Media Statement

14 October 2010

COMMERCE COMMISSION DECISION – CLARIFICATION OF THE STANDARD TERMS DETERMINATIONS ON TELECOM'S UNBUNDLED BITSTREAM ACCESS SERVICE

The Commerce Commission has today released the attached Clarification of the Standard Terms Determinations on Telecom's Unbundled Bitstream Access Service.

ENDS

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COMMERCE COMMISSION

CLARIFICATION OF THE STANDARD TERMS DETERMINATIONS ON TELECOM'S UNBUNDLED BITSTREAM ACCESS SERVICE

DECISION NO. 700

Clarification under section 58 of the Telecommunications Act 2001 (the '**Act**') of Decision 611

The Commission:	Dr Ross Patterson Anita Mazzoleni Gowan Pickering Pat Duignan
Summary of Application and Initiation:	On 28 January 2010 CallPlus, Kordia, Orcon and Vodafone sought clarification of the UBA STD in relation to the pricing of UBA services in the situation where Access Seekers are purchasing the Sub-loop Extension Service (SLES).
Date of clarification:	14 October 2010

Summary

1. On 12 December 2007, the Commission issued a standard terms determination (STD) under section 30M of the Act in respect of the designated access services of Telecom's unbundled bitstream access service (UBA). This determination has been clarified on a number of occasions.

2. On 28 January 2010, Callplus, Kordia, Orcon and Vodafone (the submitting parties) wrote to the Commission raising an issue with the pricing of the Telecom (Wholesale) UBA services that are taken in conjunction with Telecom (Chorus) services – namely the regulated Sub-loop UCLL (SLU) service (the copper line between the end user and the cabinet) and the commercial Sub-loop Extension Service (SLES).

3. The SLES service is a commercial service provided by Telecom (Chorus) that allows the copper between the cabinet and the local exchange to be rented to assist in providing an active analogue telephone service to end users.

4. The submitting parties indicated that where they wished to supply an exchange-based voice service and a UBA-based broadband service to a cabinetised end-user, they would like to purchase from Telecom (Chorus) the SLES and SLU service to provide the copper path from the end user to the exchange over which telephone services can be provided, and UBA from Telecom (Wholesale). However, Telecom (Wholesale) required that they pay for Naked UBA (i.e. UBA with the 'uplift') at the cabinet to provide a broadband service, on the basis that they were not purchasing a POTS service from Telecom.

5. According to the submitting parties, if they are required to pay for SLU, SLES, and UBA (without POTS), they will be paying for the costs of the copper line twice. They submitted that where they purchase SLES and SLU from Telecom (Chorus), Telecom (Wholesale) should be required to provide them with UBA without any price uplift, as Telecom will have recovered its copper costs through the SLES and SLU prices.

6. On 28 May 2010, the Commission released a Draft Clarification with a preliminary view that the effective double recovery of the copper costs was an unintended consequence of the way that the section of the STD relating to payment of the uplift was drafted. Hence, the Commission's view in the Draft Clarification was that where an Access Seeker purchases SLES and SLU from Telecom (Chorus), and wishes to acquire UBA, no uplift is applied, as Telecom has already recovered the copper price in the SLU and SLES prices. The Commission proposed clarifications to reflect this in the UBA STD. Submissions and cross submissions were received.

Decision

7. For the reasons set out in this clarification, the Commission's view remains that where an Access Seeker acquires SLES and SLU from Telecom (Chorus), and wishes to acquire UBA (without POTS) from Telecom (Wholesale) at the distribution cabinet, the appropriate price is the UBA with POTS price (i.e. no uplift is applied). The Commission considers that in this situation the UBA price without uplift already takes into account the relevant costs, as Telecom has already recovered the costs of its local loop network that would usually be recovered from an end-user of POTS through the SLU and SLES prices. The Commission, therefore, has clarified the UBA STD to reflect this.

