interfaces between their operational support systems for the service inquiry, service ordering, provisioning and fault reporting processes required to support the Requested Services.*"
21. Consistent with general pricing principle (a), Telecom should only be required to automate processes that are cost-effective (e.g. those of sufficient scale, simplicity and maturity). Telecom has serious reservations as to whether this test would be met in respect of some of the services sought by TelstraClear. To the extent that it is cost-effective, Telecom already has a phased programme to achieve direct electronic interfaces and integration (such as the electronic ordering system that is about to go live to TelstraClear and, importantly, to other access seekers at the same time). Back-office systems integration is part of this phased programme.
22. Telecom therefore submits that the service requested by TelstraClear:
  - 22.1 does not fall within the description of the wholesale bitstream service which is required to be read in conjunction with the limits on access principles; and
  - 22.2 is outside the Commission's jurisdiction because it is outside the limits on access principles.
23. Accordingly, Telecom submits that the Commission should decline to investigate TelstraClear's PDN Application, so far as that application relates to the wholesale bitstream service.

#### SECTION 22(d)

24. Telecom considers that the applicable conditions for a determination have not been met and therefore under s22(d) of the Act the Commission should decide not to investigate TelstraClear's application.
25. The applicable conditions for a determination in respect of access to and interconnection with Telecom's Public Data Network are set out in Schedule 1 of the Act at Subpart 1 of Part 2 as follows:

*"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 in a market for the service, and the Commission has decided to require that service to be wholesaled in that market".*

26. The applicable conditions for a determination in respect of access to Telecom's Public Data Network Backhaul are also set out in Schedule 1 of the Act at Subpart 1 of Part 2. Those conditions are as follows:

*"Both of the following:*

(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 the service; or*

(ii) *Telecom does not face limited, or is not likely to face lessened, competition in a market for the service, and the Commission has decided to require that service to be wholesaled in that market."*

27. Telecom notes that TelstraClear has sought a determination exclusively on the basis that condition (a) in respect of Telecom's Public Data Network and condition (b)(i) in respect of Telecom's Public Data Network Backhaul have been met. Paragraph 14 of the PDN Application states that:

*"TelstraClear considers 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*

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*operator with ubiquitous network infrastructure capable of supplying the Requested Services in the relevant markets."*

28. The PDN Application is premised on the relevant markets being:

*"(a) in respect of the wholesale bitstream service:*

- (i) a national wholesale market for supply of bitstream services; or*
- (ii) in the alternative, the wholesale markets for bitstream services in each Telecom Exchange Service Area (ESA);*

*(b) in respect of the backhaul service:*

- (i) a national market for the supply of backhaul services; or*
- (ii) in the alternative, the wholesale markets for backhaul service for each of the ESAs in which TelstraClear is supplied or is to be supplied the wholesale bitstream services."*

29. 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.<sup>2</sup> Therefore any assertion of limited competition which follows from this (incorrect) market definition needs careful examination.

30. TelstraClear has defined the market in terms of ESAs in the alternative but in doing so has failed to acknowledge that the LLU determination found that Telecom did not face limited competition in respect of a number of key ESAs namely:

30.1 Auckland Central;

30.2 Mount Wellington;

30.3 Manukau City;

30.4 Courtenay Place; and

30.5 Wellington (Central).

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<sup>2</sup> This market definition by ESA and carve out was also applied by the Commission in relation to the UPC draft Benchmarking Report dated 4 August 2004, covering letter, paras 20-22.

31. TelstraClear has not provided any threshold evidence which would suggest that competition in these areas is now limited.
32. In the event that the Commission decides to investigate TelstraClear's application, then Telecom requests that these ESAs are excluded from the outset to save all parties an unnecessary reconsideration of old ground.

