



COMMERCE COMMISSION

Review of the Standard Terms Determination for the designated service Telecom's unbundled bitstream access backhaul

DECISION NO. 707

Final Review Decision under section 30R of the Telecommunications Act 2001 of Decision 627

The Commission:

Dr Ross Patterson
Anita Mazzoleni
Gowan Pickering
Pat Duignan

Date of Review Decision: 23 March 2011

ISBN: 978-1-869451-89-4

EXECUTIVE SUMMARY

1. This competition review of the designated access service of Telecom's unbundled bitstream access backhaul (**UBA Backhaul Service**)¹ is the first review conducted by the Commerce Commission (the **Commission**) since the UBA Backhaul Service standard terms determination (**STD**) was issued on 27 June 2008. The UBA Backhaul Service in the STD is only for the purpose of providing access to the Enhanced UBA Service (EUBA).²
2. The Commission concludes that the relevant markets for the UBA Backhaul service are separate wholesale markets for transmission capacity on each Primary Link³ of the UBA Backhaul Service and transmission capacity on each Secondary Link⁴ of the UBA Backhaul Service. The Commission has applied the same competition assessment framework in this decision as was applied in the UCLL Backhaul STD.
3. In this review the Commission concludes that Telecom faces limited competition on all UBA Backhaul Primary Links and UBA Backhaul Secondary Links. Accordingly, all UBA Backhaul links remain subject to the terms of the UBA Backhaul STD.
4. The factors supporting this conclusion are:
 - i. competitive UBA Backhaul markets have not developed because of the small number of EUBA services that are being purchased from Telecom;⁵ and
 - ii. the absence of an appropriately specified and priced service that allows alternate backhaul providers to aggregate backhaul traffic inside the exchange which would further promote competition.

INTRODUCTION

5. On 27 June 2008, the Commerce issued a STD under section 30M of the Telecommunications Act 2001 (the **Act**) in respect of the designated access service of the UBA Backhaul Service.
6. The description of the UBA Backhaul Service (as set out in Part 2 of Schedule 1 of the Act) provides that competition conditions apply to the UBA Backhaul Service three years from the date on which the Telecommunications Amendment Act (No 2) 2006 receives the Royal assent. These conditions came into force on 22 December 2009.
7. This Decision represents the first competition assessment conducted for the UBA Backhaul Service under section 30R of the Act (the **Review**). The Commission gave

¹ Commerce Commission, *Standard Terms Determination for the designated service of Telecom's unbundled bitstream access backhaul*, 27 June 2008 (**UBA Backhaul STD**).

² The Enhanced UBA Service is the "enhanced unbundled bitstream access service" set out in section 4 of the UBA Service Description which forms part of the Unbundled Bitstream Service Standard Terms Determination dated 12 December 2007.

³ A Primary Link of the UBA Backhaul service is the part of UBA Backhaul service between a FDS and its Parent point of interconnection (POI).

⁴ A Secondary Link of the UBA Backhaul service is the part of the UBA Backhaul service between the Parent point of interconnection and the access seekers nearest available POI (ASNAPOI).

⁵ The UBA Backhaul Service in the STD is only for the purpose of providing access to the Enhanced UBA Service.

public notice⁶ of its decision to commence a review on 2 June 2010 but informal consultation on the issues at stake started in early 2010.

8. The Commission has applied the following competition conditions set out in sub clause (b) of the UBA Backhaul Service:

either—

- (i) Telecom faces limited, or is likely to face lessened, competition in a market for transmission capacity between Telecom's first data switch (or equivalent facility) and the access seeker's nearest available point of interconnection; or
- (ii) Telecom does not face limited, or is not likely to face lessened, competition in a market for transmission capacity between Telecom's first data switch (or equivalent facility) and the access seeker's nearest available point of interconnection, and the Commission has decided to require Telecom's unbundled bitstream access backhaul to be wholesaled in that market.

