

TELECOMMUNICATIONS ACT 2001:

**SECTION 20: APPLICATION FOR DETERMINATION FOR DESIGNATED
ACCESS SERVICES**

4 November 2004

Mr Douglas Webb
Telecommunications Commissioner
Commerce Commission
PO Box 2351
WELLINGTON

By email

Dear Commissioner Webb

Pursuant to section 20 of the Telecommunications Act 2001 (the **Act**) notice is hereby given seeking a **determination for designated access services**.

TelstraClear has paid the required non-refundable application fee of \$22,500 (inclusive of GST) by way of electronic transfer to the Commission's bank account:

BNZ	North End	Commerce Commission
02	0536	0329867 000

In addition, we acknowledge that we will be required to meet any additional application costs incurred by the Commission and make periodic payments to reimburse the Commission for a portion of the costs it incurs in completing the determination requested. Furthermore, we acknowledge that after the determination is completed that we may be required to meet some or all the costs that were incurred by the other party to the determination.

This application comprises this document (paragraphs 1 to 20 and Annexes 1 and 2).

DETERMINATION DETAILS

THE PERSON GIVING NOTICE

1. TelstraClear Ltd (**TelstraClear**)
Grant Forsyth
Manager of Industry and Regulatory Affairs
Private Bag 92143
Auckland
grant.forsyth@team.telstraclear.co.nz
tel: +64 9 912 5759
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DESCRIPTION OF SERVICES

2. TelstraClear seeks a determination for the supply by Telecom to TelstraClear of the following services¹:
 - a) the designated access service called “access to, and interconnection with, Telecom’s PDN”² for supply by TelstraClear to residential and business customers (**wholesale bitstream service**); and
 - b) the designated access service called “access to Telecom’s PDN backhaul” (**backhaul service**),

(together **the Requested Services**).
3. TelstraClear seeks a determination for the supply of the Requested Services for the following markets:
 - 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:

¹ The Requested services are more particularly described in Annex 1.

² Telecommunications (Public Data Network) Order 2004, amending Schedule 1.

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

4. Each of the Requested Services is a designated service.

JUSTIFICATION FOR APPLICATION

5. A determination is being sought due to the failure of any agreement between the parties regarding the provision of the Requested Services.

6. TelstraClear considers that the Commission should make a determination because:

- a) the parties have significant disagreements regarding key terms for the provision of the Requested Services;
- b) the parties have not been able to reach an agreement regarding the provision of the Requested Services despite reasonable attempts to reach a negotiated outcome on each of the Requested Services;
- c) Telecom exercises substantial market power in the downstream markets in which TelstraClear competes or would compete utilising the Requested Services and Telecom has no incentive, in the absence of the requested determination, to reach fair and reasonable terms of supply with TelstraClear; and
- d) Such continuing disagreement will jeopardise competition in telecommunications markets and the long-term benefit of end-users of telecommunications services within New Zealand.

PARTIES TO DISPUTE

7. The parties to the determination are:

- a) TelstraClear; and
- b) Telecom New Zealand Limited (**Telecom**)

Telecom Networks House

68-86 Jervois Quay Wellington, New Zealand.

8. TelstraClear and Telecom are both telecommunications providers.

REQUIREMENTS FOR APPLICATION

9. 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.
10. The parties in dispute have not agreed not to have any term for the supply of the services determined by the Commission.
11. TelstraClear has made reasonable attempts over a period of 11 months to negotiate the terms of supply of the Requested Services with Telecom, as set out in the statement of Craig Brian Young, dated 4 November 2004 in Annex 2.
12. TelstraClear has not annexed any of the correspondence and other documents exchanged between Telecom and TelstraClear in the course of these negotiations because the parties have agreed these documents are to be treated as “commercial in confidence”. If the Commission requires verification that the section 22 requirements have been met, TelstraClear would be prepared, if requested by the Commission to provide relevant documents to the Commission with appropriate masking of commercially sensitive material.
13. There are conditions set out in Schedule 1 of the Telecommunications Act applicable to the Requested Services, being either that:
 - a) Telecom faces limited, or is likely to face lessening competition in a market for each of the Requested Service; or
 - b) Telecom does not face limited, or is not likely to face lessening, competition in a market for the relevant service and the Commission has decided to require the relevant service to be wholesaled in that market.
14. 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 operator with ubiquitous network infrastructure capable of supplying the Requested Services in the relevant markets.

