



COMMERCE COMMISSION

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

DECISION NO. 731

Final Review Decision under section 30R of the Telecommunications Act 2001 (the 'Act') of Decision 611

The Commission:

Dr Ross Patterson
Anita Mazzoleni
Gowan Pickering
Pat Duignan

Date of Final Review Decision:

2 September 2011

Confidential information cited in this Review Decision is subject to the confidentiality order made by the Commission under s 15(i) of the Act and s 100 of the Commerce Act 1986 ('the Order'). The Order in relation to the UBA section 30R review is dated 7 September 2010.

Chorus restricted information is denoted as [] **CRI**.

Commission only information is denoted as [] **COL**.

All restricted, additional protection and Commission only information is subject to the Order and has been extracted from the public version of this draft Review Decision

Key documents are available on the Commission's website at: <http://www.comcom.govt.nz/1st-competition-test-for-uba-std-june-2010/>

EXECUTIVE SUMMARY

1. The designated access service of Telecom's unbundled bitstream access (**UBA Service**), as set out in Part 2 of Schedule 1 of the Telecommunications Act 2001, provides that three years from the date on which the Telecommunications Amendment Act (No 2) 2006 receives the Royal assent, i.e. 22 December 2009, the UBA Service 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.
2. This competition review of the UBA Service is the first review conducted by the Commerce Commission (the **Commission**) under section 30R since the UBA Service standard terms determination (**STD**) was issued on 12 December 2007.
3. The Commission concludes that the relevant market in which the UBA service is supplied is the wholesale market for broadband access in each Telecom exchange service area (**ESA**), (irrespective of whether UBA is supplied from an exchange or a cabinet within the ESA.).
4. The Commission has applied the following criteria when assessing the state of competition in the wholesale market for UBA services
 - (a) Telecom does not face limited, and is unlikely to face lessened, competition in an ESA (including lines that are cabinetised) where:
 - two or more Competing Providers are present; and
 - Telecom has a market share of less than 80% in that ESA; and.
 - (b) there are no additional market conditions present that may prevent effective competition from developing.

Telecom faces limited competition in all other ESAs.
5. The Commission concludes that there are additional market conditions which prevent effective competition from developing:
 - (a) in the wholesale market, the impact of cabinetisation has resulted in no effective wholesale competition over the more than 50% of end user lines that are served from cabinets; and
 - (b) in the retail market, the unavailability to Access Seekers of an equivalent service to that supplied by Telecom Wholesale to Telecom Retail to enable voice services to be supplied from the exchange following cabinetisation has limited competition in the retail market, thereby dampening the indirect constraint that effective retail competition would otherwise have imposed on the wholesale market.
6. Having applied the framework outlined above, the Commission concludes that Telecom faces limited competition in the wholesale markets for broadband access in each of Telecom's ESAs. Accordingly all ESAs remain subject to the terms of the UBA STD.

7. The Commission will not be undertaking further reviews of competition in UBA markets as the transitional requirements imposed under s76 of the Amendment Act expressly prohibit the Commission from reviewing the UBA STD under s30R for three years starting on separation day. As a consequence, the Commission is prohibited from conducting further competition assessments for the next three years.

BACKGROUND

8. On 12 December 2007, the Commerce Commission (the **Commission**) issued a standard terms determination (**STD**) under section 30M of the Telecommunications Act 2001 (the **Act**) in respect of the designated access service of Telecom's unbundled bitstream access (**UBA Service**).¹
9. The UBA Service (as set out in Part 2 of Schedule 1 of the Telecommunications Act 2001) provides that three years from the date on which the Telecommunications Amendment Act (No 2) 2006 receives the Royal assent, i.e. 22 December 2009, the UBA Service 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.
10. On 23 June 2010² the Commission commenced a review (this **Review**) under section 30R of the Act to assess the state of competition in the market in which UBA services are provided.
11. On 28 October 2010³ the Commission issued a Draft Decision of this Review of the Standard Terms Determination for the designated service of Telecom's unbundled bitstream access (the **Draft Review**).
12. After considering submissions and cross submissions on the Draft Review, on 8 June 2011⁴, the Commission issued a Revised Draft Decision (the **Revised Draft**).
13. The Commission's preliminary conclusions in the Revised Draft were that:
- (a) the relevant market in which the UBA service is supplied is the wholesale market for broadband access in each of Telecom's exchange service areas (including cabinetised lines)
 - (b) Telecom does not face limited competition in exchange service areas where:
 - two or more Competing Providers are present; and
 - Telecom has a market share of less than 80% in that ESA.