Background

9. On 30 March 2010,⁷ the Commission wrote to interested parties inviting submissions on whether it was appropriate for the Commission to follow the same general approach for the UBA Backhaul competition assessment as that adopted for UCLL Backhaul assessment. The Commission also asked parties to raise any issues that should be taken into account in reviewing the approach to the market definition and competition review for the UCLL Backhaul Service.
10. Parties who responded to the Commission's 30 March 2010 letter submitted that the Commission should use the same framework for the UBA Backhaul competition assessment as has been applied in the UCLL Backhaul competition assessment.⁸
11. On commencement of the Review on 2 June 2010,⁹ the Commission requested that parties provide specific information as to whether or not Telecom faced limited, or was likely to face lessened, competition in a market for transmission capacity between Telecom's first data switch (or equivalent facility, other than a DSLAM) and the access seeker's nearest available point of interconnection in relation to the UBA Backhaul Links assessed under this Review.
12. In response to this request, the Commission received information from eleven parties¹⁰ and public versions of this information are available on the Commission's website.

⁶ The New Zealand Gazette notice officially launched the Review. Refer to New Zealand Gazette No. 61, 3 June 2010, 1787.

⁷ Commerce Commission, *Unbundled Copper Local Loop Backhaul and Unbundled Bitstream Access Backhaul Standard Terms Determinations – Consultation over the market definition and competition assessment*, 30 March 2010 (the **30 March 2010 letter**).

⁸ Responses to the 30 March 2010 letter are available on the Commission's website at <http://www.comcom.govt.nz/competition-reviews-for-uba-backhaul-and-ucll-backhaul-services/>.

⁹ The Commission's gave public notice commencing the Review on 2 June 2010 – New Zealand Gazette No. 61, 3 June 2010, 1787.

¹⁰ Information was received from Telecom (Group), Telecom (Chorus), Vodafone, TelstraClear, FX Networks, Vector Communications, Network Tasman, Alpine Energy, CountiesPower, NorthPower and Enable Networks. This information has informed the Commission's views in this Decision.

Draft UBA Backhaul Competition Review

13. On 23 September 2010 the Commission issued a draft UBA Backhaul Decision Document under section 30R of the Act (the **Draft**).¹¹ In summary, the Commission's preliminary conclusions were that:
- the relevant markets for the UBA Backhaul service are separate wholesale markets for:
 - transmission capacity on each Primary Link¹² of the UBA Backhaul Service; and
 - transmission capacity on each Secondary Link¹³ of the UBA Backhaul Service;
 - this market definition is consistent with the approach taken in the UCLL Backhaul STD;
 - it is appropriate to apply the same competition assessment framework used in the revised draft UCLL Backhaul Review to the UBA Backhaul Review;
 - where a UBA Backhaul Link follows the same network topography as a comparable UCLL Backhaul Link and the UCLL Backhaul Link is considered to be competitive,¹⁴ then the UBA Backhaul Link should also be considered to be competitive (subject to the absence of any other competition factor particular to that link which would change the outcome of the competition assessment or other demonstrated cost differences);
 - if, in the future, a UBA Backhaul Primary Link does not follow the same network topography as a UCLL Backhaul Primary Link from the same exchange, then the Commission will need to reassess whether the UBA Backhaul Primary Link is competitive or not; and
 - the Commission intends to complete a review of all UBA Backhaul Links annually, in combination with the review of UCLL Backhaul Links, taking into account competition developments, with the annual review being supplemented by competition reviews on a link-by-link basis (either in response to requests from interested parties, or on the Commission's own initiative).
14. In the Draft the Commission applied the following criteria when assessing competition in the wholesale markets for transmission capacity on each Primary Link and each Secondary Link of the UBA Backhaul Service:
- Telecom does not face limited competition on Primary Links or Secondary Links where there is one, or more, other wholesale-only backhaul providers;

¹¹ Commerce Commission, *Draft Review of the Standard Terms Determination for the designated service Telecom's unbundled bitstream access backhaul*, 23 September 2010. (*telephone exchange to interconnection point*), 23 September 2010 (**Revised Draft**)

¹² A Primary Link of the UBA Backhaul service is the part of the UBA Backhaul service between a FDS and its Parent point of interconnection (POI).

¹³ A Secondary Link of the UBA Backhaul service is the part of the UBA Backhaul service between the Parent point of interconnection (POI) and the access seekers nearest available POI (ASNAPOI).

¹⁴ That is, Telecom does not face limited, or is unlikely to face lessened, competition in the relevant markets.

