



**Submission to the Commerce Commission  
on the 1<sup>st</sup> UBA Competition Test Draft  
Decision**

**25 November 2010**

## Introduction

1. Vector welcomes the opportunity to submit on the Commerce Commission's (the **Commission**) "Draft Review Decision under section 30R of the Telecommunications Act 2001 (the '**Act**') of Decision 611" (the **Draft Review Decision**).
2. Vector's interests in the Draft Review Decision are:
  - a) As owner and operator of our existing fibre network (VectorFibre), which facilitates unbundling in most of Telecom's Auckland exchanges by providing competitive backhaul for Unbundled Copper Local Loop (**UCLL**) traffic; and
  - b) As a short-listed participant in the government's Ultra-Fast Broadband (**UFB**) initiative which, if chosen as the Crown's preferred build partner, will provide layer 2 fibre access services that are likely to directly compete with Unbundled Bitstream Access (**UBA**) services.
3. Vector is supportive of stripping back regulation where there is strong evidence of effective competition. Under such conditions, deregulation typically leads to more efficient investment and consumer decisions and is ultimately in the long term interests of consumers and industry participants.
4. However, it is critical that the Commission also makes sound decisions as the consequences of drawing the wrong competition conclusions are asymmetric and significant for both consumers and investors. That is, deregulating UBA when Telecom still possess significant market power (**SMP**) is likely to be more damaging to consumers and competitors than continuing regulation in the face of effective competition. The Commission should therefore seek to develop a robust competition-assessment framework that errs on the side of caution and which minimises the risk of a false positive decision<sup>1</sup>.
5. The approach the Commission finally adopts will also set a framework precedent for how UBA will be deregulated in response to the UFB and RBI fibre deployments. It is therefore vital that the Commission more actively accounts for Local Fibre Companies (**LFC**) and RBI networks at this stage of the process through adopting and committing to a strong principles-based competition framework that foresees and is resilient to these fibre deployments. Such regulatory commitment now would provide important

---

<sup>1</sup> Deregulating UBA when Telecom still has SMP.

upfront investment certainty for LFC and RBI investors as well as for the wider industry and consumers that are impacted.

6. Vector's key submission points with regards to the Draft Review Decision are outlined in the next section in the same topic order as laid out in the Draft Review Decision. However, to summarise these points:
- a) The product definition should be a bandwidth range within which UBA is offered and within which consumers make substitution decisions. It should also be technology neutral so should factor in competition from 3G mobile and wireless broadband to the extent that they are substitutable with UBA.
  - b) 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;
  - c) We agree that ESAs and cabinets are the most appropriate unit of analysis and that cabinets should be treated distinctly given the different economics of unbundling. However, UCLL competition will only be effective while EOI exists between UCLL and UBA and where there is effective co-location and backhaul regulation (or otherwise competitive backhaul). The Commission also should define the minimum coverage a competing network must have over an ESA or cabinet to deregulate UBA.
  - d) With regards to the competition assessment, Vector is concerned that Draft Review Decision:
    - Provides no practical ex-post assessment of the impact of competition in a particular ESA to supplement the threshold based competition test, thereby increasing the risk of a false positive decision;
    - Does not take account of the *extent* of unbundling or competitive network coverage. Minimum unbundling and competitive network coverage ratios should be pre defined to rectify this;
    - Does not take account of the intentions of Competing Providers to invest further in unbundling or competing networks. The Commission should question Competing Providers of their future investment intentions;
    - Ignores Telecom's national scale and its ability to subsidise competitive ESAs from its national activities.
    - Provides little robust evidence of the level of competitive constraint provided by competing networks potentially weakening the competition analysis.

- Does not effectively assess the impact of competition directly from competitive networks on UBA *cabinet* services.
  - Needs to investigate further the competitive constraint derived from 3G mobile and wireless broadband.
- e) Vector supports six monthly reviews going forward, especially due to upcoming fibre deployments.