Telecom faces limited competition in all other EASs

¹ Commerce Commission, *Standard Terms Determination for the designated service Telecom's unbundled bitstream access*, 12 December 2007 (**UBA STD**).

² Commerce Commission, *Commencement of review of competition in the market in which unbundled bitstream access (UBA) services are provided under section 30R of the Telecommunications Act (No2) 2006 (the Act)*, 23 June 2010 (the **23 June 2010 letter**).

³ Commerce Commission, *Draft Review of the Standard Terms Determination for the designated service Telecom's unbundled Bitstream access*, 28 October 2010 (**Draft Review**)

⁴ Commerce Commission, *Revised Draft Review of the Standard Terms Determination for the designated service Telecom's unbundled Bitstream access*, 8 June 2011 (**Revised Draft**)

- (c) the Commission will undertake a review of competition in broadband markets every six months
 - (d) the UBA price should be calculated from UBA prices in regulated ESAs only.
14. The Commission has considered the submissions and cross submission on the Revised Draft to reach its final decision in this Review.⁵

MARKET DEFINITION

15. This section discusses the key issues raised in submissions and cross-submissions, outlines the Commission's response to these issues, and sets out the Commission's decision on the relevant market for the purposes of this competition assessment.
16. In the Revised Draft, the Commission's preliminary view was that the relevant market in which the UBA service is supplied is the wholesale markets for broadband access in each of Telecom's exchange service areas (including cabinetised lines).
17. In its submission in response to the Revised Draft, Telecom agreed that it is appropriate to define a single market for cabinetised and non-cabinetised lines because this reflects current market conditions.⁶
18. In contrast, Vodafone submitted that cabinetised and non-cabinetised lines are in separate markets because:⁷
- cabinet services are unlikely to be constrained by alternative infrastructure
 - exchange provisioned service is not equivalent to a cabinetised service because cabinet services are superior due to closer proximity of DSL equipment to the customer
 - a uniform retail price for cabinet and exchange lines is not conclusive evidence that services constrain each other to the same degree.
19. CallPlus submitted that cabinetised and non-cabinetised wholesale UBA were within the same market only if there was no price-discrimination between these services. If Telecom were able to price discriminate between cabinetised and non-cabinetised lines, CallPlus submitted that cabinet and non-cabinet lines be defined as separate markets.⁸
20. In considering whether cabinet-fed services and exchange-fed services are in the same or separate product markets, the Commission has considered:
- (i) direct constraints as a consequence of competition between cabinet-fed and exchange fed broadband services in the wholesale market, and
 - (ii) indirect constraints on the wholesale market as a consequence of competition in the retail market between cabinet-fed and exchange-fed broadband services

Direct price constraint

21. The Commission agrees with Vodafone that a direct price constraint at wholesale level as a consequence of competition between services over cabinet-fed lines and exchange-fed lines is weak. As a result of cabinetisation, in excess of 50% of lines in urban ESAs cannot be competitively supplied with UBA exchange based equipment by access seekers. Cabinets typically serve 300 -350 end users. It is uneconomic for access seekers to unbundle cabinets,

⁵ A summary of submissions and cross submissions received on the Revised Draft is provided in Appendix 1. All submissions and cross submissions received as part of this Review are on the Commission's website.

⁶ Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review*, 6 July 2011, page 5

⁷ Vodafone, *Unbundled bitstream Access (UBA) Commerce Commission Competition Review*, 6 July 2011

⁸ CallPlus Kordia, *UBA Competition Review: Cross Submission*, 25 July 2011, page 1

as none have a sufficient market share of those end users to justify the investment required in unbundling a cabinet. As a consequence there is no competition at wholesale level in relation to at least 50% of UBA services which are delivered from a cabinet.