8. Part 2 of Schedule 1 is clear that the price that can be charged under the IPP is to be set on a retail-minus basis, and the only additional charge which can be made relates to the cost of the copper network where those costs are not otherwise being recovered by Telecom. The pricing principle does not extend to any other costs incurred by Telecom in the provision of the service.

9. Telecom can recover any extra costs of cabinetisation through the UBA price, but it can do so only through adjusting its retail price, which will flow through to the regulated UBA wholesale price. It cannot however charge an additional amount in addition to the UBA retail-minus price, except in the specific case recognised in Part 2 of Schedule 1, where the costs of its copper network have not otherwise been accounted for.

Analysis

UBA Initial Pricing Principle

10. Bitstream services (the Basic UBA Service and the Enhanced UBA Services) provide connectivity from Telecom Wholesale's network to an end-user's premises over a copper connection using DSL technology. The price of the UBA Service has been set by the Commission in its UBA Standard Terms Determination (UBA STD) in accordance with the retail-minus Initial Pricing Principle (IPP) set out in Schedule 1 of the Telecommunications Act:

> Retail price (as imputed by the Commission having regard to the price of any other digital subscriber line enabled service, including the imputed price of any such service offered as part of a bundle of retail services) minus a discount benchmarked against discounts in comparable countries that apply retail price minus avoided costs saved pricing in respect of the service
> +
> Plus, if no person is also purchasing **a local access and calling service** from the access provider in relation to the relevant subscriber line, all or any of the costs of Telecom's local loop network that would usually be recovered by the access provider from an end-user of its local access and calling service, as determined by benchmarking against comparable countries **unless the Commission considers that the price already takes into account all of the relevant costs.** [Emphasis added.]

11. The first part of the IPP is used to determine what is commonly referred to as the price of the 'clothed UBA Service' and is referred to formally in the UBA STD as 'UBA with POTS'. This description was used because in this case the UBA Service is being supplied to an end-user who is also purchasing 'a local access and calling service' (POTS) from Telecom, in which case Telecom is able to recover its local loop network costs that would usually be recovered by the access provider from an end-user of POTS, (local loop network costs).

12. The second part of the IPP applies, in addition, where the UBA Service is being supplied to an end-user who does not purchase a POTS service from Telecom. This is commonly referred to as 'naked UBA' and in the UBA STD as the 'UBA without POTS' service. In this case, Telecom is unable to recover its local loop network costs as it is not supplying the POTS service to an end-user, and the IPP allows for an uplift to be applied to the 'clothed UBA' price in order to cover Telecom's local loop network costs. The 'uplift', therefore, relates to the costs of Telecom's local loop network.

13. In the UBA STD, the Commission based the uplifts required for the UBA Services on the cost-based UCLL prices determined in the UCLL STD.[1]

[1] The Commission's Unbundled Copper Local Loop Network Determination dated 7 November 2007.

14. An exception to the application of the second part of the IPP arises where the Commission considers that all the relevant costs are already taken into account in the price of the UBA Service under the first part of the IPP.

Draft Clarification

15. In the Draft Clarification released on 28 May 2010, the Commission's view was that the effective double recovery of the copper costs was an unintended consequence of the way that the section of the STD relating to payment of the uplift was drafted.

16. At the time of the UBA STD, the only way that Telecom could recover the price of the copper from an Access Seeker purchasing the UBA Service was as part of the POTS, and therefore the UBA services were described in terms of whether or not Telecom was supplying POTS to the end user (either directly, or through a resold service to the Access Seeker). Where Telecom was supplying POTS, Telecom's local loop network costs were being recovered through the POTS price, and a lower UBA price applied. It was not contemplated that Telecom might recover the copper price from Access Seekers in any other way.

17. The intention was not that payment of the uplift should depend solely on whether or not Telecom-supplied voice products were consumed. The Commission noted in the Draft Clarification that the IPP for the UBA Service does accommodate the possibility that Telecom's local loop network costs could be recovered elsewhere, in which case no uplift is required.

