



TelstraClear Limited

Submission on Unbundled Copper Local Loop Backhaul and
Unbundled Bitstream Access Backhaul Standard Terms
Determinations – Consultation on competition assessment

21 October 2010

PUBLIC VERSION

Public version

This is the public version of TelstraClear's submission. Commercially confidential information for the Commerce Commission only has been removed, and is identified by square brackets. [] TCLCO

Introduction

1. TelstraClear welcomes the opportunity to comment on the Commission's consultation regarding the competition assessment criteria for Unbundled Copper Local Loop (UCLL) Backhaul and Unbundled Bitstream Access (UBA) Backhaul Standard Terms Determinations, issued on 23 September 2010¹.
2. Investment in both primary and secondary backhaul is continuing. As competitive constraints on Telecom emerge, it is important that unnecessary backhaul regulation is removed through a regular process of review.
3. We consider that the current approach, which undertakes a regular review of the development of competition on a route-by-route approach including consideration of near-entrants, will go some way to reduce potential distortion that occurs from the initial backhaul services regulated in the Backhaul Standard Terms Determinations.
4. However, it is important to the development of a competitive backhaul market that the Commission should:
 - a. avoid a 'chicken and egg' problem where continued regulation of Telecom's backhaul services discourages competitors from entering the wholesale market. As we discuss in this submission, the Commission's approach not to deregulate where the only alternative provider is vertically integrated risks that outcome; and
 - b. consider whether there are barriers to entry, including Telecom conduct that may hamper effective provisioning of competitive backhaul services in the first place. Tackling these issues would remove a clog on the development of competition and allow backhaul regulation to be removed from more routes.
5. In summary, TelstraClear:
 - a. Broadly supports the Commission's revised assessment framework; and
 - b. Disagrees with the Commission's view that vertically integrated providers are unable to act as a constraint in the backhaul market; and

¹ *Commerce Commission, Revised Draft Review of the Standard Terms Determination for the designated service Telecom's unbundled copper local loop network backhaul (telephone exchange to interconnection point), 23 September 2010; and Commerce Commission, Review of the Standard Terms Determination for the designated service Telecom's unbundled bitstream access backhaul, 23 September 2010.*

- c. Sets out how Telecom limits efficient aggregation in the exchange and impedes effective provisioning of UCLL Backhaul and UBA Backhaul.
6. This submission briefly responds to the specific questions raised in the Commission's consultation documents and provides an update to the Commission of TelstraClear's progress in the backhaul market.

UCLL Backhaul

7. The following section responds to the specific questions raised in respect of the UCLL Backhaul Standard Terms Determination.

53. Submissions are invited on the Commission's preliminary conclusion in paragraph 52 of this Revised Draft. In particular, interested parties are requested to submit on:

- The new framework used for assessing a near entrant in the UCLL Backhaul market set out on paragraph 37 on the classification of UCLL Backhaul Links under the simplified criteria, as set out in paragraphs 39 to 45; and

8. TelstraClear interprets each of the Commission's four criteria as being an assessment of competition in their own right.

9. The Commission's criteria include:

*"for Primary Links or Secondary Links where there is only Telecom or Telecom and one, or more, vertically-integrated operators, the Commission considers that Telecom faces limited competition;"*²

10. TelstraClear remains of the view that vertically integrated fibre operators that compete to deliver wholesale backhaul services to other carriers, such as TelstraClear, should be considered as a competitor for the provision of backhaul services. Being vertically integrated does not diminish the competitive constraint that TelstraClear brings to the wholesale markets. TelstraClear operates a significant wholesale division which provides wholesale data, virtual ISP, telephony and data centres, internet and voice services. TelstraClear Wholesale markets to carriers, ISPs and resellers.

² Commerce Commission, Revised Draft Review of the Standard Terms Determination for the designated service Telecom's unbundled copper local loop network backhaul (telephone exchange to interconnection point), 23 September 2010, para.37