## Relevant Market

### *Product Dimension*

7. The Commission's draft decision is "that the relevant product market is that for broadband access, provided over copper, cable and fibre (but excluding fixed to wireless, satellite, and 3G mobile services)"<sup>2</sup>.
8. Vector agrees in principle that the relevant service is 'broadband', but this term is becoming increasingly relative in the shift to 'ultra-fast broadband'. Consumers differentiate services by comparable bandwidth, amongst other things, not just on access to generically defined broadband. Accordingly, the Commission should consider the merits of defining the product with reference to such bandwidth characteristics. For instance, the relevant market could be expressed in the form of a 'range of bandwidth' within which UBA is offered and within which customers are seen to make substitution decisions.
9. The relevant product definition should also be technology agnostic, meaning wireless and 3G mobile broadband should be included where they provide a comparable bandwidth service. This does not necessarily mean that the Commission will find 3G mobile or wireless broadband to be a competitive constraint on UBA pricing, but rather that it is a close substitute that needs to be considered in the product definition.
10. Although we recognise that mobility is currently charged at a premium to fixed line services, mobile and wireless markets are rapidly changing and becoming increasingly substitutable with lower-speed DSL broadband services. Increased mobile network competition, changing customer behaviours, and enhanced mobile web-browsing applications are all rapidly blurring the lines between DSL and mobile bandwidth. As such the Commission can no longer rely on the 5-year-old 2005 bitstream (UBS)

---

<sup>2</sup> Draft Review Decision – Paragraph 20

determination<sup>3</sup> to establish the extent of fixed to mobile substitution. This issue needs to be considered in detail afresh as part of the Commission's deliberations.

11. Indeed, the Commission's more recent analysis in its 'Annual Telecommunications Monitoring Report 2009' suggests that there is an emerging trend of fixed to mobile substitution:

"There is, however, some evidence that end-users are now starting to substitute fixed-line access with mobile access. Despite the number of households in New Zealand increasing, fixed-line connections have remained relatively static, while the number of mobile connections has risen significantly."<sup>4</sup>

12. The average bandwidth speed data used in the Draft Review Decision to show that mobile is not comparable to UBA broadband is also slightly misleading in that *average* mobile download speeds (800Kbps-3Mbps) are compared to *maximum* ADSL2+ speeds (24Mbps)<sup>5</sup>. The Commission's 2009 report on New Zealand Broadband Quality showed UBA to have a weighted average speed of between 2.5Mbps – 4Mbps in Wellington and Christchurch<sup>6</sup> and 4Mbps-6Mbps in Auckland<sup>7</sup>. This compares better with advertised average mobile download speeds on the XT network of 3Mbps<sup>8</sup>.
13. We admit that while mobile is unlikely to be a perfect substitute for fixed lines services it is increasingly becoming a near substitute. Accordingly, the Commission should at least include 3G mobile and wireless broadband in the relevant product definition and then assess the level of competitive price constraint that these products provide at a later stage in the competition assessment.

### *Geographic Dimension*

14. The Commission draws the conclusion that the presence of UCLL unbundling, and competing cable and fibre infrastructure in different regions indicates the presence of a sub-national market and that competition is likely to vary across these different regions<sup>9</sup>.

---

<sup>3</sup> *Ibid* – Paragraph 13

<sup>4</sup> Commerce Commission - Annual Telecommunications Monitoring Report 2009, April 2010, page 68

<sup>5</sup> Draft Review Decision - Paragraph 18

<sup>6</sup> Commerce Commission – Report on New Zealand Broadband Quality – July to December 2009, May 2010 - page 21

<sup>7</sup> *Ibid*, page 29

<sup>8</sup> Draft Review Decision - Paragraph 18

<sup>9</sup> *Ibid* – Paragraph 40

15. Vector agrees that this is the case at the moment. A national approach to assessing competition for UBA would be too problematic to implement given this regional diversity, whereas a more granular customer-by-customer approach is likely to be too onerous to implement for the Commission and the industry.
16. There are also likely to be UBA services that are outside of 3G mobile and wireless broadband coverage that would also indicate a sub-national market too.
17. Although we support a sub-national market approach, the Commission should explicitly factor in Telecom's national scale and national market power in determining whether it has SMP in a particular region. Telecom's national scale could allow it to subsidise activities in competitive regions from other non-competitive regions, meaning it may still retain SMP. To mitigate the risk of a false-positive decision - the risk of deregulating when Telecom still has SMP - the Commission should undertake a supplementary test that questions whether Telecom's national scale affords it SMP in areas being investigated for deregulation.