18. Hence, the Commission's view in the Draft Clarification was that where an Access Seeker purchases SLES and SLU from Telecom (Chorus), and wishes to acquire UBA, no uplift is applied), as Telecom has already recovered the copper price in the SLU and SLES prices. The Commission proposed clarifications to reflect this in the UBA STD.

Submissions on the Draft Clarification

19. The submissions and cross submissions on the draft determination raise a number of preliminary issues that require resolution.

Reasoning for clarification application from Access Seekers

20. Access Seekers base their application for clarification on the principle that they be treated on an equivalent basis to Telecom's internal business units:

> "Currently cabinetisation is causing significant issues for LLU builders but not impacting Telecom's retail services. This is unreasonable. Their own retail arm consumes POTS and clothed UBA, to effectively compete in cabinetised areas. We are seeking access to the same service[2]"

> "...this clarification will allow access seekers to provide services to cabinetised end-customers, utilising existing investment in UCLL infrastructure in Telecom exchanges to provide voice services, in a manner equivalent to Telecom Retail."[3]

[2] CallPlus Submission, 17 June 2010
[3] Vodafone Submission, 18 June 2010, page 1

> "Kordia also notes that Telecom continues to deliver competitive initiatives eg cabinetisation, which has a significant impact on its competitors that have invested in LLU infrastructure. We are concerned that Telecom Retail is able to consume POTS and clothed UBA in a cabinetised area. As an Access Seeker, we seek access to the same service to enable us to compete[4]."

21. Telecom to the contrary, characterises the Access Seekers' application for clarification as being "motivated" by a wish to avoid the existing regulatory regime:

> "We can understand what is likely to have motivated this request from access seekers. The economics of serving broadband from equipment installed in cabinets is very challenging. In combining the products in the proposed manner the access seekers seek to avoid the costs associated with cabinets. Instead, Telecom would incur those costs without being able to pass those costs on to access seekers through the UBA Price. Telecom Wholesale has had a number of requests from access seekers for various services and prices that we understand are designed to avoid the regulated costs of cabinetisation[5]."

22. Telecom implies that it is access seekers who have "combined the products in the proposed manner", and have "designed" that combination of products to circumvent the existing regulation. This theme is repeated at paragraph 104 of the Telecom submission:

> **"Avoiding the regulated FTTN prices**
> The Commission has separately determined an appropriate cost-base price for provision of SLU services as part of the SLU STD. The request from access seekers to provide UBA in combination with SLES at the clothed UBA price would effectively enable them to avoid these regulated and principled costs that the Commission has determined that Telecom should be entitled to recover."

23. CallPlus, Kordia, Orcon and Vodafone filed a joint cross-submission on 17 July 2010. In response to this issue they stated:

> "Telecom claims that the purpose of this clarification is to allow Access Seekers to avoid the regulated SLU prices. More appropriately, it is about equivalence. Telecom Retail has been providing essentially the same service (broadband from the cabinet combined with voice from the exchange using SLES) to its retail customers since the cabinetisation programme began (and before SLES was even commercially available).
> Access seekers are essentially unable to benefit from SLU because the pricing is such that approximately 50% market share is required to recover costs on the average sized cabinet. So, access seekers are effectively limited to exchange-based UCLL and UBA. In order to make efficient use of existing investment in exchange UCLL equipment, access seekers wish to continue providing voice service from the exchange on cabinetised lines, in essentially the same way Telecom Retail do. The ability to do this, on equivalent terms with Telecom Retail, is likely to see increased investment in UCLL infrastructure, as well as greater competition and innovation in services provided from that infrastructure. There is potential benefit in this to 50% of end users who are (or soon will be) serviced by cabinetised lines and who otherwise would have no choice of network provider[6]."

24. In determining which view is correct, it is necessary to retrace the history of the development of SLES. This approach also contributes to the Commission's consideration under s18, including what will best promote competition in telecommunications markets for the long term benefit of end users.

