

TELECOMMUNICATIONS ACT 2001
SECTION 20: APPLICATION FOR DETERMINATION FOR DESIGNATED
ACCESS SERVICE OR SPECIFIED SERVICE

10 March 2006

The Manager
Network Access Group
Commerce Commission
PO Box 2351
WELLINGTON

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

The required initial payment of \$22,500 (inclusive of GST) has been electronically lodged on 10 March 2006 into the Commission’s bank account.

We acknowledge that we may be required to meet any additional application or determination costs incurred by the Commerce Commission (“the Commission”). We agree to make periodic payments, as invoiced, 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, we may be required to meet some or all the costs that were incurred by the other party to the determination (including costs incurred by the Commission that were invoiced to the other party).

DETERMINATION DETAILS
TO BE COMPLETED BY ALL APPLICANTS

THE PERSON GIVING NOTICE

- 1 This notice is given on behalf of ihug Limited (“ihug”) by David Diprose, who is GM Regulatory of that company.

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SERVICE DESCRIPTION

- 2 The service for which a **determination** of the terms of supply is sought is “Access to, and Interconnection with, Telecom’s fixed PDN”, as more fully described in the Telecommunications (Fixed Public Data Network) Order 2004/231 (“Bitstream Access”). This is a designated access service.

More specifically ihug seeks such access on a nationwide basis, and except as stated in this application, it seeks such access on the terms determined by the Commission in Decision 568, dated 20 December 2005 (“Decision 568”), or as otherwise determined by the Commission. That Decision relates to an application for a determination made by TelstraClear Limited on 4 November 2004 (“the TelstraClear Application”).

JUSTIFICATION FOR APPLICATION

- 3 The grounds on which a determination is being sought are:
 - 3.1 The Commission correctly concluded in Decision 568 that there is a relevant national market for the provision of broadband access, in which Telecom faces limited competition (see paragraphs 188 and 189).
 - 3.2 The Commission determined in Decision 568 that Telecom should be obliged to provide Bitstream Access with a full-speed downstream peak information rate¹ for the reasons set out in that Decision (see paragraphs 239 and following, and Table 7).
 - 3.3 However following the publication of Decision 568, Telecom and TelstraClear entered into an agreement such that TelstraClear would receive from Telecom Bitstream Access on a basis inferior to that set out in Decision 568.
 - 3.4 The result of that agreement is that the acceleration of competition and other benefits, which the Commission envisaged would occur as a result of Decision 568 (see paragraph 239), will now not occur, unless a further determination is made. Section 18 outcomes are not being achieved. This agreement provides no more than 3.5Mbps downstream compared with the unrestrained speeds under the determination. The 3.5Mbps limit applies not only to TelstraClear but is the maximum that Telecom is offering to all other ISPs as part of their commercial UBS proposal.
 - 3.5 The parties have not been able to reach agreement regarding the terms of a service despite reasonable attempts to reach a negotiated outcome.
 - 3.6 Telecom has substantial power in the market in which ihug competes (or would compete with the services that are sought) and Telecom has little or no incentive, in the absence of a determination, to achieve fair and reasonable resolution of terms for a service.

¹ As adjusted in Table 7 in Decision 568

- 3.7 While ihug is seeking a determination for a service that has a 128kbps uplink speed, this in no way infers that ihug accepts that this constraint is appropriate.
- 3.8 As outlined in the remainder of this application.

PARTIES TO DISPUTE

- 4 The parties to the determination are ihug and Telecom New Zealand Limited. Both are telecommunications providers. ihug is a wholly owned subsidiary of an Australian telecommunications company, iiNet Limited:
 - 4.1 iiNet is Australasia's third largest internet service provider with over 650,000 customers using broadband, dial-up and telephony services in New Zealand and Australia.
 - 4.2 ihug is New Zealand's largest broadband wholesaler, second largest provider of ADSL broadband and third largest internet service provider, supplying internet access and telephony services to over 100,000 customers throughout New Zealand.

REQUIREMENTS FOR APPLICATION

- 5 ihug is not aware of any approved code that provides for any matters sought in the determination.
- 6 There 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. ihug has accepted this and therefore there is no relevant provision to which s22(b) applies.
- 7 ihug has made extensive attempts to negotiate the terms of supply of the service with Telecom. Those negotiations first began in October 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 ihug. A statement outlining the position is attached in Annex 1 and further details can be provided if required. Telecom has requested that details of the negotiations are not to be disclosed to the Commission. ihug has no difficulty with such disclosure. If the Commission considers it necessary to have further documents and information, then ihug is prepared to provide this, subject to any objection from Telecom. In view of Telecom's position, it has not been possible in this application to provide all information relevant to s22(c), but this can be provided if sought.
- 8 As Para 76 of Decision 494 confirms: "*...industry practice and the dynamics of a negotiation between a new entrant and an incumbent are also factors to be taken into account in assessing the threshold as to what constitutes reasonable attempts.*"
- 9 In terms of satisfying the applicable conditions set out in Schedule 1 of the Act:

- 9.1 ihug notes 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;
- 9.2 in any event, the Commission may decide, under condition (b), to require UBS to be wholesaled in the national market. If necessary, this is an appropriate application for which the Commission could take that course (if it assists, ihug can provide reasons for this).

PREVIOUS TERMS OF SUPPLY

- 10 As outlined above, an arguably similar service is presently supplied to ihug by Telecom. The precise service sought has never been supplied to ihug by Telecom.

TERMS OF DETERMINATION

- 11 ihug seeks the service as specified in Decision 568, a service variant on the service specified in Decision 568 (to the extent that the Commission determines) or a service with price and non-price terms as the Commission so determines.
- 12 ihug seeks price terms as established in Decision 568, or as the Commission so determines. Such price to be adjusted for subsequent changes in Telecom retail pricing (Para 432, Decision 468) and for the retail-minus adjustment from 16% to 18%.
- 13 Ihug requests no more than 16 weeks for implementation of the service from the date of the determination (see Para 54 of the Commission's Statement of Consultation dated 12 October 2005).
- 14 ihug considers that the determination should apply for a period of 24 months from the date on which it takes effect. This period was requested by Telecom in relation to the TelstraClear Application (see Decision 568, paragraph 496).

MISCELLANEOUS

- 15 ihug should not have been forced to pursue this application: the issues have been substantially resolved by the Commission in December and there are no material differences as to ihug's position. Further the commercial proposals from Telecom fall well short of the determination. For those reasons, and for other reasons that arise or are advanced by ihug, ihug advises that it will seek orders that Telecom pay all or most of the Commission's costs (s.55) and that Telecom pays all or most of ihug's costs of pursuing this application (s.56). ihug requests that any regime by which interim Commission charges are invoiced allow for the prospect of unequal sharing of Commission cost.

CONFIDENTIALITY

- 19 In view of Telecom's request, ihug asks that the Commission make a Confidentiality Order under s15(1) of the Act and s100 of the Commerce Act 1986.
- 20 Ihug requests that information in Annex 1 should be treated as Confidential Information and not made publicly available. Ihug reserves the right subsequently to seek disclosure to the public and to the Commission of information relating to negotiations.

DECLARATION

THIS application is made by ihug Limited

ihug Limited hereby confirms that:

- all information specified by the Commerce Commission (“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.

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

Dated this Friday, 10 March 2006.

Signed by ihug Limited:

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

David Diprose, GM Regulatory (an officer of ihug Limited)

I am an officer of the company and am duly authorised to make this application.

Annex 1

[CONFIDENTIAL INFORMATION]