- for Primary Links or Secondary Links where there is only Telecom or Telecom and one other vertically-integrated competitor, the Commission considers that Telecom faces limited competition;
 - where a nearby fibre-based network is within 1km-2 km of a Telecom exchange, the network is considered a competitive constraint unless:
 - the operator has publicly stated that there is no intention now or in the near future, to offer services to, or from, that local exchange; or
 - the Commission considers that additional information provided by a fibre-based network about a specific link should be taken into consideration on a case-by-case basis; and
 - for those found to be markets in which Telecom does not face limited competition, Telecom is not likely to face lessened competition.
15. Submissions on the Draft UBA competition review were received from Vodafone, Chorus, CCNL, CityLink, Telecom and TelstraClear.

SUBMISSIONS

16. This section summarises the key issues raised in submissions on the Draft and provides the Commission's response to each of these issues.

TelstraClear are a constraint in the wholesale market

17. In the previous two UCLL Backhaul competition reviews, the Commission's view was that Telecom faced limited competition where Telecom and one other vertically integrated operator (such as TelstraClear) were present on a link.
18. In response to the draft UCLL Backhaul Decision Document,¹⁵ Telecom disagreed with the Commission's decision to exclude vertically integrated operators from being considered a competitive constraint. Telecom submitted that TelstraClear is a major competitor to, and constraining force on Chorus, Telecom Wholesale and Telecom Retail, and that TelstraClear's presence on a primary or secondary backhaul link constrains the freedom of Telecom Wholesale for UBA Backhaul. Telecom submitted that the constraint is a direct one where TelstraClear is active in a wholesale market and an indirect one where TelstraClear competes at a retail level – placing downward pressure on input prices.¹⁶
19. Telecom also submitted that the infrastructure provided by TelstraClear in its Southern Loop between Christchurch, Timaru, Dunedin, Invercargill and Queenstown qualifies as a real competitive alternative to Telecom.¹⁷
20. Similarly, TelstraClear disagreed with the Commission's view that vertically integrated providers are unable to act as a constraint in the backhaul market.¹⁸ TelstraClear noted that it operates a significant wholesale division which provides wholesale data, virtual

¹⁵ Commerce Commission, *Draft Review of the Standard Terms Determination for the designated service Telecom's unbundled copper local loop network backhaul (telephone exchange to interconnection point)*, 6 August 2010.

¹⁶ Telecom Submission 21 October 2010, page 1 and Telecom Submission 13 August 2010 (UCLL Backhaul)

¹⁷ Telecom Submission, 21 October 2010, page 2.

¹⁸ TelstraClear Submission, 21 October 2010, page 2

ISP, telephony and data centres, internet and voice services and that TelstraClear Wholesale markets to carriers, ISPs and resellers.

21. TelstraClear provided the Commission with confidential evidence of backhaul links that it has won through competitive tendering. The Commission has assessed this information and considers that TelstraClear is a potential competitive constraint to Telecom as a supplier of UBA Backhaul in areas where TelstraClear has a network presence within 2km of a Telecom exchange, absent any additional matters that may inhibit competition developing in those markets.

Public statements

22. In the Draft, the Commission stated that any operator that meets the near entrant criteria was to be considered a competitive constraint on Telecom unless it has *publicly stated* that it does not intend to connect to the exchange. In response, the Commission received statements from CityLink and Christchurch City Networks Limited.
23. CityLink submitted that it does not directly compete in the backhaul market, and that in cases where it is within the 1-2km areas of an exchange, the costs for establishing such network links compared to pre-existing Telecom supplied options make it uneconomic for prospective customers.¹⁹
24. CityLink further submitted that it has no specific planned intentions to build network extensions into Telecom exchanges unless there are customers wishing to contract such links based on the standard CityLink installation rates.²⁰
25. Christchurch City Networks Limited (trading as Enable Networks) submitted that it has no current intentions to connect to a number of Christchurch exchanges because the business case for the investment in providing this service is usually not viable, or at best marginally viable, with service providers taking a very short term outlook and partnering to share exchange based equipment thereby limiting backhaul requirements.²¹
26. The Commission considers that neither CityLink nor Christchurch City Networks provide a competitive constraint to Telecom for the supply of UBA Backhaul.

Are any additional market conditions present that may materially prevent competition from developing?

