



**RESPONSE TO COMMISSION
CONSULTATION ON THE REVISED DRAFT
UBA COMPETITION REVIEW
(CROSS SUBMISSION)**

PUBLIC VERSION

22nd July 2011

A SUMMARY

- 1 We welcome the opportunity to comment on responses to the Commission's revised draft conclusions on the UBA Competition Review.
- 2 Responses focussed on two primary issues: Whether deregulation should apply in competitive areas (Vector) and whether regulation should remain in cabinet areas (Vodafone and Callplus/Kordia). We discuss these points in more detail below, but in summary:
 - (a) As a matter of good regulatory practice, ex ante regulation of the type in question should be removed when a market becomes competitive. We understand that this is the policy of the Commission and is consistent with competition policy in jurisdictions that we benchmark against.
 - (b) We agree that Telecom's UBA pricing in cabinetised areas is constrained by competition faced in non-cabinetised areas in the same exchange service area. As a matter of principle if the whole ESA is found to be competitive then the whole ESA should be deregulated. If however the Commission decides that cabinet areas are to be regulated differently then this should be addressed by treating them as different markets in the market definition and competition assessment part of the Competition Test.
- 3 We include an appendix showing the effect on the nationally averaged regulated UBA price if deregulated areas are removed from the Commission's UBA calculation, and a list of which exchanges would be deregulated under Telecom's proposed methodology.

B PRINCIPLED APPROACH TO DEREGULATION

- 4 Consistent with Vector we support the Commission in seeking to establish 'explicit and quantifiable criteria for determining whether there is workable and effective competition'. We also agree with Vector that this is 'critical for determining whether there is a competition problem and whether regulation is needed.'
- 5 It is a widely accepted principle of regulation of telecommunications markets that regulation should be withdrawn when markets become effectively competitive. Examples of this principle in action include:
 - (a) The application of the competition test to deregulation of backhaul markets for UCLL and UBA, where regulation is wound back in relevant geographic backhaul markets that are subject to competition on the basis of either two or more competitors, or one or more operators and one or more near-entrants, being active in a particular market;
 - (b) The resale deregulation in New Zealand, where the Commission's stated view is that:

*“regulatory intervention should be scaled back in areas where there is effective competition and that regulation should not impose or maintain burdens which are unnecessary”.*¹

- (c) The Commission’s Statement of Intent, in which one of the Commission’s objective is stated as being

*“to reduce regulation of telecommunications markets as effective competition develops.”*²

- (d) EU regulatory policies in action, as discussed by the Body of European Regulators for Electronic Communications (BEREC) and OFCOM, also explicitly seek to step back from regulation where effective competition has developed or is likely to develop.
- (e) The OECD 2005 regulatory principles and their recent consultation on regulatory best practice also support withdrawal and windback of regulation where it is clearly appropriate to do so.

- 6 The aim of regulation is to create conditions for improved and sustainable competition by removing or reducing the barriers to entry or access. We expect the Competition Test to show that regulation of UBA has achieved this outcome and that competition is now self-sustaining in a number of areas. In these areas, general competition law is now the appropriate safeguard for all market participants and regulation should be withdrawn.
- 7 We acknowledge that it can be complex for the Commission to make the forward looking assessment of whether ex ante access deregulation promotes the objectives set out in section 18 of the Act. Equally, we understand that Access Seekers may have concerns. Nonetheless, this should not prevent the Commission deregulating areas which have already become competitive or will be competitive soon. Maintaining regulation in competitive areas risks distorting the market by creating artificial investment incentives – encouraging inefficient investment and deterring efficient investment.
- 8 Continued intervention in competitive areas can easily lead to longer term reliance by access seekers on regulation to support their business, and reduce incentives for cost reduction, investment and innovation for all market participants. Outcomes like these are unlikely to be in the long term benefit of end users in New Zealand. In withdrawing regulation, the Commission must manage the policy trade-off between the costs and benefit of regulation as against the effectiveness of competition in market operations. If areas are found to be competitive then there would need to be a very compelling reason to continue regulation in those areas and this regulation would need to be supported

¹ <http://www.comcom.govt.nz/assets/Telecommunications/Defining-Scope-of-Regulation/Resale-Services/Final-Report-for-Resale-Services-Investigation-Public-version-16-December-2010.pdf>

² Commerce Commission, 2010 – 2013 Statement of Intent, Page 13

by actual evidence of the competition problem which the remaining regulatory remedies aim to address.