PREVIOUS TERMS OF SUPPLY

15. The Requested Services were not previously supplied to TelstraClear or its predecessors, TelstraSaturn or CLEAR.

TERMS OF DETERMINATION

16. TelstraClear requests the Commission to determine the following terms of supply for Requested Services:

16.1 **price terms for the wholesale bitstream service and backhaul service:**

- a) The monthly access charge and new connection charge³ should be calculated in accordance with the applicable initial pricing principle. There should be no per megabyte charge;
- b) Telecom and TelstraClear should bear their own costs in designing, deploying, modifying, operating and maintaining their own operational support systems required to support the Requested Services and to interface with each other's operational support systems;
- c) support services, including physical collocation space for backhaul services, should be provided at charges which recoup only the incremental costs of Telecom providing those services;
- d) a service transferral charge (and not a new connection charge) should apply in the following situations:
 - (i) an end user supplied by Telecom with a retail Jetstream chooses instead to subscribe to a retail ADSL service provided using a wholesale bitstream service supplied by Telecom to TelstraClear;
 - (ii) an end user resupplied with a Telecom wholesale Jetstream service by TelstraClear or another reseller chooses instead to subscribe to a retail ADSL service provided using a wholesale bitstream service supplied by Telecom to TelstraClear;

³ "new connection" means provisioning of bitstream service over a Telecom end user line which immediately prior to TelstraClear's service request did not have a retail Jetstream service, a wholesale Jetstream service or a Wholesale bitstream service provided over it: see description of "service transferral" in paragraph 16.1(d).

- (iii) an end user supplied by another access seeker with an ADSL service provided using a Telecom wholesale bitstream service chooses instead to subscribe to a retail ADSL service provided using a wholesale bitstream service supplied by Telecom to TelstraClear.

Reference to “a retail ADSL service provided using a wholesale bitstream service supplied by Telecom to TelstraClear” includes a retail service provided by a third party operator in a downstream chain of supply from TelstraClear;

- e) The service transferral charge should recoup only Telecom’s incremental costs (excluding system setup costs) of processing the requested service migration; and
- f) Charges for other inter-carrier processes, such as moves adds and changes, should be based on Telecom’s incremental costs (excluding system setup costs).

16.2 non-price terms for wholesale bitstream services:

- a) there should be no usage limits on data downloads for individual or aggregated wholesale bitstream services;
- b) Telecom should not apply rate shaping to the Wholesale bitstream service unless otherwise required by TelstraClear in accordance with this paragraph. TelstraClear should be able to choose between two configurations when ordering a wholesale bitstream service:
 - (i) a wholesale bitstream service to the maximum speed of which the relevant DSLAM is capable without any rate shaping by Telecom. TelstraClear may undertake rate shaping of the wholesale bitstream service to configure the combination of upstream and downstream speeds it considers appropriate for its downstream ADSL services; or
 - (ii) a wholesale bitstream service which Telecom rate shapes to the configuration of upstream and downstream speeds nominated by TelstraClear⁴, provided that the speeds are consistent with the “limitations on access principles” prescribed in the bitstream designated service and do not exceed the maximum speed of which the relevant DSLAM is capable. Without limiting this requirement, the rate

⁴ TelstraClear may also apply its own rate shaping.

shaping options to be initially made available by Telecom should include:

Downstream	Upstream
256 kbps	128 kbps
512 kbps	128 kbps
1 Mbps	128kbps
2Mbps	128kbps
8 Mbps	128 kbps

- c) If Telecom introduces a new retail Jetstream Service which has a combination of upstream/downstream speeds not currently offered by Telecom at the retail level, Telecom should include that combination as a rate shaping option available for the wholesale bitstream service if it does not already do so (provided this new option meets “the limitation on access principles” prescribed in the bitstream designated service).
- d) The parties should implement a phase program to achieve efficient 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, as follows:
- (i) the initial electronic interfaces and the degree of reliance on manual vs. electronic processes should be substantially similar to those used to support residential wholesale services as at the date of first availability of the wholesale bitstream service
 - (ii) within 6 months of the Commission’s determination, the electronic interface should support direct real time interworking between each parties’ operational support systems for key processes, including ordering, provisioning, fault reporting and closing of fault tickets;
 - (iii) within 12 months of the Commission’s determination, the electronic interface must provide TelstraClear with access to Telecom’s operational support systems which is equivalent to the access which Telecom supplies itself for its retail Jetstream services; and