27. The Commission has assessed whether there are any other market conditions that may materially prevent competition from developing in the UBA Backhaul markets, given that take-up of Enhanced UBA is low and access seekers are not using the regulated UBA Backhaul service.
28. Vector Communications submitted that when a stand-alone fibre network player (such as Vector) connects to a Telecom exchange, they are required to connect one fibre per customer, whereas, by contrast, Telecom Wholesale are able to aggregate customers over one fibre giving them a potential advantage on connection costs. Vector noted that

¹⁹ CityLink submission, 28 September 2010

²⁰ CityLink submission, 28 September 2010

²¹ CCNL Submission, 30 September 2010

if backhaul aggregation and complementary services (e.g. hauling fibre into the exchange, other connection and co-location costs) are not offered to all on equivalent terms, then Telecom have the potential to skew the state of competition.²²

29. TelstraClear submitted that their ability to provide a more competitive backhaul service would improve significantly if Telecom allowed them to connect their surplus fibre to wholesale customers within the exchange, without having to install that fibre in the manhole outside the exchange.²³ TelstraClear submitted that this would allow it to aggregate its wholesale customer's backhaul services in a more cost-effective and timely way.
30. TelstraClear noted that Telecom usually requires each traffic type to meet in the manhole outside of the exchange. Each wholesale customer is required to procure their own fibre cable from inside the exchange to the outside manhole for each service. A wholesaler wishing to provision the UBA Backhaul services is also required to procure fibre from inside the exchange to the manhole.²⁴
31. TelstraClear further noted that the process and cost to procure the fibre cable is restrictive and the process to order and provision the fibre can take as long as 8 weeks.
32. Telecom submitted that any additional costs associated with providing a competitive backhaul service are likely to be comparatively low and this matter should not affect the Commission's current competition assessment framework.²⁵
33. The Commission considers that it is appropriate as part of the assessment criteria to take into account any additional information that may materially prevent competition from developing in UBA Backhaul markets as a whole.
34. A requirement to connect a separate fibre for each service at the exchange manhole is likely to be inefficient, creating additional cost for alternate backhaul providers which will ultimately be passed on to end-users, and as a result, is likely to make third party backhaul an uneconomic alternative, and create a barrier to effective backhaul competition.
35. Telecom Wholesale recently introduced a commercial aggregation service called "Commercial Co-location Interconnection Service".²⁶ This service enables a backhaul provider to install aggregation equipment in an exchange in order to provide a shared backhaul link for one or more service providers.
36. The Commission sought feedback from interested parties on Telecom Wholesale's Commercial Co-location Interconnection Service. The significant issues raised by parties were that the Commercial Co-location Interconnection Service:

²² Vector, *Submission on the Consultation on Market definition and Competition Assessment for UCLL/UBA Backhaul*, 20 April 2010, p 4.

²³ TelstraClear Submission, 21 October 2010, page 8, paragraph 30.

²⁴ TelstraClear Submission, 21 October 2010, page 8, paragraph 31.

²⁵ Telecom Submission, 21 October 2010, page 2.

²⁶ See Telecom Wholesale Informer, TW 2010-12-23.

- i. provides more than is needed to aggregate backhaul services²⁷ and hence costs more; and
 - ii. the price of the Commercial Co-location Interconnection Service was greater than the cost to haul individual fibre cables for each access seeker from the manhole into the exchange and therefore was not an economic alternative for access seekers.
37. Information provided by interested parties indicates that over the typical term of a backhaul contract the one off cost of hauling a fibre cable into the exchange for each backhaul customer is likely to be less than the cost of using the Commercial Co-location Interconnection Service. The Commission considers that the price of this commercial service would not encourage the development of competition in backhaul markets.
38. Currently, only a small number of E-UBA services (less than 0.5% of all bitstream services) are currently being purchased from Telecom. As a result, the ability to aggregate backhaul for E-UBA with other services is critical to make the provision of alternative third party backhaul a viable economic option.
39. The Commission considers that the absence of an appropriately specified and priced service that allows alternate backhaul providers to aggregate backhaul traffic inside the exchange is preventing the emergence of competition in UBA Backhaul markets.
40. This is in contrast to the “Aggregated UCLL Footprint Co-location” service recently launched by Chorus. This service enables a backhaul provider to install aggregation equipment in an exchange in order to provide a shared backhaul link for one or more UCLL service providers.²⁸ The Commission has considered the costs charged to alternate backhaul providers for the Aggregated UCLL Footprint Co-location service and considers that it does not materially restrict competition from developing in the applicable UCLL Backhaul markets.²⁹
41. Accordingly, the Commission considers that Telecom faces limited competition in UBA Backhaul markets.