#### *Unit of Analysis*

18. Vector agrees with the Commission that the appropriate geographic unit to conduct a sub-national market analysis is at the Exchange Service Area (**ESA**) level, but in assessing UCLL based competition this should only be while equivalence of inputs (**EOI**) exists between UCLL and UBA (or similar bitstream Relevant Services). If strict EOI is removed or weakened in any way then this could distort competition from UCLL based competitors. Under such a scenario, UCLL should not be considered a competitive product. Effective co-location and backhaul regulation (where there is not already competitive backhaul) would also need to be present to ensure fair unbundling.
19. Vector also agrees that the economics of unbundling cabinetised lines are likely to be materially different to unbundling non-cabinetised lines and should be treated distinctly for UCLL based competitors. Although it is unclear from our reading of the Draft Review Decision, we assume that as/ if cabinets are unbundled then a cabinet-by-cabinet competition assessment will be undertaken by the Commission.
20. There are complexities, however, in adopting ESAs as geographic units where competitive pressure comes from competing fibre and cable networks. Although it is possible to crudely map the coverage of alternative cable and fibre networks on to Telecom's ESA boundaries, there is an issue where ESAs

are only partly covered by the competing networks. A relevant question is what proportion of the ESA would need to be covered by the competing network to deregulate? It is unclear from the Draft Review Decision how the Commission will address such partial coverage scenarios. Vector proposes that a pragmatic approach is to assess the number of premises in an ESA that are passed by a competing network and deregulate where this coverage exceeds a minimum threshold (e.g. 50%, 75%).

21. The Commission needs to also explicitly consider the level of competitive constraint placed on UBA cabinet services directly from competing networks separate of that stemming from UCLL. The economics of unbundling cabinets will not matter to a competing network. It is also irrelevant to the competition assessment as to whether a competing network covers a cabinet area or an ESA. Despite this, the competitive network test will probably need to align with the distinction made for UCLL-based competition (cabinet-by-cabinet analysis), as it is currently a combination of UCLL and competing network competition that leads to a decision on whether to deregulate.
22. 3G mobile and wireless broadband presents a unique problem in terms of defining a geographic area unit, primarily because a mobile customer is exactly that – mobile – and is therefore not associated with a specific fixed line connection. However, 3G mobile and wireless network coverage of an ESA or cabinet could potentially be used in the competition assessment to show where these networks provide competitive constraint. Alternatively, competition from 3G mobile and wireless could be considered separately at a national level.

#### *Consumer dimension*

23. Consumer dimensions may need to be introduced for the analysis of the competitive impact of fixed to mobile substitution, as this is likely to be specific to certain customer groups (e.g. low bandwidth usage customers such as those who only require simple email or web-browsing functionality).

## **Competition Assessment**

24. The Commission's preliminary view is to adopt threshold rules to determine when Telecom does not face limited competition for UBA. These thresholds are:
  - "Telecom does not face limited competition in ESAs (excluding lines that are cabinetised) where:

- Two or more Competing Providers are present; or
  - One UCLL-based Competing Provider is present and the exchange will service at least 6500 non-cabinetised lines (after the cabinetisation deployment is completed); and
  - Telecom faces limited competition in all other areas, including cabinetised lines.<sup>10</sup>
25. Vector agrees that UCLL unbundling and competing cable networks appear to provide effective competitive constraint, particularly in Auckland, Wellington and Christchurch where this type of competition is prevalent. There is certainly tangible evidence of effective price competition in these three metropolitan areas as prices for residential broadband with home phone packages are circa \$5-\$10 per month cheaper compared to the rest of New Zealand. There are also signs of wider qualitative competition in the market too, such as increased data caps and investments in local caching and VDSL2.
26. However, Vector has several concerns over the robustness of the Commission's threshold approach. Specifically the Commission's preliminary view:
- a) Provides no practical ex-post assessment of the impact of competition in a particular ESA to supplement the threshold based competition test. The existence of two or more Competing Providers at an ESA may well provide a useful proxy that UBA prices are competitively constrained, but the Commission should test this presumption against evidence of complementary signs of competition at the ESA or cabinet (e.g. marketing activity, improved quality, product differentiation, or competitive pricing strategies such as discounting or bundling). We note that outside of the three largest metropolitan areas there is less evidence of the impact of competition (especially price competition). In these areas there is greater risk that using the threshold approach in isolation will lead to false positive decisions. Vector submits that a supplementary analysis of the ex-post impact of competition will bolster a simple threshold test - reducing the likelihood of false positive decisions - and will also act as a bellwether to reveal the extent and ferocity of competition at a particular ESA or cabinet.
  - b) Does not take account of the extent of unbundling or competitive network coverage. There could be only a handful of lines unbundled in a particular

