



GOVERNMENT & INDUSTRY RELATIONS

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Osmond Borthwick
Manager
Network Access Group
Commerce Commission
PO Box 2351
WELLINGTON

Dear Osmond

Ihug application for UBS determination – initial comments

1. We respond to your letter dated 13 March 2006 requesting written comment from Telecom on the above named application in accordance with section 24(c) of the Act.
2. The Commission has specifically requested that Telecom address the application criteria specified in section 22 of the Act and any other matters that we consider are relevant to the Commission's decision to investigate.
3. This response deals with the following matters:
 - (a) our understanding of the application;
 - (b) our response on the criteria in section 22 of the Act;
 - (c) our preliminary views on process; and
 - (d) our preliminary other matters.

What ihug is seeking

4. In paragraph 2 of the application ihug confirms that this is an application for bitstream access. The application does not include backhaul.
5. As to the form of bitstream access sought, ihug in the first instance states that it seeks "*such access on a nationwide basis, and, except as stated in this application, ...such access on the terms determined by the Commission in Decision 568...*"

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6. We understand that what is therefore being applied for is a bitstream access service with the following characteristics as outlined in Table 7 of Decision 568. The key characteristics are:
 - (a) full speed downstream PIR;
 - (b) SIR calculated as not less than the weighted average of the SIRs of Telecom's best efforts retail broadband services across Telecom's network;
 - (c) Shared virtual path;
 - (d) No other specified parameters or specific provisioning parameters;
 - (e) Maximum upstream of 128kpbs in line with the designation in the Act; and
 - (f) Ability to request that interleaving be turned off with costs to be recovered by Telecom.
7. We understand that the comment "except as stated in this application" refers only to the requested changes (outside the service specification itself) set out in paragraphs 11 to 14 of the application. These are discussed below.
8. ihug seeks an implementation date of 16 weeks. Telecom will comment on the implementation period at the appropriate time.
9. The pricing sought in the application is that established in Decision 568. However, in contrast to the approach in Decision 568 to rely on existing benchmarking work, ihug seeks that a new discount be calculated. This will require that new benchmarking be carried out in accordance with the Act. The Commission is not able to select a commercially agreed discount rate for other services as a default benchmarked rate.
10. A term of 24 months appears to be sought. Ihug appears not to have recognised that Telecom and TelstraClear agreed a 24 month term in Decision 568. Telecom will provide its view in respect of this application at the appropriate time during substantive submissions.
11. As to other parts of Decision 568, we assume that ihug is seeking the same sundry charges relating to the supply of the service and the same OSS terms.
12. We understand that no other terms are sought other than those outlined above. In order to avoid complexities which arose during the TelstraClear determination from continual changes in the requested service description which drew out the process, we have detailed our understanding above in order that ihug can confirm our understanding is correct.
13. Our final comment is to note that ihug has also stated that it seeks what is outlined above or "as the Commission so determines". (see paragraphs 2 and 11 of the application). We understand that these statements are made only as a default to what is actually being requested bearing in mind that it is the applicant's responsibility to clearly articulate what is being sought in this application in order that it may progress swiftly.

Section 22 criteria

Section 22(a) and (b) – commercial agreements

14. Based on our understanding of the application outlined above, Telecom is not seeking to raise section 22 (a) or (b) as jurisdictional issues.

Section 22(c) – reasonable attempts to negotiate

15. Telecom is also not seeking to raise a jurisdictional issue under section 22(c) of the Act. However, we do wish to comment briefly on ihug's version of events as follows.
16. In the first instance ihug refers to requests prior to Christmas for an advance version of the regulated UBS pending for TelstraClear. As the Commission and the industry were made clearly aware, Telecom was unable to commit to flowing through a determination until it had the opportunity to assess what that final determination was. The pending determination meant that commercial negotiations could not fully progress at that time due to the uncertainty surrounding the final determination. Accordingly, we do not agree with ihug insofar as it purports to argue that meaningful negotiations were occurring from October.
17. The final determination was unfortunately contentious but was an influence in both the TelstraClear and Telecom deal made public in January and in Telecom's revised and improved offering subsequently made to the industry as a whole in early February.
18. Negotiations occurred during February with ihug and other operators.

Section 22(d) – applicable conditions

19. 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.

Initial views on process

20. If ihug is seeking a determination on exactly the same terms as the TelstraClear determination, and subject to confirmation to that effect:
 - (a) Telecom considers that an expeditious process should be able to occur. Our position on the need for workshops or conferences is reserved at this early stage in the proceedings. While Telecom reserves its right to make full submissions in accordance with the proper processes of the Act, we recognise that the application needs to be heard as expeditiously as possible given the importance of broadband to New Zealand. Accordingly, while at our discretion, we currently anticipate that this application would enable us to avoid relitigating parts of our previous submissions. We would instead intend to focus on the extension or expansion of previous submissions where appropriate. Of course, new issues such as the need for a new benchmarking exercise will require new submissions as this matter was not dealt with in Decision 568.

- (b) We do note now that there will be new information that needs to be taken into account since Decision 568 was made. In particular 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. There will be significant changes in the retail broadband market as a result of the new retail broadband, WBS, and UBS prices which Telecom is releasing in early April 2006. These will significantly alter the "without-regulation" counterfactual to any decision to regulate bitstream access.
- (c) We are prepared to consent to the ihug and Callplus applications being heard together if they are both applying for the same service as set out in the TelstraClear determination.
11. If, contrary to our understanding above, the ihug or Callplus application is seeking something different, we seek clarification urgently to avoid complication and delay. Our views on process and substance above may not apply if the situation is not as we currently understand it.

Other

12. Telecom was mindful of the timeframes for ihug and of ihug's request for an agreement or not so it could decide whether to pursue a regulatory application. We therefore chose to clearly acknowledge []RI
13. Ihug is effectively arguing, contrary to the Commission's stated views which are in line with the legislation, that Telecom should bear the costs of its application because Telecom has not provided it with the TelstraClear determination. This assumes that Telecom was obliged to pass through the determination which is not correct. ihug conveniently ignores the Commission's own words in paragraph 319 of Decision 568 that the determination applied only in relation to TelstraClear. Other operators were advised to seek to commercially negotiate with Telecom and, if they were unable to reach agreement, they are free to seek a regulated solution.
14. Telecom's view is that there is a genuine dispute here. A regulatory determination has been sought because, []RI
Costs cannot be considered or submitted on until the conclusion of the application. Telecom rejects ihug's position that the Commission should exercise a bias in favour of ihug now in terms of how costs should be allocated.

Yours sincerely



Bruce Parkes
General Manager
Government & Industry Relations