Combining UCLL and UBA Backhaul Reviews

42. In the Draft, the Commission invited submissions on whether, in future, a combined review process should be undertaken for both the UBA Backhaul reviews and the UCLL Backhaul.
43. All submissions received were in favour of a combined backhaul review. Accordingly, the Commission will, for future reviews of backhaul markets, combine the review process for the UBA Backhaul and UCLL Backhaul Services.

²⁷ Telecom Wholesale proposed a managed service, whereas access seekers preferred a passive service made up of tie-cables that did not go through the MIS OFDF. A managed service is one where the cables are tied over into Telecom’s “MIS OFDF” from the co-location room.

²⁸ See http://www.chorus.co.nz/f869,44519/Aggregated_20UCLL_20Footprint_1_.pdf

²⁹ Commerce Commission, “*Review of the Standard Terms Determination for the designated service Telecom’s unbundled copper local loop network backhaul (telephone exchange to interconnection point)*” Decision 706, 9 March 2011, paragraphs 36-39.

THE COMMISSION'S DECISION

Market definition

44. The relevant markets for the provision of the UBA Backhaul Service are the wholesale markets for transmission capacity on each:
- Primary Link of the UBA Backhaul Service; and
 - Secondary Link of the UBA Backhaul Service.

Competition assessment

45. In undertaking this Review, the Commission has applied the conditions set out in sub clause (b) of the UBA Backhaul Service as set out in Part 2 of Schedule 1 of the Act on the basis outlined in this section.
46. The Commission has applied the following criteria when assessing competition in the wholesale markets for transmission capacity in respect of all UBA Backhaul Primary and Secondary Links:
- a) Subject to (d) Telecom does not face limited competition on Primary Links or Secondary Links where there are one or more other backhaul providers;³⁰
 - b) where a nearby fibre-based network meets the near entrant criteria, the network is considered a competitive constraint unless the operator has publicly stated that it does not intend to, and will not in the near future, offer services to or from that local exchange; or
 - c) for those markets found to be markets in which Telecom does not face limited competition, Telecom is not likely to face lessened competition; and
 - d) there are additional market conditions present that may prevent effective competition from developing (for example, the absence of an appropriately specified and priced service that allows alternate backhaul providers to aggregate backhaul traffic from multiple access seekers from inside the exchange).
47. Having applied the framework outlined above, the Commission's view is that Telecom faces limited competition on all UBA Backhaul Primary and Secondary Links..
48. The Commission considers that the inability of alternate backhaul providers to efficiently aggregate UBA backhaul with other backhaul traffic is a market condition that materially restricts competition from developing in the applicable UBA Backhaul markets. The small number of E-UBA services being purchased means that the ability to aggregate backhaul traffic is critical if a third party backhaul provider is to pose a competitive constraint to Telecom. Accordingly, the Commission concludes that all UBA Backhaul markets should remain subject to regulation under the UBA Backhaul STD.
49. The inability of third party backhaul providers to aggregate backhaul traffic in the exchange means that UBA Backhaul Links that follow the same network topography as a competitive UCLL Backhaul Link are not considered competitive.

³⁰ ie already connected to the exchange.

50. The Commission will continue to monitor the progress of the commercial aggregation products that are available and will take this into account in future section 30R reviews.

Frequency of future reviews

51. Because of the similarities between the UCLL Backhaul service and UBA Backhaul service, a combined review process will be undertaken for both of the Backhaul services in the future. The review of all Backhaul Links will be conducted annually taking into account competition developments. This review will be supplemented, where necessary, by competition reviews on a link-by-link basis (either in response to requests from interested parties, or on the Commission's own initiative)

Deployment of new FDS' in Telecom's network

52. The Commission notes that new UBA Backhaul links that are created by the deployment of a new FDS, or the alteration of the location of a current FDS, will need to be allocated a competition status.
53. All newly created UBA Backhaul links will remain subject to the terms of the STD until reviewed either on request or in the annual review process.