25. SLES was developed by Chorus and launched on 14 August 2009. The service had previously been discussed at the TCF Sub-loop Working Party and non-price terms were agreed by that working party for inclusion in the SLES service description[7]. Telecom

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[4] Kordia submission, 21 June 2010
[5] Telecom submission, 18 June 2010, paragraph 35, page 10
[6] CallPlus, Orcon, Kordia, Vodafone cross submission, page 4-5
[7] At this time it was noted that the recommendations made in the paper may not be the exact drafting that would be included in the SLES service description but that Telecom would make every endeavour to ensure that its

recognised that in most cases it needed to retain the copper connection between the exchange and the cabinet after cabinetisation, to enable it to provide a POTS service. It also recognised that Access Seekers who had unbundled an exchange and had customers that were subsequently cabinetised would be faced with stranded assets where it was uneconomic to provide cabinet-based services. Chorus accordingly proposed a new commercial service to meet the requirements of Telecom and Access Seekers.

26. In the Telecommunications Carriers Forum Recommendations For Final Agreement of the Subloop Working Party dated 6 May 2008, it was recorded that:

> "Telecom notes that the Sub-loop Extension Service is not a regulated service, but it has consulted with the industry on the SLES service description to ensure that the Sub-loop Extension Service meets Access Seekers' requirements[8]."

27. The paper described the Sub-loop Extension Service as follows:

> "SLES is a service that provides an Access Seeker or a Telecom business unit with access to, and interconnection with, the copper feeder cable running between a Telecom local exchange (Exchange) and an active Telecom distribution cabinet (Cabinet) subtended from the Exchange **for the purpose of allowing the Access Seeker or Telecom business unit to deliver services over sub-loop UCLL service MPFs from Exchange based equipment, with the additional optional capability to combine Exchange based services with a wholesale broadband service launched from a Cabinet based DSLAM[9]."** (Commission emphasis)

28. It was also noted that:

> "SLES is not available for resale to end-users. However, SLES is available for resale to other Access Seekers **who can use the resold SLES to provide POTS in combination with wholesale bitstream services offered by Telecom Wholesale or another Access Seeker[10]."** (Commission emphasis)

29. The pre-requisites for the service included that:

> "the Sub-loop UCLL service is being taken by either an Access Seeker or Telecom business unit on the associated Sub-loop MPF"
>
> "the UCLL service is being or has previously been taken by either an access seeker or Telecom business unit at the relevant exchange"
>
> "at least one set of Access Seeker or Telecom business unit equipment, either co-located at the relevant exchange or co-located adjacent to the relevant exchange using the UCLL tie cable service, is providing service to end-users[11]".

30. The service, accordingly, was specifically designed to provide an alternative to Access Seekers who were providing exchange-based services, and to Telecom, in the event that lines being served from an Exchange were cabinetised.

31. The fact that this commercial service would be available to Access Seekers in the event of cabinetisation as an alternative to SLU was discussed at the Commission's SLU conference on 8 December 2008:

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drafting was entirely consistent with the principles set out in the recommendations (page 1 of the 'Recommendations for Final Agreement of the Subloop Working Party' paper)

[8] "Recommendations for Final Agreement of the Subloop Working Party", TCF Paper, 6 May 2008 paragraph 3.4, page 1

[9] ibid, paragraph 1.1, page 2

[10] ibid, paragraph 1.4, page 2

[11] ibid, paragraph 1.13, page 4-5

Mr Ratcliffe: "We think across the whole network the end customers do have options; UCLL, sub-loop, sub-loop extension services, the basic UBA service and the enhanced UBA service. There are now a range of different ways that you can take services from Telecom, either Chorus or Telecom Wholesale, in terms of building broadband services for end customers.[12]"

32. Telecom Wholesale (who were also involved in the TCF Working Party) were aware that it was contemplated that Access Seekers planned to provide voice services from the exchange while taking wholesale bitstream services from the cabinet. There was in fact a dialogue between Telecom Wholesale and Orcon to this effect at the Sub-loop Conference when discussing using voice emulation cards in the exchange over SLES:

> **"Mr Crockett:** Just for clarity can I check though, you would not have DSLAM in the cabinet and do the broadband from the cabinet and use SLES to do the voice from your exchange?
>
> **Mr Salmen:** Yeah, that is one option, we would consider doing that"[13]. (Transcript, p73)

33. On 14 August 2009, Chorus launched SLES and released an Informer noting to its customers that SLES would "give you the copper connectivity between your exchange based equipment, cabinet based broadband equipment and your customer."[14] Chorus also note in this Informer that "In future, we will make it possible to combine SLES MPF with an Unbundled Bitstream Access (UBA) Service from Telecom Wholesale".