22. The Commission considers, however, that in addition to direct competition at the wholesale level, regard must also be had to the extent of competition at the retail level, as this can impose constraint at the wholesale level.

Indirect price constraint

23. A wholesale price increase for cabinet-fed services would be expected to result in a retail price increase for retail customers of cabinet-fed services. Unless Telecom is able to price discriminate between retail services over cabinet-fed and exchange-fed lines, a retail price increase on services over cabinet-fed lines would be expected to also result in a price increase for services delivered over exchange-fed lines. Such a price increase would be likely to lead to Telecom's exchange-fed customers switching to unbundlers, resulting in lost revenues for Telecom, and making the wholesale price increase unsustainable.
24. There is no evidence of any price discrimination at retail between services over cabinet-fed and exchange-fed lines. Telecom's commercial unbundled bitstream service has a uniform price for both cabinet and non-cabinet lines. Telecom has maintained this uniform price, despite the presence and emergence of some competition in exchange-fed lines as a consequence of local loop unbundling.

Geographic market

25. The Commission's preliminary view in the Revised Draft was that the geographic dimension of the market was ESAs.
26. The Commission remains of that view, because it is likely that there will be different levels of competition (and market power) in different ESAs.

Commission's view

27. The Commission considers for the reasons set out above that there is a single wholesale market for broadband access, which includes services delivered over cabinet-fed and exchange-fed lines in each Telecom ESA.

COMPETITION ASSESSMENT

28. The Commission's preliminary conclusions in the Revised Draft Review were that Telecom does not face limited, and is unlikely to face lessened, competition in exchange service areas (including lines that are cabinetised) where:
- two or more Competing Providers are present; and
 - Telecom has a market share of less than 80% in that ESA.

Telecom faces limited competition in all other ESAs.

Competition criteria should apply separately

29. Telecom submitted that the two criteria should be viewed as primary and secondary tests, because each are independent indicators of the level of competition in an ESA.⁹

⁹ Telecom, *Response to Commission consultation on the Revised Draft UBA Competition Review*, 6 July 2011, para 30, page 7.

30. Telecom also submitted that the Commission's proposed methodology downplays the impact of competition from alternative access infrastructure providers;¹⁰ in particular, TelstraClear's cable presence and market share in certain areas act as a significant constraint on UCLL market entry.¹¹
31. Vector submitted¹² to the contrary that Telecom's proposal could lead to deregulation of an ESA where two competitors were present yet had a combined market share of less than 1%. In Vector's view, workable competition could not be found in this situation regardless of the number of competitors, where their combined market share was very low.

Commission's view

32. If the two tests operated separately, situations may arise where in certain ESAs, there were two competing providers with few lines being unbundled. In such a scenario, the ESAs would not be subject to the terms of the STD, but competition in the ESA would be limited.
33. The Commission therefore determines that both criteria must be present before it can conclude that Telecom faces effective competition in an ESA.

Is 80% an appropriate market share threshold?

34. CallPlus/Kordia submitted that the 20% market share required by access seekers before deregulation could occur may be too low.¹³
35. Vodafone submitted that the 80/20 rule is significantly out of line with competition assessment undertaken in other jurisdictions. Vodafone further noted that an 80/20 threshold, without any minimum operator restriction, and applied to non-cabinetised lines only, is too low a threshold to represent an effectively competitive market.¹⁴

Commission's view

36. In the Commission's view, the 80/20 threshold is appropriate. Once access seekers have reached a 20% market share they should have sufficient scale to compete more aggressively, and increase their market share through the competitive process.
37. The Commission therefore determines that a market share threshold that should apply is 80/20 percent, i.e. deregulation will only be considered in ESAs where Telecom's market share is less than 80% and access seekers have an aggregate market share greater than 20%.
38. This market share threshold, in combination with the competing provider assessment will be applied to assess competition levels in the relevant wholesale broadband markets.