11. The Commission also needs to be cognisant of the impact which regulated pricing of backhaul can have on incentives of vertically integrated operators to ‘unbundle’ their downstream products and compete in wholesale markets. In order to win business from the incumbent, a new entrant will usually have to price below the incumbent. Where incumbent’s prices are set by the regulator, entrants face the current or future risks of uneconomic wholesale prices. This does not mean that, if backhaul regulation is removed, backhaul prices have to go up. However, route by route regulated pricing creates rigidity in the market which may disrupt or discourage wholesale competition. Vertically integrated operators may well decide that it is easier not to enter into a regulated wholesale market in the first place.
12. TelstraClear would be interested to understand why the onus rests on suppliers to demonstrate that vigorous competition exists³, rather than on the regulator to demonstrate that little or no competition exists. If the Commission is minded to continue with the onus resting on suppliers, the requirement to provide evidence of ‘vigorous competition’ is too high a test. Evidence of ‘workable and effective competition’ would appear to be a more appropriate standard. The Commission also should not apply its test about the requisite degree of competition solely on an ex ante basis but to avoid the disincentive effects discussed above, the Commission should also be prepared to make an ex ante assessment of the competition which is likely to emerge on a route given current plans of operators or market conditions.
13. For this reason, TelstraClear supports the Commission’s ‘near entrant’ criteria:
*“...where a nearby fibre based network is within 1km-2km of a Telecom exchange, the network is considered a competitive constraint...”*⁴
14. The close proximity of a fibre-based network is an indication of a near entrant. However, as the Commission has noted in the exceptions of the assessment framework, it is sensible to consider other factors including an operator’s intentions to offer services from an exchange.

³ Commerce Commission, Revised Draft Review of the Standard Terms Determination for the designated service Telecom’s unbundled copper local loop network backhaul (telephone exchange to interconnection point), 23 September 2010, para.23

⁴ Commerce Commission, Revised Draft Review of the Standard Terms Determination for the designated service Telecom’s unbundled copper local loop network backhaul (telephone exchange to interconnection point), 23 September 2010, para.37

15. TelstraClear assumes that the Commission's criteria will apply 1km for smaller networks with localised coverage and 2km for inner-city networks. We request confirmation that this interpretation is correct. We suggest the Commission clarifies the interpretation of these criteria in all documentation.
16. In paragraph 44, table 2 of the Revised Draft Review document, the Commission has identified its preliminary view of the links assessed as being subject to limited competition. TelstraClear has fibre based network within 1km-2km of these Local Exchanges: [] TCLCO
17. We can provide additional information if it will assist the Commission's competition assessment.

53. Submissions are invited on the Commission's preliminary conclusion in paragraph 52 of this Revised Draft. In particular, interested parties are requested to submit on:

- *Whether it is appropriate, in the future, for combined review process to be undertaken for both the UCLL Backhaul and the UBA Backhaul reviews.*

18. TelstraClear supports the Commission's preliminary conclusion that it is appropriate, in the future, for a combined review process to be undertaken for both the UCLL Backhaul and the UBA Backhaul reviews.

UBA Backhaul

19. The following section responds to the paper and specific questions raised in respect of the UBA Backhaul Standard Terms Determination.

46. Submissions are invited on the Commission's preliminary conclusions in paragraph 45 of the Draft Review Decision. In particular, interested parties are requested to submit on whether they consider:

- *there are additional costs associated with provisioning a competitive backhaul service and the impact any such costs should have on the Commission's competition assessment framework as discussed in paragraphs 21 to 22 of this draft Review Decision;*

20. TelstraClear consider that there could be additional costs, beyond those listed in the Commission's draft Review decision, which may impact on whether or not Telecom faces limited competition. The Commission's competition framework could consider the nature of a fibre-based network and the build costs that can vary considerably dependent on the location and terrain.

46. Submissions are invited on the Commission's preliminary conclusions in paragraph 45 of the Draft Review Decision. In particular, interested parties are requested to submit on whether they consider:

- *that it remains appropriate to apply the assessment framework used in the revised UCLL Backhaul Review to the UBA Backhaul Review as discussed in paragraph 25 of this draft Review Decision;*

21. The Commission's assessment framework includes:

*"Telecom does not face limited competition on Primary Links or Secondary Links where there is one, or more, wholesale-only backhaul providers;"*⁵

22. By omitting 'other' in front of 'wholesale', TelstraClear suggests that the above criterion is not consistent with the Commission's criterion for the UCLL Backhaul review and that this definition is incorrect. The definition above would incorrectly deem a link competitive where Telecom is the only wholesale-only backhaul provider.