34. On 6 October 2009 Chorus made a presentation to the Commission on SLES. The purpose of this presentation was to seek guidance on non-discrimination obligations under the Undertakings in relation to the provision of this service.

35. Chorus recognised that because SLES was a Relevant Network Access Service[15] that Chorus was choosing to provide on a commercial basis, it must be offered on a non-discriminatory basis, pursuant to clauses 40 and 31 of the Undertakings. Its concern was that while it was intending to provide the same service at the same price to Access Seekers and to Telecom business units, the internal trade and external business agreements were not exactly the same. While the service description and the key commercial terms including price were the same, there were differences in how the service was delivered, driven by the fact that internal customers were using legacy operating and delivery systems (primarily ICMS), while external customers would use new systems.

36. In its presentation, Chorus explained the need for SLES as follows:

> "UCLL STD covers unbundling of the copper local loop from exchange to end user
>
> - UCLL STD leaves connectivity gap between exchange and cabinet on cabinetisation as feeder cable is excluded
> - Access Seeker who has unbundled faced with stranded assets as only current options are UBA or cancellation.
> - Telecom Wholesale and Retail need connectivity between exchange and cabinet after cabinetisation to provide POTS service in most cases"[16].

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[12] Sub-loop Conference Transcript, page 15
[13] Sub-loop Conference Transcript, page 73
[14] Chorus informer, Issue 039, 14 August 2009
[15] This term is defined in clause 18.2 of the Undertakings
[16] Chorus presentation to the Commission, 6 October 2009

37. Chorus explained that it had developed SLES in consultation with the industry and had made a commitment to its customers to deliver SLES and SLU by September 2009 (and this was achieved with a launch date of 14 August 2009). Chorus' presentation explained that Telecom business units already used SLES to provide a variety of products and services including taking UBA from the cabinet and providing POTS from the main distribution frame in the exchange. It explained that Access Seekers could use SLES to provide the same products and services, including the access seeker providing POTS itself from the exchange and taking broadband from another provider at the cabinet. There was a requirement (which applied to access seekers and Telecom business units) that SLES must be purchased in conjunction with a sub-loop MPF. Chorus explained that internal trade contractual documents setting out the terms and conditions had been signed, it was providing the service internally, and charging had commenced.

38. On 24 November 2009 the Commission confirmed, in writing, oral advice it had previously provided to Chorus:

> "The Commission understands that the reason this service is delivered to internal and external customers using different systems is because internal customers use ICMS and other legacy systems, and it is not intended (or required) to transition internal customers to the system used by external customers. Chorus has advised that use of these legacy systems to deliver SLES to internal customers will not give internal customers any material advantage.
>
> Accordingly, I confirm that the provision of services such as SLES using different support systems will not, on its own, constitute a breach of the non-discrimination obligations[17]"

39. What is clear from this is that the UBA service that Access Seekers have requested from Telecom Wholesale, to be taken in conjunction with SLU/SLES from Chorus, and which is the subject of the request for clarification, is the combination of products which Telecom indicated that they would provide to Access Seekers, and which it has been providing internally since cabinetisation began in 2008. Moreover the SLU/SLES offering by Chorus was specifically designed to allow Telecom business units and Access Seekers to provide voice services from the exchange after cabinetisation in conjunction with taking bitstream services from the cabinet; that is, exactly the combination of services that Access Seekers have requested.