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

39. Vector submitted that since its previous submissions on the UBA competition review, the Commission announced that it was 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.¹⁵

¹⁰ Ibid, para 45, page 10.

¹¹ Ibid, para 45, page 10.

¹² Vector, *Cross-Submission on UBA Competition Review*, 25 July 2011, para 6, page 2.

¹³ CallPlus/Kordia, *UBA Competition Review: Submission on the Revised Draft Decision*, 6 July 2011.

¹⁴ Vodafone, *Unbundled Bitstream Access (UBA) Commerce Commission Competition Review*, 6 July 2011, page 2.

¹⁵ Vector, *Submission on UBA Competition Review*, 6 July 2011, Paragraph 7

40. Vector submitted that this follows other discriminatory conduct such as Telecom's so-called "loyalty offers", which allegedly price discriminated against access seekers who did not commit to maintain current and future customers on Telecom's Wholesale service rather than that of a competitor.
41. Vector further noted that the Commission has stated that Telecom's discriminatory behaviour has caused serious harm to competition and deterred efficient investment by other companies in telecommunications infrastructure, and that the Commission had further noted that Telecom's failure to provide UBA with SLES has reduced the financial feasibility of unbundling local exchanges, reduced the extent of unbundling, and consequently reduced the extent of retail competition.¹⁶
42. Vector submitted that the Commission should take into account instances of anti-competitive and discriminatory behaviour in its competition assessment, and that the Commission cannot conclude that there is effective competition where claims of anti-competitive and discriminatory behaviour remain unresolved.¹⁷

Commission's view

43. The Commission accepts Vector's submission that it is appropriate as part of the assessment criteria to take into account any additional factors that may materially prevent competition from developing in wholesale or retail broadband markets.
44. The Commission adopted a similar approach in the UBA Backhaul competition review¹⁸, where it concluded that there were additional market conditions present that may prevent effective competition from developing.¹⁹
45. In the wholesale market for broadband access, as a result of cabinetisation as discussed in paragraph 21, competition is limited to the less than 50% of lines in an ESA which have not been cabinetised.
46. In the retail market, for the reasons outlined below the Commission considers that the inability of access seekers to provide their own voice services from the exchange over cabinetised lines, in conjunction with cabinet-based UBA from Telecom Wholesale, has limited their ability to provide competitive retail voice and broadband bundled offerings, and as a result limited competition in the retail broadband market.
47. The Commission considers that the provision of a bundled voice and broadband service is a major driver of competition at the retail level of the market.
48. Telecom committed to provide Access Seekers with UBA in conjunction with SLES to allow them to offer voice services direct from the exchange to their customers after cabinetisation, in conjunction with cabinet-based UBA which they could acquire from Telecom Wholesale. While an equivalent service has for at least the past two years been provided to Telecom Retail, it has not yet been provided to Access Seekers.²⁰
49. In the Commission's view, had UBA and SLES been supplied to access seekers, it would have had a significant positive impact on access seeker's business cases for unbundling,

¹⁶ Ibid, paragraph 9

¹⁷ Ibid, paragraph 10-11.

¹⁸ Commerce Commission, Review of the Standard Terms Determination for the designated service Telecom's Unbundled Bitstream Backhaul, 23 March 2011, paragraph 46

¹⁹ In particular, 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.

²⁰ See Clarification of the Standard Terms Determinations on Telecom's Unbundled Bitstream Access Service, decision no. 700, 14 October 2010, paragraphs 20 -44

leading to the unbundling of further exchanges, and would in addition have resulted in the introduction of more competitive bundled voice and broadband services to retail consumers.

50. The Commission considers that the unavailability of UBA with SLES has resulted in limited competition in retail markets, compared with the vigorous competition which would otherwise have developed. As a consequence, the indirect constraint imposed on the wholesale market by competition at the retail level has been dampened.
51. The Commission accordingly concludes that Telecom faces limited competition in the wholesale markets for broadband access in each of Telecom's ESAs. Accordingly all ESAs remain subject to the terms of the UBA STD.