**SECTION 22(c)**

33. Section 22(c) of the Act provides that no person can apply to the Commission for a determination if:

*"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".*

34. Telecom 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.
35. Nevertheless Telecom does not consider that in some key respects TelstraClear has fully or fairly described its attempts to negotiate the services in the PDN Application. The details are set out in Mr Freeman-Greene's affidavit at Appendix 1 of this letter in response to the affidavit of Mr Young of TelstraClear.
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39. TelstraClear's frustrations in the non standard negotiations are essentially the result of its endeavours to obtain terms better than those accepted by its competitors. TelstraClear is again seeking to gain better terms through this application.
40. Whilst Telecom is not taking the s22(c) jurisdictional issue further in this response to TelstraClear's application, it considers that in all of the circumstances, TelstraClear's PDN Application was filed prematurely with the Commission.

#### **BACKHAUL SERVICE**

41. The backhaul service application is premised on there being a valid application for the wholesale bitstream services. Given our reasons as to why the wholesale bitstream service application falls outside s20 and s22(d) of the Act, it follows that the Commission should also decline to investigate the backhaul service.

#### **CONFIDENTIALITY**

42. At para. 5 of the Commission's letter you request that Telecom provides the Commission with copies of the relevant correspondence and other documents exchanged between Telecom and TelstraClear in the course of the negotiations between them relating to UBS Services. TelstraClear has not annexed such documents to its PDN Application because the parties agreed that these documents were to be treated as "*commercial in confidence*" (para. 12 of TelstraClear's application), although we understand from your letter that the Commission has now requested that TelstraClear provide these documents to the Commission.
43. Telecom appreciates that, if it refuses to provide the documents requested to the Commission, the Commission has the power to require Telecom (and TelstraClear) to give up such documents under s98 of the Commerce Act (through s15 of the Telecommunications Act). Accordingly, if the Commission insists on access to these documents, Telecom will provide them to the Commission.

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44. However Telecom considers that there are good reasons why the Commission should not insist on Telecom and TelstraClear providing these documents to it. These reasons are as follows:
- 44.1 The main relevance of the documents is to assess the criteria under s22(c) and Telecom is not raising this jurisdictional issue.
- 44.2 It is far preferable that this correspondence is protected to encourage free and frank commercial negotiations. Resolution of issues via commercial negotiation is, of course, the first port of call as it is most likely to lead to better results for end users because the parties understand the environment better. Regulation is a backstop position. Moves to disclose commercial in confidence correspondence will shift these dynamics (as explained in Mr Freeman-Greene's affidavit).
45. On a separate issue, as stated above we annex at Appendix 1 of this letter the affidavit of Mr Freeman-Greene. Telecom requests that Mr Freeman-Greene's affidavit should be treated as confidential and restricted information and not made publicly available on the same basis as that set out in respect of Mr Young's affidavit in paras. 17-19 of TelstraClear's PDN Application. With the exception of Mr Freeman-Greene's affidavit, and paragraphs 36 to 38 that refer to Mr Young's affidavit, this response by Telecom to TelstraClear's PDN Application is not otherwise confidential.

## CONCLUDING COMMENTS

46. Telecom considers that the Commission should decide not to investigate TelstraClear's application as it falls outside the designated service in a material way and is inconsistent with the principles behind the Commission's final LLU determination.
47. The application also does not meet the required conditions (under s22(d) of the Act) and at the very least requires amendment to remove the relevant ESAs from consideration.
48. Finally, although Telecom is not raising a jurisdictional issue under s22(c), it notes that the standard terms which TelstraClear and Telecom were discussing at the point this application was lodged were developed after extensive consultations with a number of ISPs to meet the criteria in the designated service and have been accepted by 11 other ISPs. Given time, Telecom considers that it can reach a commercial solution with TelstraClear and that this is both a realistic and a far more preferable option than considering the applications which have been filed.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Vanessa Oakley', is centered below the text 'Yours sincerely'. The signature is fluid and cursive.

**Vanessa Oakley**  
Regulatory & Competition Counsel