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Daniel Vincent  
Regulation Branch  
Commerce Commission  
WELLINGTON

Dear Daniel,

### **Submission on UBA Competition Review**

#### **Introduction**

1. Vector welcomes the opportunity to make a submission to the Commerce Commission on its "Revised Draft of the Standard Terms Determination for the designated service Telecoms unbundled bitstream access" (Revised Draft), 8 June 2011. No part of Vector's submission is confidential and we are happy for it to be publicly released.
2. Vector commends the Commerce Commission for establishing explicit and quantifiable criteria for determining whether there is workable and effective competition. Vector believes this is critical for determining whether there is a competition problem and whether regulation is needed. Vector also considers that it provides a benchmark for good regulatory practice.

#### **Tests for whether to continue regulation**

3. As referenced in the Revised Draft the regulation of unbundled bitstream access (UBA) is subject to the following competition conditions:  

That either –

  - i. Telecom faces limited, or is likely to face lessened, competition in the relevant market;  
or
  - ii. Telecom does not face limited, or is not likely to face lessened competition in the relevant market, and the Commission has decided to require Telecom's unbundled bitstream access to be wholesaled in that market.
4. The Commerce Commission's competition review, to date, has focused on the first of these two clauses, but not the second. This is an important omission as, even where there is workable or effective competition, regulation can result in even

stronger competition. The Electricity Authority articulates this well in their interpretation of "promoting competition":<sup>1,2</sup>

The Authority interprets *promoting competition* to mean exercising its functions to facilitate or encourage stronger competition ...

*Promoting competition* does not mean achieving a certain level of competition. Even in markets where the Authority considers competition is already strong, the Authority interprets its statutory objective as requiring it to adopt proposals that would further strength competition if such proposals have positive net long-term benefits for consumers.

5. Vector does not believe it is sufficient for the Commerce Commission to satisfy itself that there is effective or workable competition (the first test above), but it should also determine the extent to which regulation of UBA in those areas where there is effective competition contributes to greater levels of competition. For example, what would be the impact of a withdrawal of 27 exchanges on the ability of access seekers to provide nationwide broadband services?

### **Evidence of Telecom's conduct**

6. Vector reminds the Commerce Commission of some of Vector's previous comments:

... it is critical that the Commission also makes sound decisions as the consequences of drawing the wrong competition conclusions are asymmetric ... That is, deregulating UBA when Telecom still possess significant market power ... is likely to be more damaging to consumers and competitors than continuing regulation in the face of effective competition.<sup>3</sup>

We agree that there is a sub-national market, but the Commission need to additionally factor in Telecom's national scale and market power as part of its competition assessment<sup>4</sup>

... Vector is concerned that Draft Review Decision ... Ignores Telecom's national scale and its ability to subsidise competitive ESAs from its national activities.<sup>5</sup>

7. Since Vector made its previous submissions on this matter, the Commerce Commission has announced it is issuing proceedings alleging that Telecom is likely to have discriminated under the Telecom Separation Undertakings by failing to provide other telecommunications service providers with UBA in conjunction with the sub-loop extension service (SLES), when it provided an equivalent service to its own retail business.<sup>6</sup> This follows other discriminatory conduct such as Telecom's so-called "loyalty offers", which price discriminated against access

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<sup>1</sup> The purpose statement in section 15 of the Electricity Industry Act 2010 has substantial overlap with the purpose in section 18 of the Telecommunications Act 2001. Both require the regulator to "promote competition ... for the long-term benefit of end-users [consumers]".

<sup>2</sup> Electricity Authority "Interpretation of the Authority's statutory objective", 14 February 2011.

<sup>3</sup> Paragraphs 3 and 4 of Vector "Submission to the Commerce Commission on the 1<sup>st</sup> UBA Competition Test Draft Decision", 25 November 2010.

<sup>4</sup> Paragraph 6b) of Vector "Submission to the Commerce Commission on the 1<sup>st</sup> UBA Competition Test Draft Decision", 25 November 2010.

<sup>5</sup> Paragraph 6d) of Vector "Submission to the Commerce Commission on the 1<sup>st</sup> UBA Competition Test Draft Decision", 25 November 2010.

<sup>6</sup> Commerce Commission media release "Commerce Commission to issue proceedings against Telecom for discriminating against other telco companies", 26 May 2011.

seekers if they did not commit to maintain current and future customers on Telecom's Wholesale service rather than that of a competitor.