OTHER ISSUES

Should a non-discrimination condition be mandated?

52. CallPlus and Kordia²¹ requested that the Commission make it a condition of deregulation of an ESA that Telecom not price discriminate between retail broadband provided over cabinetised and non-cabinetised lines. In the alternative, they argue that cabinetised areas should be considered a different market and continue to be regulated.
53. In their cross submission CallPlus re-iterated the need for either an undertaking or some assurance from Telecom that there will be no price discrimination between cabinetised and non cabinetised lines. If these assurances are not in place, then CallPlus has concerns including cabinetised lines in the competition assessment.²²

Commission's view

54. As it has concluded that the terms of the UBA STD will continue to be applicable in all ESAs, the Commission does not need to determine this issue.

What is the appropriate approach for calculating the regulated UBA price?

55. In the Revised Draft, the Commission's preliminary view was that the UBA price should only be calculated from UBA prices in regulated ESAs.
56. CallPlus and Kordia suggest that the Commission defer making changes to regulated UBA price until cost based UBA is in place.²³
57. Telecom argued against the inclusion of retail prices in competitive ESA's in the calculation of the regulated UBA price. Telecom submitted that this will introduce an explicit cross subsidy between competitive and non-competitive areas inhibiting Telecom's incentive to compete in competitive ESAs.²⁴

Commission's View

58. As the Commission has concluded that the terms of the UBA STD will continue to be applicable in all ESAs, the Commission does not need to come to a final decision on this issue.

²¹ CallPlus Kordia, *UBA Competition Review Submission on the Revised Draft Decision*, 6 July 2011, page3

²² CallPlus Kordia, *UBA Competition Review: Cross Submission*, 25 July 2011, page 1

²³ CallPlus Kordia, *UBA Competition Review Submission on the Revised Draft Decision*, 6 July 2011, page 3

²⁴ Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review*, 6 July 2011, page11

Review Process

59. In the Revised Draft the Commission's view was that competition reviews should be undertaken every six months, and that the Commission would consider undertaking ad hoc reviews in individual ESAs where there are material grounds for doing so.
60. Telecom noted that recent changes to the Telecommunications Act will place limitations on the Commission's ability to conduct quarterly competition reviews under section 30R of the Act.
61. Telecom proposed that changes should be made to the General Terms of the STD to ensure the continuation of competition reviews thereby ensuring competitive ESAs are deregulated appropriately.²⁵

Commission's view

62. Competition assessments by the Commission are performed under section 30R of the Act. The transitional requirements imposed under s76 of the Amendment Act expressly prohibit the Commission from reviewing the UBA STD under s30R for three years starting on separation day, except for certain limited reviews expressly authorised by the Amendment Act (including a review for the UBA cost-based IPP). As a consequence, the Commission is prohibited from conducting competition assessments under section 30R of the Act for the next three years.
63. In the Commission's view, it would be inappropriate to amend the STD to give it the power to continue to carry out competition reviews when Parliament has specifically prohibited the Commission from using the 30R review power for three years. It is for Parliament to amend the legislation if it did not intend to prohibit competition reviews during the three year period.
64. However, the Commission will continue to monitor development of competition for UBA services and other wholesale products under its section 9A powers, including the impact in retail markets of the Access Seeker voice service (Telecom's commercial alternative to UBA with SLES) which is to be launched shortly. The Commission will publish its views on the development of competition in ESAs as part of its monitoring reports.

THE COMMISSION'S DECISION

Market definition

65. The relevant market in which the UBA service is supplied is the wholesale market for broadband access in each of Telecom's exchange service areas.

Competition assessment

66. In undertaking this Review, the Commission has applied the conditions set out in the UBA Service (as set out in Part 2 of Schedule 1 of the Act) on the following basis:
 - (a) Telecom does not face limited, and is unlikely to face lessened, competition in exchange service areas (including lines that are cabinetised) where:
 - two or more Competing Providers are present;
 - Telecom has a market share of less than 80% in that ESA; and

²⁵ Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review*, 6 July 2011, page12

- (b) there are no additional market conditions present that may prevent effective competition from developing.