- 9 Accordingly we agree with Vector's earlier submissions supporting deregulation in competitive markets in its response to the Commission consultation on UCLL and UBA backhaul links (April 2010):

"We are firmly of the view that regulation only serves to distort investment and consumer decisions in the presence, or threat, of robust network competition. Deregulation of Telecom's backhaul links, therefore, remains necessary in the face competitive constraint to ensure efficient investment and consumer decisions."³

C REGULATION IN CABINETISED AREAS

- 10 Both CallPlus/Kordia and Vodafone question whether deregulation is appropriate in cabinet areas where a whole ESA is deemed competitive due to the different competitive constraints that apply within cabinetised areas. They argue that cabinet areas should remain regulated to protect access seekers and consumers in these areas.
- 11 There are in fact a number of cabinet areas which are subject to vigorous competitive constraints without competition from other operators in the cabinet. These are primarily in TelstraClear's cable areas and we discussed how cable areas should be included within the Commission's analysis in our previous submission.
- 12 There are also some cabinet areas where UCLL operators compete using exchange based broadband, albeit at a slower speed than if the service had been provisioned from the cabinet. We recognise however that, outside cable areas, Telecom's wholesale market share is much higher in cabinet areas than non cabinet areas. This was the justification for the Commission's use of an 80% market share threshold across the whole ESA.
- 13 The decision on whether to deregulate cabinetised areas in competitive ESAs is a question of market definition and competition assessment rather than the regulatory remedy. In other words, if an ESA is found competitive then deregulation should apply across the entire ESA. We agree with the Commission's conclusion in its draft Competition Review that Telecom's UBA pricing in cabinetised areas is constrained by competition faced in non-cabinetised areas in the same exchange service area. If however the Commission decides that this is not the case and that cabinetised lines warrant a different deregulatory treatment then they should be analysed as a separate market segment as per the Commission's first consultation. We accept there are trade offs associated with the two approaches considered by the Commission for cabinetised areas. We encourage the Commission, to be consistent

³ www.comcom.govt.nz/competition-reviews-for-uba-backhaul-and-ucll-backhaul-services/

between its market analysis, competition assessment and in determining whether ex ante regulation is still warranted whichever approach it adopts. Whatever market segments are found to be competitive should be deregulated.

Appendix 1: Impact of excluding deregulated areas from the regulated UBA price calculation

Scenario	Estimated Price Increase
Current UBA methodology (all ESAs)	\$0 (base case)
Commission Draft Decision	[TNZRI]
Telecom proposal	[TNZRI]

Table 1: Estimated impact of removing deregulated areas from regulated UBA price calculation

Assumptions:

- Calculations based on March 2011 service adjustment.
- Calculations use the current UBA pricing methodology and do not estimate the impact of the Commission's ongoing UBA pricing review.
- Calculations are based on the tolls used in the current UBA methodology, which are averaged over the entire broadband connections. We are unable currently to supply the tolls split by competitive and non-competitive ESA's but are looking in to whether this will be possible. As a result, the prices shown are likely to be at the top end of the price range but not materially overstated as at March 2011.

Appendix 2: Exchanges identified where Telecom plus 2 competitors exist or Telecom has less than 80% market share in the ESA area.

Assumptions:

- Based on March 2011 data submitted to the Commission.
- To avoid double counting, where cable is present this is taken as one additional operator unless the cable supplier also has UCLL present in the exchange. The geographic coverage of cable has been estimated.
- Orcon, Callplus and Compass have been counted as one UCLL competitor.
- Cable market share is unknown in cable areas so is not used in determining the 80% market share threshold.

[

]TNZRI

Table 2: Estimated deregulated exchanges using Telecom's proposed methodology