



18 November 2004

Osmond Borthwick
Manager – Network Access Group
Commerce Commission
The Terrace
WELLINGTON

By email

Dear Mr Borthwick,

TelstraClear's Application for Wholesale Bitstream Services and associated Backhaul Services

1. As requested in the Commission's letter of 4 November 2004, this letter sets out TelstraClear's comments on why the Commission should investigate TelstraClear's Application for Determination in respect of wholesale bitstream and associated backhaul services, dated 4 November 2004 (TelstraClear's Bitstream Application).
2. Since the Commission's Unbundling Report, TelstraClear has made persistent efforts to negotiate a commercial agreement with Telecom for the supply of wholesale layer 2 DSL or bitstream services. TelstraClear provided Telecom with its detailed proposals for the terms of supply for bitstream services on no less than four occasions: on 10 February 2004¹; on 29 June 2004, which was in response to Telecom's presentation of its proposed standard UBS service²; on 20 July, 2004³; and on 10 September, 2004⁴.
3. Over the nine month period from February to October 2004, TelstraClear was unable to get agreement with Telecom on TelstraClear's service requirements, despite its repeated efforts⁵. Negotiations broke down in September and there have been no further substantive discussions over TelstraClear's service requirements since then.

1 Paragraph 10, affidavit of Craig Brian Young, dated 4 November, 2004, Annex 2, TelstraClear Bitstream Application.

2 Paragraph 18, affidavit of Craig Brian Young, dated 4 November, 2004, Annex 2, TelstraClear Bitstream Application.

3 Paragraph 24, affidavit of Craig Brian Young, dated 4 November, 2004, Annex 2, TelstraClear Bitstream Application.

4 Paragraph 38, affidavit of Craig Brian Young, dated 4 November, 2004, Annex 2, TelstraClear Bitstream Application.

5 See generally affidavit of Craig Brian Brian Young, dated 4 November, 2004, Annex 2, TelstraClear Bitstream Application.

4. The negotiations between the parties foundered because Telecom refused to negotiate the supply of bitstream other than on its 'standard' Unbundled Bitstream Service (UBS) terms, including refusing to supply wholesale bitstream services other than in a 256 kbps downstream/128 kbps upstream configuration until sometime in 2005 or later.
5. Telecom currently offers retail Jetstream services with a wide range of downstream speeds. Further, in October 2004, Telecom launched new Jetstream retail plans offering downstream speeds of 1Mbps and 2 Mbps, but Telecom has refused to supply TelstraClear with the wholesale bitstream equivalents.
6. TelstraClear considers that Telecom's refusal to offer wholesale bitstream services equivalent to its current retail Jetstream services, and to release new retail Jetstream and wholesale bitstream services in tandem, is inconsistent with the Standard Access Principles (SAPs) and undermines the Commission's objectives in recommending the designation of wholesale bitstream services. Telecom says that it will release UBS services with higher downstream speeds sometime next year or later, but by that stage Telecom will have entrenched its market position in higher speeds. In the meanwhile, competitors will have to compete against Telecom Retail with products with lower download speeds which customers are likely to regard as inferior.
7. Telecom clearly turned its mind to the issue of whether it should proceed with its new higher speed retail Jetstream services ahead of the equivalent wholesale bitstream services. Bruce Parkes is reported as saying⁶:

"Telecom did give some thought to pulling its high-speed retail plans on this basis, but decided to continue offering them because Internet service providers could access them as a resold service."

8. The Commission clearly concluded in its Unbundling Report that resale of Telecom end-to-end Jetstream services was an inadequate substitute for wholesale bitstream, with its cost benefit modelling showing a substantial net consumer gain from wholesale bitstream over a counterfactual which included resale of Telecom retail Jetstream services. Telecom making available the resale Jetstream services cannot be regarded, even on an interim basis, as being consistent with the SAPs.
9. We consider that the Commission should interpret the section 22(c) threshold requirement having regard to the rights and obligations of supply that a party has in relation to the designated service. If the access provider refuses to open negotiations for the supply of services that would clearly fall within the designated service description, the other party should not be penalised by a finding that the threshold requirements of section 22 are not met because there was little or no negotiation between the parties. Otherwise, the access provider would be rewarded for its intransigence.

⁶ Dominion Post, 10 November 2004 "IHUG takes action against Telecom"

10. TelstraClear has set out on a number of occasions its requirement for bitstream services with higher downstream speeds. However, Telecom has pursued a strategy of staving off negotiating over TelstraClear's request while going to market with an expanding range of retail Jetstream services.
11. The threshold in section 22(c) was designed to ensure that parties made a genuine effort to find a commercial solution, and not to provide Telecom with an opportunity to manage entry by competitors to allow it time to further entrench its position in downstream retail markets.
12. Finally, as set out in our letter of 16 November⁷, TelstraClear does not consider it is in a position to provide copies of the documents exchanged between the parties in the course of their negotiations over Telecom's objections. To reiterate our position:
 - a) we believe that sufficient information has been put before the Commission to enable it to decide that the section 22(c) threshold has been met. We are concerned that, given Telecom's objections, production of the documents may adversely affect future negotiations; and
 - b) the assessment of whether the section 22(c) threshold has been met must take primacy, and if the Commission has any doubts as to whether the threshold has been met, it should issue a direction under section 98 to both parties requiring production of the documents.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Susan Wells', is written over a horizontal line.

Susan Wells
Regulatory & Industry Advisor

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⁷ Letter from Grant Forsyth (TelstraClear) to Osmond Borthwick (Commission), 16 November, 2004.