Telecom faces limited competition in all other ESAs.

67. Having applied the test outlined above, the Commission has determined that Telecom faces limited competition in the wholesale market for broadband access in each of Telecom's exchange service areas.
68. As a consequence of the Commission's decision, no amendments to the UBA STD General Terms or Schedules are required.

DATED at Wellington this 2nd day of September 2011

A handwritten signature in blue ink, consisting of a stylized initial 'R' followed by a long, horizontal, wavy line.

Dr Ross Patterson
Telecommunications Commissioner
Commerce Commission

APPENDIX 1

Summary of Submissions

69. This appendix summarises the key issues raised in submissions and cross submissions on the Revised Draft.

Market definition

70. Telecom submitted that an ESA should be deregulated if the whole ESA is found to be competitive²⁶. Therefore, they see the Commission's proposed inclusion of both cabinetised and non-cabinetised lines in the market definition as pragmatic.
71. However, Telecom submitted that if cabinet areas are to be regulated differently, they should be treated as a different market within the market definition and competition assessment.²⁷
72. CallPlus and Kordia submitted that they were in agreement with the Commission that mobile broadband is not a competitive restraint on the UBA service.²⁸
73. Telecom however submitted that significant growth is forecast in the areas of mobile broadband and fibre expansion, suggesting that this will soon reach levels where substitutability will be appropriate.²⁹
74. Telecom therefore suggested that the Commission should keep an open mind to development in this area and refrain from relying on international analysis which may not be directly comparable to the New Zealand market.³⁰

Competition assessment

75. Telecom submitted that a greater focus should be placed on the benefits of deregulating and that the Commission's proposed competition assessment criteria may lead to less deregulation than is ideal to promote effective competition. Telecom proposed that the competition criteria be applied separately (number of operators *or* market share) rather than concurrently (number of operators *and* market share) as in the Revised Draft.³¹
76. Accordingly, Telecom suggests that the number of operators test should be applied first so that ESA's where two or more competing providers are present would be deregulated. Then the market share test would be applied separately for ESA's where Telecom has a wholesale market share of less than 80%. This would ensure the deregulation of ESA's where there is only one other competing provider but where there is effective competition.³² Telecom argues that such an approach would deliver a level of deregulation appropriate for an effectively competitive market.³³

²⁶ Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review*, 6 July 2011, page 5

²⁷ Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review (Cross Submission)*, 22 July 2011, pages 3-4

²⁸ CallPlus Kordia, *UBA Competition Review Submission on the Revised Draft Decision*, 6 July 2011, page 3.

²⁹ Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review*, 6 July 2011, pages 5, 6

³⁰ *ibid*

³¹ Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review*, 6 July 2011, page 3

³² Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review*, 6 July 2011, pages 6-10

³³ Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review (Cross Submission)*, 22 July 2011, page 1

77. Vodafone submitted that they were concerned that relying on an all-line market share threshold would fail to prevent monopolisation of cabinetised lines to the detriment of telecommunication end-users.³⁴
78. Vodafone disagreed with the commission's view that Telecom's wholesale price for cabinetised areas is constrained by the retail prices of UCLL providers in non-cabinetised areas.³⁵ They noted that non-cabinetised lines are likely to provide little constraint on cabinetised lines as cabinetisation provides a customer with a DSL service subject to higher quality than exchange fed broadband.
79. Vodafone believes that the commission should consider a similar approach to the deregulation of UBA as considered by the Australian Competition Tribunal (ACT) or Ofcom. The presence of an effective competitive alternative should be a prerequisite for the unwinding of UBA regulation on non-cabinetised lines. Therefore, cabinetised lines that do not have the exertion of an effective competitive alternative should continue to have regulatory obligation to provide wholesale UBA services.³⁶
80. Vodafone therefore proposed that the commission should remove UBA regulation on non-cabinetised lines only where alternative providers are supplying at least 40% of retail broadband services over non-cabinetised lines in an ESA.³⁷
81. CallPlus and Kordia support the move from an assessment based on the number of competing providers to a market share assessment as they believe that the mere presence of providers does not mean effective competition and not all providers will offer wholesale services.³⁸
82. CallPlus and Kordia believe that the 20% threshold for the presence of effective competition appears to be a very low hurdle if measured across both cabinetised and non-cabinetised lines. They however stated that if cabinetised lines are excluded then the level of 20% is definitely too low.
83. CallPlus and Kordia³⁹ suggest that the Commission makes it a pre-condition that Telecom continue to not price discriminate between wholesale UBA between cabinetised and non-cabinetised areas where the regulated product is not available; or Cabinetised areas should be in a different market and continue to be regulated.⁴⁰
84. In their cross submission CallPlus re-iterated the need for either an undertaking or some assurance from Telecom that there will be no price discrimination between cabinetised and non cabinetised lines. If these assurances are not in place, then CallPlus has concerns including cabinetised lines in the competition assessment.⁴¹
85. Vector⁴² cites a number of examples of Telecom's discriminatory behaviour and submitted that the Commission should delay its competition review until the matter of Telecom's anti-competitive and discriminatory behaviour in the market has been resolved.