- (iv) The parties are to agree on the specifications for electronic interfaces and an implementation program.
- e) Telecom should configure the wholesale bitstream service so that TelstraClear can utilise static IP addresses for end users supplied with services utilising the wholesale bitstream service.
- f) Telecom should make available wholesale bitstream services in any Telecom network area where at least 35 individual ADSL services have been requested by end users (whether subscribers to the Telecom retail services or services offered by Telecom wholesale customers). Telecom should provide TelstraClear with not less than 90 days' advance notice of the expected completion of upgrading of Telecom network in an area to support ADSL services and wholesale bitstream services should be made available no later than the date on which Telecom first commences to provide retail ADSL services in an area (including by way of a "soft launch")
- g) if a service transferral from Telecom Retail or a Telecom wholesale customer to TelstraClear occurs part way through the customer's Telecom billing cycle, Telecom should not charge the customer for the service in respect of the period between the date of service transferral and the end of that billing cycle. If the service transferral to TelstraClear occurs part way through the Telecom wholesale billing cycle, TelstraClear also should pay the first month's charges on a rateable basis. If a service transferral away from TelstraClear occurs part way through the wholesale billing cycle, Telecom should not charge TelstraClear for the service in respect of the period between the date of service transferral and the end of that wholesale billing cycle. If the service transferral away from TelstraClear occurs part way through the Telecom retail or wholesale billing cycle (as applicable), the retail or wholesale customer involved in the service transferral also should pay the first month's charges on a rateable basis;⁵
- h) Telecom should provide the wholesale bitstream services in accordance with the service level, rebate and reporting requirements set out in Annex 1.

16.3 The following non-price terms for the backhaul service:

⁵ TelstraClear is concerned that, in the absence of these proposed requirements, Telecom will be able, in effect, to double charge by separately charging TelstraClear and the end user or other wholesale customer for a full month although each takes the relevant service for part of a month.

- a) collocation for backhaul services (if required) should be provided on a co-mingled basis and TelstraClear employees and contractors should have access to the collocated equipment on Telecom's standard access and security procedures which apply to Telecom's own employees and contractors;
- b) backhaul services can be used, to the extent technically feasible, to carry aggregated traffic from the wholesale bitstream services and any other services TelstraClear acquires from Telecom, whether pursuant to a determination of the Commission or an agreement between the parties;
- c) there should be no minimum number of PoPs required before TelstraClear is permitted to order backhaul services for individual routes to ESAs; and
- d) Telecom should provide the backhaul services in accordance with the service levels rebate and reporting requirements specified in Annex 1.

16.4 The term of the supply terms:

- a) the commencement date shall be the date of the determination;
- b) the expiry date, subject to sub-paragraph (c) shall be 24 months from the date of the Commission's initial determination of this Application (**initial determination**); and
- c) if either Telecom or TelstraClear has made a price review application in respect of the initial determination, the expiry date shall be the later of 24 months from the date of the Commission's initial determination or 12 months from the date of the Commission's final price review determination.

16.5 The other non-price terms of Decision 497 (**the Wholesale Determination**) should apply to the supply of the wholesale bitstream service and the backhaul service.

CONFIDENTIALITY

- 17. TelstraClear requests that the Commission make a Confidentiality Order under section 15(1) of the Act and section 100 of the Commerce Act 1986.
- 18. TelstraClear requests that the statement of Craig Young at Annex 2 should be treated as confidential information and not made publicly available (**Confidential**

Material). TelstraClear requests that the Confidential Material be restricted to Telecom internal and external counsel and to the Telecom personnel named in it.

19. In respect of the Confidential Material and documents containing the Confidential Material, TelstraClear requests that the Commission return those documents to TelstraClear on making any determination and that the Commission, if it retains any such documents, withhold those documents pursuant to section 9(2)(b)(ii) of the Official Information Act 1982 after the expiry of any confidentiality order made under the Telecommunications Act 2001, because disclosure of the information therein would be likely unreasonably to prejudice the commercial position of TelstraClear and/or Telecom.
20. With the exception of the Confidential Material, this Application is not otherwise confidential.