⁵ Commerce Commission, *Review of the Standard Terms Determination for the designated service Telecom's unbundled bitstream access backhaul*, 23 September 2010, para.25

23. TelstraClear anticipate the Commission's intention is to deem a link competitive where there is one, or more, *other* wholesale-only backhaul providers present. We suggest the correct definition is;

Telecom does not face limited competition on Primary Links or Secondary Links where there is one, or more, other wholesale-only backhaul providers;

46. Submissions are invited on the Commission's preliminary conclusions in paragraph 45 of the Draft Review Decision. In particular, interested parties are requested to submit on whether they consider:

- *the Commission's classification of any UBA Backhaul Links discussed in paragraphs 29 to 33 of this draft Review Decision is incorrect. Parties should provide evidence to support the reclassification of any such links;*

24. TelstraClear has fibre based network within 1km-2km of these Local Exchanges: [] TCLCO

25. We can provide additional information if it will assist the Commission's competition assessment.

46. Submissions are invited on the Commission's preliminary conclusions in paragraph 45 of the Draft Review Decision. In particular, interested parties are requested to submit on whether they consider:

- *that it is appropriate, in the future, for the Commission to undertake a combined review of UBA Backhaul and UCLL Backhaul links; and*

26. As discussed in paragraph 18 of this response, TelstraClear supports the Commission's preliminary conclusion that it is appropriate, in the future, for the Commission to undertake a combined review of UBA Backhaul and UCLL Backhaul links.

46. Submissions are invited on the Commission's preliminary conclusions in paragraph 45 of the Draft Review Decision. In particular, interested parties are requested to submit on whether they consider:

- *any additional changes are necessary to the Schedules of the UBA Backhaul STD as discussed in paragraphs 41 to 44 and Appendix 1 and 2 of this draft Review Decision.*

27. TelstraClear has reviewed the suggested drafting changes to the Schedules of the UBA Backhaul STD and we suggest that no further changes are necessary.

Backhaul Aggregation would improve competition

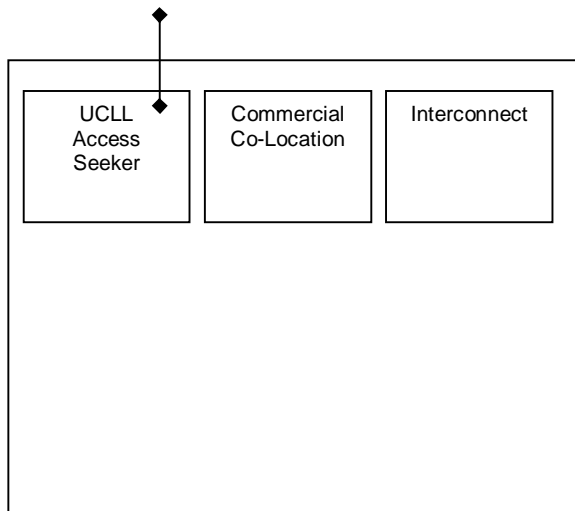
28. The following section provides an update to the Commission of the restriction placed on TelstraClear by Telecom for efficient aggregation in the exchange and the impediment on effective provisioning of UCLL Backhaul and UBA Backhaul services.
29. We urge the Commission to continue monitoring progress, and impediments to progress, in the backhaul markets to assist the Commission's activities to effectively promote backhaul competition.
30. Where TelstraClear has surplus fibre in an exchange, our ability to provide a more competitive backhaul service would improve significantly if Telecom allowed TelstraClear to connect this fibre to wholesale customers within the exchange. This would allow TelstraClear's wholesale customers to present their access circuits for voice, UCLL and HSNS at the TelstraClear frame within the exchange. TelstraClear could then aggregate our wholesale customer's backhaul services in a more cost-effective and timely way.
31. However, 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. The wholesaler wishing to provision UCLL Backhaul and UBA Backhaul services is also required to procure fibre from inside the exchange to manhole.
32. The process and cost to procure the fibre cable runs is restrictive. The process to order and provision the fibre is 8 weeks. The costs are distant-dependent and typically range from [] TCLCO per fibre cable. The availability of duct space to exit the exchange is limited and we expect supply issues are likely in the near future.