³⁴ Vodafone, *Unbundled bitstream Access (UBA) Commerce Commission Competition Review*, 6 July 2011, page 1

³⁵ Ibid, page 3

³⁶ Ibid, page 5

³⁷ Ibid, page 6

³⁸ Callplus/Kordia, *UBA Competition Review*,: Submission on the Revised Draft Decision, 6 July 2011, page 3

³⁹ Ibid, page3

⁴⁰ Ibid, page 3

⁴¹ CallPlus Kordia, *UBA Competition Review: Cross Submission*, 25 July 2011, page 1

⁴² Vector, *Submission on UBA Competition Review*, 6 July 2011, pages 2-3

86. In their cross submission, Vector submitted that Telecom's proposed assessment of, 'two or more alternative operators, **or** wholesale has a market share of all broadband lines in the ESA (including cable broadband lines where applicable) of less than 80%' is far too low. Vector suggests that the Commission raise the proposed threshold.⁴³
87. Vector submitted that the Commission has not put any consideration into the second competition condition in the service description in the Act (i.e. 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).⁴⁴ Vector suggests that the Commission should also determine the extent to which regulation of UBA in those areas where there is effective contribution contributes to greater levels of competition.

Calculation of UBA price

88. CallPlus and Kordia suggest that the commission defer making changes to regulated UBA price until cost based UBA is in place.⁴⁵
89. Telecom argues against the inclusion of retail prices in competitive ESA's in the calculation of the regulated UBA price. Telecom submitted that this will introduce an explicit cross subsidy between competitive and non-competitive areas inhibiting Telecom's incentive to compete in competitive ESAs.⁴⁶
90. In their cross-submission, Vector⁴⁷ dismisses Telecom's claim about the cross subsidy, and suggested that the Commission should place no weight on Telecom's claim unless Telecom substantiates it with evidence of its costs in each exchange, and proof of the extent of cross-subsidies that would result.

Future reviews of competition for UBA

91. Telecom noted that recent changes to the Telecommunications Act will place limitations on the Commission's ability to conduct quarterly competition reviews under section 30R of the Act.
92. Telecom proposed that changes should be made to the General Terms of the STD to ensure the continuation of competition reviews thereby ensuring competitive ESAs are deregulated appropriately.⁴⁸

⁴³ Vector, *Cross-Submission on UBA Competition Review*, 25 July 2011, page 2

⁴⁴ Vector, *Submission on UBA Competition Review*, 6 July 2011, pages 1-2

⁴⁵ Callplus/Kordia, *UBA Competition Review*,: Submission on the Revised Draft Decision, 6 July 2011, page 3

⁴⁶ Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review*, 6 July 2011, page11

⁴⁷ Vector, *Cross-Submission on UBA Competition Review*, 25 July 2011, page 2

⁴⁸ Telecom, *Response to Commission Consultation on the Revised Draft UBA Competition Review*, 6 July 2011, page12