DECLARATION

This application is made by TelstraClear Ltd.

TelstraClear hereby confirms that:

- * all information specified by the Commission has been supplied;
- * all information known to the applicant/s which is relevant to the consideration of this application has been supplied;
- * all information supplied is correct as at the date of this application.

TelstraClear undertakes to advise the Commission immediately of any material change in circumstances relating to the application.

Dated this 4 day of November 2004.

*Signed by TelstraClear Limited:

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

Grant Forsyth, Manager of Industry and Regulatory Affairs (an Officer of TelstraClear)
I am an officer of the company and am duly authorised to make this application.

Annex 1

Description of Requested Services

Wholesale Bitstream Services

1.1 Minimum Service Specifications for wholesale bitstream service:

Table 1: Minimum Specifications

Specification	Requirement
Jitter	Jitter should not exceed latency
Latency	<50 ms
Delay Variation	Less than mean packet delay
Packet Loss	<0.1%
Contention Ratio from DSLAM to Core	1:20
Interleaving	optional

1.2 Service Levels

The wholesale bitstream service shall be provided in accordance with the following service levels:

Table 2: Service Levels

	Service Level	Quantum
a.	Service level for confirmation of new service requests and transferral ⁶ requests	No more than 4 working hours ⁷ from the receipt of a valid ⁸ service request
b.	Service level for implementation of new service requests and transferral requests	No more than 2 working days from the receipt of a valid service request
c.	Service level for confirmation of requests for moves, adds and changes	No more than 4 working hours from the receipt of a valid service request
d.	Service level for implementation of requests for moves, adds and changes	No more than 2 working days from the receipt of a valid service request

⁶ See paragraph 16.1(d) for description of service transferral.

⁷ Working day is a day which is not a Saturday or Sunday or a national holiday.

⁸ Parties are to agree on the information and formatting requirements for service request.

	Service Level	Quantum
e.	Service Availability	Each individual wholesale bitstream service must be not less than 99.9% measured on a rolling 30 day period
f.	Service level for confirmation of fault notifications	Fault acknowledgement within 1 hour of the fault notification by TelstraClear
g.	Service level for fault repairs	Fault response (i.e. work on repairing must commence) within 6 hours of the fault notification by TelstraClear
h.	Service level for notification of fault clearance	Service must be restored within 24 hours of the fault notification by TelstraClear

- 1.3 Telecom will provide the following rebates for failing to meet the service levels listed as (a) to (e) in table 2:

Table 3: Rebates

Actual Performance against service level	Rebate against total monthly access charge for services
80 – 90%	5%
70 – 79%	10%
50 – 69%	15%
Less than 50%	30%

- 1.4 Telecom's performance against each service level will be measured on a monthly basis and any rebates will be applied against each individual service in the next following month.

- 1.5 Telecom will provide the following rebates for service outages (including for individual service faults) in an individual wholesale bitstream service:

Table 4: Individual Line Outages

Cumulative outage period in each 30 day period	Rebate against monthly access charge
4-12 hours	10%
13-24 hours	20%
25-40 hours	50%
41 hours or more	100%

- 1.6 The rebate will be applied against the access charge for the relevant service in the next following month.
- 1.7 Telecom will provide TelstraClear with quarterly reports on the following metrics (measured monthly) for the wholesale bitstream service and its own retail Jetstream services:
- a) Mean packet transfer delay;
 - b) Delay variance experience;
 - c) Packet loss;
 - d) Results for the service levels listed as a). to h) in table 2;
 - e) The number and duration of planned outages; and
 - f) The number and duration of unplanned outages.

2. Backhaul Services

- 2.1 A Gigabit Ethernet interface should be utilised, where technically feasible. Otherwise a shared NNI interface will be used.
- 2.2 Telecom shall provide the backhaul service at service levels (including rebates or compensation for failure to meet service levels) which are no less favourable to TelstraClear than the standard service levels and associated terms (including rebates or compensation for failure to meet service levels) on which Telecom supplies ATM services to end users or backhaul to wholesale customers (whichever is more favourable to TelstraClear).

Annex 2

Statement of Craig Brian Young

Refer separate attachment

**[As set out in paragraph 18 of the application, the whole of annex 2 contains
Confidential Information]**