40. Telecom has been supplying itself with the SLU/SLES service and UBA from the cabinet since cabinetisation began in 2008, but has not been prepared (or able) to provide the same services to access seekers at the same price it charges itself (the level of that price is discussed below).

41. In its cross submissions, in response to Access Seekers' claim that they were merely seeking "access to the same service" as Telecom provided itself, Telecom's response was:

> "Kordia 'wants what Retail gets'. However Retail does not take UBA with SLES. Telecom takes UBA and POTS, with financial trades for the legacy inputs it takes from Chorus, Wholesale and TT&SS. The fact that Telecom Retail would consume legacy inputs for PSTN was agreed as part of the operational separation Undertaking. However it is true that access seekers get the same as Retail when they also take UBA (with EOI applying going forward) and resold POTS (to which resale equivalence applies).[18]"

42. The Commission does not agree with this characterisation of what "Retail gets". Telecom Retail takes SLU/SLES from Chorus, UBA from Telecom Wholesale, and acquires the

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[17] Letter to Telecom from the Commission, 24 November 2009

[18] Telecom cross-submission, 23 July 2010, paragraph 19

main distribution frame (MDF) (which enables it to deliver the POTS service) from TT&SS[19]). In this sense Telecom Retail is in the equivalent position as Access Seekers wish to be (in that it takes UBA from Telecom Wholesale in conjunction with SLU/SLES from Chorus, and provides the voice service itself using equipment provided by an entity other than Telecom Wholesale); in the case of Telecom Retail from TT&SS, and in the case of Access Seekers, through their own equipment located at the exchange. Importantly, Telecom Retail does not pay any amount to Telecom Wholesale in addition to the clothed UBA price, and Access Seekers expected to be treated in like manner.

43. The following allegations made by Telecom in its submission on 18 July 2010 simply cannot be reconciled with the history of the development of SLES outlined above:

> "in combining the products in the proposed manner the access seekers seek to avoid the costs associated with cabinets[20]"
> and that
> "the request from access seekers to provide UBA in combination with SLES at the clothed UBA price would effectively enable them to avoid these regulated in principle costs that the Commission has determined that Telecom should be entitled to recover[21]"

44. The Commission rejects entirely the implication of improper motive contained in Telecom's submissions and cross-submissions. It is satisfied that, in seeking the clarification, Access Seekers were seeking to obtain access to a service that Telecom was providing to itself (and at the same price).

Price of UBA – cost recovery by Telecom

45. The second preliminary point that needs to be addressed is Telecom's submission regarding the consequence of the Draft Clarification – whereby the Commission concluded that where an access seeker purchases SLES and SLU and wishes to acquire UBA (without POTS), "the appropriate price is the UBA (with POTS) price (i.e. no uplift is applied) as Telecom has already recovered the copper price in the SLU and SLES prices[22]". Telecom asserts that the consequence is:

> "such a low price would mean that Telecom could not recover its costs, which would undermine efficient investment. When access seekers are taking UBA in combination with SLES, they are using both Telecom's fibre and copper networks between the exchange and the cabinet. It is therefore appropriate for Telecom to recover the costs of its fibre investment[23]."

46. The Commission, in its Draft Clarification, noted that the wording of the IPP set out in Part 2 of Schedule 1 of the Telecommunications Act provided for a retail minus price, and as part of that IPP stated:

> "plus if no person is also purchasing a local access and calling service from the access provider in relation to the relevant subscriber line, all or any of the costs of Telecom's local loop network that would usually be recovered by the access provider from an end user of its local access and calling service, as determined by benchmarking against comparable countries (unless the Commission considers that the price already takes into account all of the relevant costs)".

