



COMMERCE COMMISSION

Decision Whether to Investigate the CallPlus 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:

CALLPLUS LIMITED

The Commission:	Douglas Webb
Summary of Application:	CallPlus Limited applied for a determination under section 20 in regard to access to, and interconnection with, Telecom's fixed Public Data Network ('PDN').
Decision:	The Commission has decided to investigate the application for determination by CallPlus Limited.
Date of Decision:	29 March 2006

THE APPLICATION

1. On 10 March 2006, CallPlus Limited ('Callplus') filed with the Commerce Commission an application for determination of a designated access service under section 20 of the Telecommunications Act (the 'Application').
2. CallPlus sought a determination by the Commission in regard to 'access to, and interconnection with, Telecom's fixed PDN' under Schedule 1 of the Act.

ASSESSMENT OF APPLICATION UNDER SECTION 22

3. 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 the comments made by CallPlus and Telecom on the Application.

SECTION 22(a)

4. 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.
5. CallPlus submits that '[t]here is an agreement between the parties for the wholesale supply of some variants of commercial UBS. Telecom has confirmed that the existing agreements are not to be disclosed and that they do not consider that this is necessary for the purpose of making an application for a regulated UBS'.¹
6. Telecom does not seek to raise section 22(a) as a jurisdictional issue in its comments on the Application.²
7. The Commission can find no evidence to suggest that the parties have an agreement for the supply of the service for part or all of the specified period of time. The Commission is satisfied that the Application complies with the requirements of section 22(a).

¹ CallPlus, *Application for Determination for Designated Access Service or Specified Service*, 10 March 2006, para. 5.

² Telecom, *CallPlus application for UBS Determination – initial comments*, 27 March 2006, para. 14.

SECTION 22(b)

8. 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.
9. CallPlus submits that ‘Telecom has confirmed that the existing agreements are not to be disclosed and that they do not consider that this is necessary for the purpose of making an application for a regulated UBS. CallPlus has accepted this and therefore there is no relevant provision to which s22(b) applies.’³
10. Telecom does not seek to raise section 22(b) as a jurisdictional issue in its comments on the Application.⁴
11. Accordingly, the Commission is satisfied that the Application complies with the requirements of section 22(b).

SECTION 22(c)

12. 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.
13. Section 22(c) requires an applicant for a determination to have made reasonable attempts in their negotiations. The Commission is therefore concerned only with the reasonableness of the attempts made by CallPlus to negotiate the terms of supply.
14. In its application, CallPlus provides a summary of the negotiations that occurred, noting that ‘CallPlus has made extensive attempts to negotiate the terms of supply of the service with Telecom. Those negotiations first began in December 2005 and have continued into March 2006 when it became clear that Telecom were not willing to offer UBS at any download speed beyond 3.5Mbps, nor a service that is commercially acceptable to CallPlus.’⁵
15. Telecom does not seek to raise section 22(c) as a jurisdictional issue in its comments on the Application.⁶
16. Accordingly, the Commission is satisfied that Callplus, as the access seeker, has made reasonable attempts to negotiate terms of supply for relevant designated access service of access to, and interconnection with, Telecom’s fixed PDN.

³ CallPlus, *Application for Determination for Designated Access Service or Specified Service*, 10 March 2006, para. 5.

⁴ Telecom, *Callplus application for UBS Determination – initial comments*, 27 March 2006, para. 15.

⁵ CallPlus, *Application for Determination for Designated Access Service or Specified Service*, 10 March 2006, para. 6

⁶ Telecom, *CallPlus application for UBS Determination – initial comments*, 27 March 2006, paras. 17-18.

SECTION 22(d)

17. 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.
18. The designated service, access to, and interconnection with, Telecom's fixed PDN has the following conditions:
- 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.
19. In its Application, CallPlus submits that the applicable conditions in relation to access to, and interconnection with, Telecom's fixed PDN have been met. CallPlus submits that 'the Commission has concluded that Telecom faces limited competition in the national market (Para 188-189) Decision 568. There is no material change since the December decision.' CallPlus further notes that 'in any event, the Commission may decide, under condition (b), to require UBS to be wholesale in the national market. If necessary, this is an appropriate application for which the Commission could take that course.'⁷
20. Telecom 'reserves its position on whether the requirements of section 22(d) have been met, but does not raise any objections to this application on section 22(d) grounds given that the Commission does not, in practice, carry out a competition assessment (the applicable condition here) prior to its decision to investigate.'⁸
21. In December 2005, the Commission undertook market analysis and competition assessment on the relevant markets for the bitstream access service in Decision 568. The Commission concluded that Telecom faces limited, or is likely to face lessened, competition in the national wholesale market for the provision of broadband access. The Commission is satisfied that there is no basis for changing this conclusion and it remains current.
22. Accordingly, the Commission is satisfied that the Application complies with section 22(d).

⁷ Callplus, *Application for Determination for Designated Access Service or Specified Service*, 10 March 2006, paras. 8.1 & 8.2.

⁸ Telecom, *Callplus application for UBS Determination – initial comments*, 27 March 2006, para. 17

COMMISSION DECISION UNDER SECTION 25

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

DATED this *29th* day of March 2006

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

Douglas Webb
Telecommunications Commissioner
Commerce Commission