8. In Vector's view Telecom's Separation Undertakings provide very clear and unambiguous requirements for Telecom's wholesale business not to discriminate: "... the Wholesale Unit ... will not discriminate between Service Providers and Retail Units or between Service Providers".
9. The Commerce Commission has stated Telecom's discriminatory behaviour has caused serious harm to competition and deterred efficient investment by other companies in telecommunications infrastructure. The Telecommunications Commissioner has stated "Telecom's failure to provide this service has reduced the financial feasibility of unbundling local exchanges, reduced the extent of unbundling, and consequently reduced the extent of retail completion."<sup>7</sup> CallPlus has publicly stated that it has been detrimentally affected by Telecom's discrimination, with CallPlus's CEO stating "Telecom announced a significant cabinetisation program in late 2007 which effectively meant that 50 per cent of consumers could not be offered services using our own equipment in exchanges, forcing us to use Telecom's network at a much higher cost ... At this time, CallPlus and others publicly expressed concerns over the impact on their investment plans for Local Loop Unbundling."<sup>8</sup>
10. Just as Vector has previously stated that the Commerce Commission should take into account Telecom's substantial market power and ability to subsidise competitive ESAs from its national activities, it follows that we consider the Commission should take into account instances of anti-competitive and discriminatory behaviour in its competition assessment.
11. Vector does not believe the Commerce Commission should conclude there is effective competition, in some exchanges, in relation to UBA until the matter of Telecom's anti-competitive and discriminatory behaviour in this market has been resolved; including an acknowledgement by Telecom of its wrong-doing, which it is presently denying in the face of clear evidence to the contrary, and Telecom's conduct has been fully remedied. Even then the Commerce Commission should wait and determine that greater competition is starting to emerge, to be fully sure the problem has been resolved. Vector believes this approach would help incentivise Telecom to conduct itself in a reasonable and non-discriminatory manner in the future.
12. Vector also notes that, since the last consultation, the Commerce Commission has determined that Telecom's regulatory financial statements are unreliable for regulatory purposes and that Telecom's access network is overvalued by over a

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<sup>7</sup> Ibid.

<sup>8</sup> Tom Pullar-Strecker and Jason Krupp article "Commission to take action against Telecom", Business Day, 26 May 2011.

billion dollars.<sup>9</sup> Vector considers that this highlights that Telecom's natural monopoly network infrastructure is not subject to the same disciplines, faced by equivalent infrastructure service providers in electricity and gas, as those provided by economic regulation under Part 4 of the Commerce Act 1986. Vector believes this is also suggestive of the scope for Telecom to use its substantial market power to subsidise competitive ESAs from its national activities.

13. The passing of the Telecommunications (TSO, Broadband, and Other Matters) Amendment Bill 2010 could also have negative consequences for broadband competition, and further entrench Telecom's substantial market power. This is because the amendments provide Telecom with broad competition law exemptions which heighten the risk of Telecom taking advantage of its substantial market power for the purpose of restricting, preventing, deterring or eliminating competition.<sup>10</sup> This is particularly alarming given Telecom's track record of Commerce Act and Operational Separation Undertaking breaches.
14. Based on these observations, and our previous comment that it is better to continue regulation in the face of effective competition than to deregulate UBA when Telecom still possesses substantial market power, Vector believes the Commerce Commission should err on the side of caution. Vector, accordingly, **recommends** that the Commerce Commission does not remove any exchanges from the UBA requirements at this stage.

### **Concluding remarks**

15. Vector does not believe the Commerce Commission should offer Telecom regulatory relief in relation to UBA regulation.
16. Such relief should not be granted at the same time that the Commission is alleging Telecom has breached its Separation Undertakings by acting anti-competitively in relation to UBA.
17. The Commerce Commission should ensure it has adopted a robust and transparent analysis from a competition perspective which includes all relevant factors which may impact on competition, including Telecom's own conduct.
18. The Commerce Commission should also consider not only whether there is workable or effective competition in any particular exchange (or cabinet), but also the extent to which regulation of UBA in those areas where there is effective competition contributes to greater levels of competition.
19. Only then can the Commerce Commission absolutely determine that relief should be granted.

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<sup>9</sup> Commerce Commission media release "Commerce Commission concludes Telecom's regulatory financial statements are unreliable", 3 May 2011.

<sup>10</sup> These concerns are detailed in Section C of Vector's submission to the Finance and Expenditure Select Committee on the Telecommunications (TSO, Broadband, and Other Matters) Amendment Bill & SOP, 11 March 2011.

20. If the Authority has any queries regarding Vector's submission or would like further information please contact Robert Allen, Senior Regulatory Advisor, on 04 803 9036 or [robert.allen@vector.co.nz](mailto:robert.allen@vector.co.nz).

Kind regards

A handwritten signature in blue ink that reads "R. Girdwood".

Bruce Girdwood

**Regulatory Affairs Manager**