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[19] TT&SS is the shared services part of Telecom that is outside the separated Network Wholesale and Retail business units.
[20] Telecom Submission, 18 June, paragraph 35, page 10
[21] Ibid, paragraph 104, page 22
[22] Draft Clarification, paragraph 17
[23] Telecom submission, 18 June 2010, paragraphs 19-20, page 6

47. The Commission noted that the uplift related to all or any of the costs of Telecom's local loop network that would usually be recovered by the access provider from and end user of its local access and calling service, that this was the copper network (as the fibre connection from the cabinet back to the exchange was not used for local access and calling) and as the costs of the copper network had been accounted for in the price payable to Chorus for the SLU/SLES, no uplift was chargeable. Telecom for its part said in its submissions,

> "We appreciate that the Commission's view is that any UBA uplift that applies under the pricing principles in Schedule 1 of the Act can only take into account the recovery of Telecom's copper costs. However, we do not think that this precludes Telecom from recovering its fibre and other costs through separate charges...[24]".

48. Part 2 of Schedule 1 is clear that the price that can be charged under the IPP is to be set on a retail-minus basis, and the only additional charge which can be made relates to the cost of the copper network where those costs are not otherwise being recovered by Telecom. The pricing principle does not extend to any other costs incurred by Telecom in the provision of the service.

49. This does not mean however that Telecom is, or has been, precluded from recovering its extra costs of cabinetisation. UBA is a retail minus pricing construct: the regulated price is calculated from the retail price that Telecom chooses to charge in the market. As Access Seekers note in their joint cross-submission:

> "The Telecom submission also overlooks the current situation, that UBA is priced on a retail- minus basis, not on a cost-plus basis. We are unsure why Telecom states in paragraph 103, (that 'it was never envisaged that we would not be able to recover the costs of the FttN programme from all users of FttN services'. But to date, Telecom has done nothing to earn additional revenue (either retail or wholesale) from its significant investment in FttN (or cabinetisation). It has chosen not to increase its retail prices, either across the board or specifically on cabinetised lines, and thus the wholesale bitstream price (UBA) of cabinetised lines remains the same as the wholesale bitstream price of normal exchanged lines. It does seem rather strange that Telecom appears content with this situation, and yet is so keen (as evidenced by its submission), to recover the costs of its cabinetisation program solely from access seekers desiring to purchase UBA in combination with SLU plus SLES[25]"

50. The Commission agrees that Telecom can recover any extra costs of cabinetisation through the UBA price, but it can do so only through adjusting its retail price, which will flow through to the regulated UBA wholesale price. It cannot charge an additional amount in addition to the UBA retail-minus price, except in the specific case recognised in Part 2 of Schedule 1, where the costs of its copper network have not otherwise been accounted for.

The UBA service requested

51. Telecom further submits that the UBA service that access seekers have requested, where the access seeker is purchasing SLU/SLES from Chorus, would not fall within the UBA service description in Schedule 1 of the Act as Telecom would need to provide the service over an access seeker controlled SLU. It submitted:

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[24] Telecom submission, 18 June 2010, paragraph 24, page 7

[25] CallPlus, Orcon, Kordia, Vodafone cross-submission, 17 July 2010, page 4

> "it is not clear whether the Commission can force an access seeker to provide a high frequency line-sharing service to allow Telecom Wholesale to provide the new UBA service over the SLU controlled by that access seeker within the scope of the SLU STD[26]".

52. The access seekers responded in their joint cross-submission that:

> "we are prepared to allow Telecom to use the line-sharing service at no charge in this situation, in order to get the UBA service at the clothed price".

53. For completeness, the Commission notes that a "line-sharing service" is not regulated under Part 2 of Schedule 1. Further, "line-sharing" is not a component (where the low voice frequency is leased to an Access Seeker) of the UBA service description in the Act. Access Seekers have however agreed to the use of the high frequency component of the line by Telecom to deliver the UBA service.

54. The question is whether the UBA service requested by the Access Seekers falls within the service description in the Act, which is:

> "a digital subscribed line enabled service...that enables access to, and interconnection with, that part of Telecom's fixed PDN that connects the end user's building...to Telecom's first data switch (or equivalent facility), other than a digital subscriber line enabled service."

55. The answer is yes. The reference to the UBA service with or without POTS only appears in the Schedule to the Act for pricing purposes; in essence allowing Telecom to recover its costs of the local copper network if Telecom is not providing the customer with a local access service, and those costs are not otherwise recovered.