33. TelstraClear connects to Telecom exchanges in three ways:

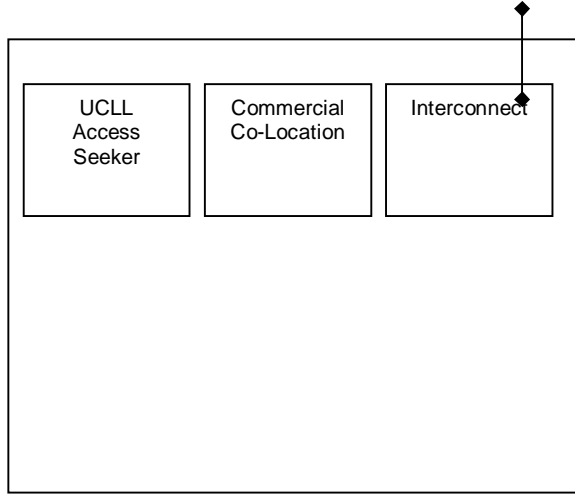
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b. Non-LICA exchanges: Usually in larger cities. Typically, TelstraClear has obtained access for its UCLL DSLAM rollout and connects from the road to the UCLL area. This is illustrated below:



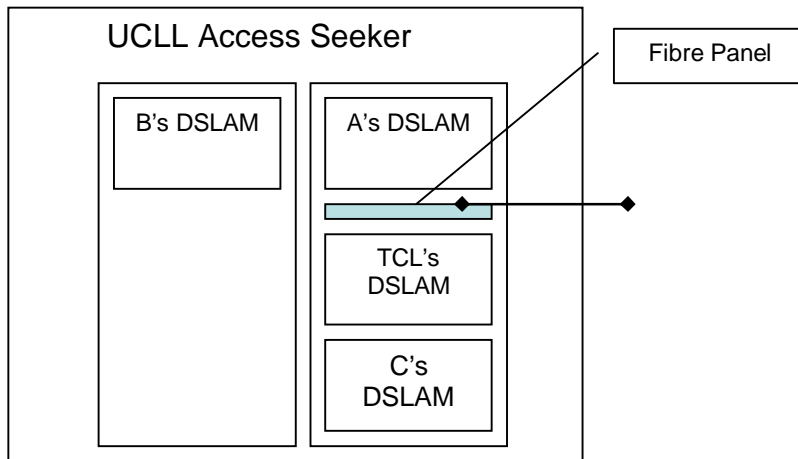
- c. Recent LICA exchanges: Typically, a direct connection in the exchange's Interconnection space is utilised. This is illustrated below:



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35. Within the UCLL Access Seeker space within an exchange, access seekers mount their equipment in racks that also contain their fibre demark points (OFDF). Ideally, TelstraClear's provision of backhaul for UCLL Access Seekers A, B, or C in the same or adjacent racks would require a connection from the fibre panel directly to the Access Seeker. This is illustrated below:



36. However, as we have mentioned previously, this configuration has been refused by Telecom Wholesale. Instead, Telecom Wholesale requires a separate fibre cable from the Access Seeker to a manhole outside of the exchange. In the manhole, a splice is made in the TelstraClear fibre cable and the UCLL backhaul is provided from that point. This mechanism requires each customer to have a separate connection back to a TelstraClear point of presence.
37. Should either TelstraClear, for its own purposes, or another access seeker wishing to purchase backhaul from TelstraClear, have interconnection links or customer equipment in the Commercial Co-location space, then a separate fibre cable from each point back to the manhole is the only permitted mechanism to connect and backhaul services. Under this arrangement each fibre cable typically will have only one useable pair of fibres.
38. In this manner, a competing backhaul provider is not able to aggregate access traffic within the exchange and is penalised with having to provision services in a costly and timely way. The added costs of fibering out to meet TelstraClear in a manhole represent a barrier to wholesale customers choosing TelstraClear backhaul versus Telecom's, and represents an inefficient use network infrastructure.

39. TelstraClear is not aware of any technical reason for Telecom to refuse to support TelstraClear to aggregate the services of its wholesale customers. We request the Commission's support as we try to remove the impediments to a competitive backhaul market.

TelstraClear's progress in the backhaul market

40. The following section provides an update to the Commission of TelstraClear's progress in the backhaul market.

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Conclusion

41. TelstraClear broadly supports the Commission's revised competition assessment framework.
42. However TelstraClear remains concerned with the Commission's view that vertically integrated providers, who deliver wholesale backhaul services to other carriers, do not act as a constraint in the backhaul market.
43. TelstraClear is impeded by Telecom from provisioning UCLL Backhaul and UBA Backhaul services effectively, from a time and cost perspective. If Telecom allowed aggregation of services within the exchange it would improve the competitive market for UCLL backhaul.