---

<sup>10</sup> Draft Review Decision – Paragraph 164

ESA, but all customers will be deregulated by the threshold test. We recognise that the threshold test is forward looking in nature but we suggest it would be more robust if the Commission consider introducing a de-minimus number of unbundled lines or a minimum coverage proportion before deregulating a particular ESA or cabinet.

- c) Does not take account of the intentions of competing businesses to invest further in unbundling or competing networks. In the UCLL and UBA backhaul competition tests, competitors can make public representations to the Commission that they are not intending to connect to a particular exchange. A similar approach could be applied to this UBA competition test in that the Commission could release a questionnaire that asks whether a Competing Provider has plans to unbundle an ESA that has more than 6500 lines or to further invest in a competing network. Responses to this questionnaire would need to be confidential but it would reinforce any ex-ante competition decisions made by the Commission.
- d) Ignores Telecom's national scale and its ability to subsidise competitive ESAs from its national activities. As discussed earlier, the Commission should mitigate the risk of a false positive decision by undertaking a supplementary test of whether Telecom's national scale provides it with SMP in a particular ESA or cabinet.
- e) Provides little evidence of the level of competitive constraint provided by competing networks. From what was presented in the Draft Review Decision, the analysis of competitive constraint from Telstraclear's HFC network appears insufficiently robust to draw competition conclusions. The Commission needs to apply more rigorous competition analysis in this area and should lay out a framework for assessing the extent of network competition before it decides on a threshold rule for deregulating UBA. For instance, it could well be that one competing network (Telstraclear by itself) provides sufficient competitive constraint without the need for unbundled UCLL, but the Draft Review Decision does not investigate this (largely due to lack of data). ESA's with partial coverage from Telstraclear's network also do not appear to be deregulated (e.g. the Porirua ESA). This raises the question of what the minimum coverage criteria is for deregulating an ESA. Such robustness and clarity will be especially important going forward as network competition from non-Telecom LFCs and RBI networks materialises over the next decade.
- f) Does not effectively assess the impact of competition directly from competitive networks on UBA cabinet services. As discussed earlier, the economics of unbundling is irrelevant to the level of competitive constraint coming from a competing network. Whether Telstraclear offers wholesale

products is also irrelevant as it is competition directly from Telstraclear's retail arm that should be being assessed<sup>11</sup>.

- g) The Commission needs to investigate further the competitive constraint stemming from 3G mobile and wireless broadband. Specifically, the Commission should analyse afresh the type of customers that readily substitute fixed for mobile access and assess whether this growing trend limits Telecom's market power. Intuitively, these customers are like to be those with lower usage requirements whose usage is satisfied by mobile broadband (e.g. checking emails, basic web-browsing etc.).

#### Equivalence of Inputs (EOI)

27. Vector agrees with the Commission's draft decision "that if regulation (under the UBA STD) is removed in a particular ESA or cabinet then equivalence requirements contained in the Undertakings will continue to apply, as UBA will remain a Relevant Service in accordance with the Undertakings". Telecom's Undertaking obligations must be upheld in full so long as they are enforceable.

#### Frequency of future reviews

28. Vector supports six monthly reviews during the bedding in phase. More frequent reviews are nevertheless likely to be necessary over the next decade of fibre deployments to measure the competitive constraint of LFCs in a timely fashion.

#### *Contact details*

29. Vector looks forward to working with the Commission as it considers and develops its thinking on this topic. We would be happy to expand on any of the points raised in this submission. Please contact Aaron Webb at [aaron.webb@vector.co.nz](mailto:aaron.webb@vector.co.nz) or on 09-978-8288 should you wish to discuss further.

---

<sup>11</sup> Refer to Commission discussion in the Draft Review Decision – Paragraph 160