



**CallPlus Limited**

**ihug Limited**

**Submissions to the Commerce Commission on the  
proposed price and non-price terms for access to and  
interconnection with Telecom's fixed PDN**

**12 April 2006**

**PUBLIC VERSION**  
**[There is no restricted information in these  
submissions]**

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**1. Executive Summary**

1.1. ihug and CallPlus have combined their submissions into one document.

1.2. They seek the same service and terms as determined in Determination 568, adjusted to a price of \$22.70 excluding GST instead of \$27.87 per month.

1.3. The reasons for this application are largely as stated in Determination 568.

**2. (a) Restricted Information and (b) Telecom’s approach to the application**

2.1. It was only the day before submissions were due that the access seekers’ representatives first saw the restricted parts of the regression analysis that underpins the fixing of the price in Determination 568. This is Restricted Information from Determination 568 which the Commission and Telecom have had since last year and the access seekers’ representatives have only just seen<sup>1</sup>. Price in itself is a key part of this application. However it has wider implications too. It is relevant to the cost-benefit analysis raised by Telecom (see the section below headed “*Cost-benefit analysis*”). It also pervades other aspects of the application and of Determination 568. The access seekers have not been able to prepare submissions fully and they reserve their position in this regard, as they have done in correspondence to Telecom and the Commission, with a view to further submitting if that proves appropriate. They were able to analyse some of the material from the Determination in relation to price but they could only go so far, particularly as they could not verify certain information. Having noted that, it may be that it will ultimately not be necessary to lodge much more extensive submissions (much depends on

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<sup>1</sup> Neither of Messrs Wigley or Diprose sought and obtained access to the RI last year even though they appeared in respect of the TCL-Telecom application

the issues that Telecom raises in its submissions). The access seekers would prefer to keep further submissions to a minimum.

2.2. It is not clear what points Telecom will pursue based on the letters to the Commission from Telecom dated 27 March (in these submissions, called “the Telecom letters”). There are helpful indications in those letters that parts of their previous submissions may not be re-litigated. For this reason also, and because of the point in the following paragraph, the access seekers are not lodging extensive submissions at this point.

### **3. The access seekers’ approach to the application**

3.1. The access seekers request a determination that has the same terms as the service in Determination 568, adjusted for price. We expand on price in a separate section below. In case there is a change in the configuration of the price and non-price terms from what is in Determination 568 (for example, because of steps taken by Telecom or the Commission), the access seekers continue to reserve the ability to seek appropriate alternative terms (that is, the position is reserved, as set out in the application document). It is not currently intended however to deviate from Determination 568.

3.2. The access seekers rely on the reasons given in the determination.

### **4. Retail-minus discount**

4.1. Telecom, commercially, has ubiquitously altered the 16% discount to 18%. The access seekers cannot understand why Telecom doesn’t simply concede the alteration in those circumstances.

4.2. Despite that, the access seekers have no choice but to accept that the 16% discount will be applied in this determination. Telecom can be expected to take this point in each forthcoming determination which includes the discount as a factor. That is an artificial outcome and a further disincentive to access seekers requesting a determination (they start their applications with a built-in handicap of the 16% when 18% is applied commercially).

### **5. Downstream Speed**

5.1. The access seekers do not know whether (and how) Telecom will contest the Commission’s December determination as to speed, as set out in Table 7 in Determination 568. Subject to what is submitted by Telecom, the access seekers rely on the reasons and conclusions in Determination 568.

- 5.2. If the number of full speed plans has dropped since that determination, the access seekers contend that this does not drive a different outcome: this part of the rationale for the decision as to speed remains unaffected.

## 6. Price

- 6.1. John de Ridder, telecommunications economist, has applied the methodology used by the Commission in Determination 568. As with that determination, he has based his calculation on the new 128kbps retail products and pricing introduced by Telecom in April 2006. In his appended report he concludes that the UBS price should be \$22.70 per month.
- 6.2. The access seekers anticipate that Telecom would probably not pursue the point at Para 319 of Determination 568 (which deals with the prospect that ISPs will not price discriminate). The reason for their view is that substantial price discrimination appears to be wide spread among ISPs even though the price differentiation between CUBS offerings is small relative to retail price discrimination. However, Telecom notes paragraph 319 in a different context (when dealing with costs in the Telecom letters). In these circumstances, the access seekers at this stage do not provide a comprehensive submission on the point. Mr. de Ridder deals with the point on this basis in his appended report, noting that there is price discrimination among other conclusions.

## 7. Cost-benefit analysis

- 7.1. At Para 18(b) of the Telecom letters, Telecom notes *“...the cost-benefit analysis which the Commission will need to conduct to determine whether any regulated service would be for the long term benefit of end users will be different from the one that should have been conducted in relation to Decision 568.”* Telecom references the new prices from April 2006 and notes that the new prices *“will significantly alter the “without regulation” counterfactual to any decision to regulate bitstream access.”*
- 7.2. This is targeted at whether or not the Commission should decide to regulate the service, in the sense of determining whether or not Telecom must make it be available to the access seekers under the Act.
- 7.3. This point is misconceived. The issue is not whether or not Telecom must make the service available to the access seekers. It must do so. The only issue is the terms on which the service is to be provided, such as price, speed, etc. In short, that conclusion flows from Section 30(a).