Additional amendments to UBA STD Schedules to give effect to the application of the competition condition following this Review

54. As a consequence of applying the competition conditions outlined in Schedule 1, Part 2 of the Act, amendments to the UBA Backhaul STD Schedules are required. These changes are summarised in this section. The changes to Schedule 4 and Schedule 5 are addressed in detail in Appendix 1 and the changes to Schedule 1 – UBA Backhaul Service Description are outlined in Appendix 2 which replicates the UBA Backhaul Service Description with all changes tracked.
55. Schedule 1 – UBA Backhaul Service Description requires the addition of:³¹
- background on the market analysis (after clause 1.2);
 - a definition of the term *Conditions* (after clause 1.3); and
 - a statement that the the UBA Backhaul Service is available on all Primary Links and Secondary Links (clause 2.2A) except new links that arise as a result of an increase in geographic availability of the UBA Backhaul Service (clause 1.2E).

CONCLUSIONS OF THE REVIEW

56. As a result of the Commission's decisions set out above, the Commission concludes:
- it is appropriate to apply the same assessment framework in the UCLL Backhaul Review and the UBA Backhaul Review given that there are few technical differences between the Services.
 - the inability of alternative backhaul providers to efficiently aggregate traffic within Telecom's exchanges restricts competition in the UBA Backhaul

³¹ Other minor consequential changes have also been made to Schedule 1.

markets and means that Telecom faces limited competition on all UBA Backhaul Primary and Secondary Links;

- the Commission will continue to monitor the progress of the commercial aggregation products that are available and will take this into account in future section 30R reviews;
- the Commission intends to complete a review of all UBA Backhaul Links annually, in a joint review of UBA Backhaul and UCLL Backhaul Links. The review will take into account competition developments across all relevant markets in New Zealand. The annual review will be supplemented by competition reviews on a link-by-link basis (either in response to requests from interested parties, or on the Commission's own initiative);
- Appendix 1 outlines the amendments that are required to the UBA Backhaul STD Schedules as a consequence of applying the competition conditions for the first time.

DATED at Wellington this 23 March 2011



Dr Ross Patterson
Telecommunications Commissioner

APPENDIX 1 – AMENDMENTS TO THE SCHEDULES UBA BACKHAUL GENERAL TERMS

1. The following amendments are required to the UBA Backhaul Standard Terms Determination and the Schedules to the UBA Backhaul General Terms as a consequence of applying the competition “conditions” as set out in subclause (b) of the UBA Backhaul Service³² for the first time.

Schedule 1 to the UBA Backhaul General Terms – UBA Backhaul Service Description

2. The amendments that are required to the UBA Backhaul Service Description as a consequence of this Section 30R Decision are set out in the attached copy of the UBA Backhaul Service Description. The amendments are highlighted with tracked changes.

Schedule 4 to the UBA Backhaul General Terms – UBA Backhaul Operations Manual

3. The following text is added to the end of clause 14.1.5 of the UBA Backhaul Operations Manual:

Where there is an increase in geographic availability or coverage of the UBA Backhaul Services, the routes corresponding to new POIs or FDSs will not be available to the Access Seeker unless the Commission has determined that the Conditions apply in the relevant markets for transmission capacity.

4. The following term is added to Appendix A of the UBA Backhaul Operations Manual – Glossary:

Conditions means the Conditions as described in the UBA Backhaul Service Description

Schedule 5 to the UBA Backhaul General Terms – UBA Backhaul POI Site Related Information

5. The following clause 1.1 replaces clause 1.1 of Schedule 5 to the UBA Backhaul General Terms:

- 1.1 This schedule is part of the UBA Backhaul Terms, which set out the rights and obligations of Telecom and Access Seekers in relation to Telecom’s unbundled bitstream access backhaul service (**UBA Backhaul Service**). It sets out to the extent necessary:
 - 1.1.1 A list of POI Sites for interconnection to the UBA Backhaul Service – Appendix A;
 - 1.1.2 Lists of the radial distances for Primary Links and Secondary Links, between Parent POI Sites and associated FDSs, and between POI Sites – Appendix A; and

³² The UBA Backhaul Service is a designated access service that is set out in Part 2 of Schedule 1 of the Telecommunications Act 2001.