7.4. The Commission has decided to investigate the matter pursuant to s25 (1)(a). It must now prepare a determination (s27) after steps such as obtaining submissions from the parties. Sections 29 and 30 set out how the Commission undertakes its determination. As Section 30 (a) notes:

*“..A determination must include...the terms on which the service must be supplied...”*

7.5. Once the decision has been made to investigate, the only option is to make a determination by which the access seekers must get the service from Telecom. The issues that the Commission takes into account are outlined in Sections 29 and 30.

7.6. Of course the Commission must also, pursuant to s19, consider and implement the Section 18 purposes. We assume that this is the source of Telecom’s reference to “*the long term benefit of end users*”. However Section 30(a) makes it clear that Sections 18 and 19 cannot be taken into account in deciding whether or not the access seekers must get the service from Telecom. Under the clear words of the Act, they must get the service regardless. Sections 18 and 19 are directed to other matters (such as the terms upon which the service must be provided (eg: price).

7.7. Although not necessary to establish the point (as this is a matter of interpretation of an unambiguous statute), that conclusion is consistent with the policy underlying the Act. Of the range of telecommunication services, only some are included in Part 2 of Schedule 1. Earlier decision making processes have led to their inclusion. The best example is UBS, included as it was, after the extensive LLU/PDN investigation which included detailed analysis of costs and benefits. It was at that point that cost-benefit and section 18 issues were material.

7.8. Additionally, if cost-benefit issues (as to whether or not the service must be made available) were to be raised, the time to do so, if at all, was during the phase when the Commission was considering whether to investigate.

7.9. In any event, the access seekers cannot understand why, simply based on April’s price movements, Telecom would seek a cost-benefit analysis now when it did not do so, on this point, during the TelstraClear UBS application.

7.10. The access seekers do not consider that a cost-benefit analysis option is available to Telecom or the Commission, as proposed by Telecom. In case that conclusion is wrong, the access seekers are not able to undertake such an analysis before the due date for submissions in

the circumstances noted above. The access seekers have no option but to continue to reserve their position including the ability to make further submissions should that be necessary, including as to any other cost-benefit issue that Telecom raises.

## **8. Implementation period**

8.1. The access seekers request a maximum of 18 weeks from the date of determination (see Paras 490-492 of Determination 568): we consider that the service can be implemented much more quickly.

## **9. Term of the determination**

9.1. The access seekers request 2 years based on Telecom's request in the earlier proceedings (Para 496, Decision 568).

## **10. Costs**

10.1. We refer to costs (Para 21 and 22 Telecom letters). The access seekers' purpose in including reference to costs in the notice of application was to give clear notice to Telecom (and the Commission) that an award of costs in their favour (both their own costs and the share of the Commission's costs) would be sought. If it transpires that the access seekers' should not have been put in the position of making the applications (or they have unnecessarily incurred costs in other ways due to Telecom's actions) cost awards against Telecom are appropriate. Quite apart from compensating parties for unnecessary expense (a small consolation for the much greater cost and lost profit caused to the access seekers by Telecom's opposition), this is a mechanism which the Commission can use to help discourage, in the future, unmeritorious opposition to applications (preceded by failure to resolve matters on a commercially appropriate basis).

10.2. The access seekers' position is that Telecom should have passed through the benefit of Determination 568 (adjusted for example as to price) and that, if the Commission makes a determination largely to the same effect, Telecom should pay the full costs of the application (the Commission's and the access seekers'). The TelstraClear-Telecom settlement does not change the appropriateness of that outcome.

10.3. It is not enough for Telecom to refer simply to inability to commercially negotiate, leading to freedom to seek a regulated solution. Telecom's own reference to Para 319 of Determination 568 illustrates this point. As is demonstrated in Mr. de Ridder's report, price discrimination is alive and well among the ISPs, a fact that must have been well known to

Telecom when the point was reached when the access seekers filed their application. Para 319 does not therefore provide a legitimate reason for Telecom to force the access seekers into the position where they must make and pursue the application. That the issues in Para 319 are not a legitimate ground to oppose the access seekers' request for service and subsequent application is now clear from market information in April including ISP retail pricing following April's price drops. Therefore, if Telecom does not now agree to provide the service on terms aligned with Determination 568 (so that the access seekers can withdraw their application), it should meet the access seekers' costs.

10.4. Costs are an issue to be handled at the end. The access seekers do not invite any bias in their favour in the meantime. They are simply flagging the issue at this stage so that Telecom is fully on notice. An issue arises if the Commission interim bills for its services before the final determination and that is the point that is referred to in the notice of application.

10.5. The access seekers reserve the ability to make more comprehensive submissions at the time when costs allocation is to be determined.