56. A second question to be determined is whether there is anything in the terms of the UBA STD that means the UBA service being requested falls outside the current terms of the STD. The answer to this question is no.

Technical issues

57. Telecom has stated that for a number of technical reasons it cannot immediately provide the UBA service in a situation where the access seeker acquires the SLU/SLES service from Chorus. This is surprising, given (as outlined in paragraphs 25 to 37) Telecom designed the SLU/SLES service for the specific purpose of allowing access seekers to use the service in conjunction with UBA from Telecom Wholesale delivered from the cabinet. It appears that Telecom Wholesale did not design its UBA service in a way that was compatible for use by access seekers in conjunction with the SLU/SLES service, although its service was designed in a way that enables its internal business units to take those services.

58. Telecom submitted that what access seekers require is a new service which has not been built, and which it is not currently able to provide:

> "It is complex, costly and time consuming to create the capability to offer UBA in combination with SLES. The capability does not exist in Telecom's CMO systems and processes, and, because it was not a requirement known or foreseen at the time, was never specified into Telecom's design for FMO capability to meet the Undertakings. If the Commission is minded to regulate, it needs to allow

[26] Telecom submission, 18 June 2010, paragraph 13 (b), page 5

> sufficient time for Telecom to build the new capability, and recognise the costs involved in doing so in the pricing[27]"

59. Telecom also stated that "*creating this capability will take 12-18 months*[28]" and total costs are estimated at "*between $5 million and $10 million*[29]".

60. The Commission finds surprising Telecom's assertion that the capability to offer UBA in combination with SLES was not known or foreseen. It was certainly known to Telecom prior to May 2008 (almost 2 ½ years ago) when the TCF made its recommendations on Telecom's proposed sub-loop extension service. This, it must be remembered, was a service proposed by Telecom and subject to extensive consultation with industry "*to ensure that the sub-loop extension service meets access seeker's requirements*"[30]. As previously noted, it was specifically designed to enable access seekers to take SLES and SLU and combine it with a UBA service from Telecom Wholesale at the cabinet. Furthermore, as already indicated, the issue was raised at the Commission's SLU Conference in December 2008, when access seekers' intentions to take UBA from the cabinet in conjunction with SLU/SLES was discussed.

61. Telecom was also aware that it needed the SLES service for its own internal purposes (it having decided not to provide voice services from the cabinet) and Chorus at least, recognised its obligations under the Undertakings to provide the service in a non-discriminatory manner to access seekers. The fact is that Telecom has been providing an equivalent service to itself for more than a year, and access seekers clearly indicated in their submissions that they have been trying for that period of time to get the same service on the same terms, in accordance with what Telecom had committed to provide.

62. Under these circumstances, the burden of the challenge which Telecom now faces as a consequence of its failure to develop the system that it promised to deliver should not, and cannot, be expected to fall on access seekers.

Interim proposal

63. When it became apparent to access seekers that operational and technical issues may delay the service being made available to them, they proposed an interim measure.

> In our view it should be simple to come up with a transitional arrangement if required, to make the service available to access seekers, whilst Telecom deals with any internal system issues. Although not our preference, in the absence of any better solution, CallPlus would even accept an interim solution whereby Telecom Wholesale provides us with wholesale POTS (rather than a SLU/SLES from our own LLU cards) and UBA at the SLU/SLES and clothed UBA price. This would mean we pay the same amount in the interim until Telecom can deliver us the service".(CallPlus)

> "Should Telecom raise operational issues ...as a reason for delaying making this service available to access seekers, we propose an interim measure. Our proposal (and this aligns with the solution in the CallPlus submission) is that Telecom Wholesale provide Kordia with the wholesale POTS and UBA at the SLU/SLES plus Clothed UBA price – i.e. we pay the same costs as we would under the preferred solution in the interim, until Telecom can deliver the service". (Kordia)

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[27] Telecom submission, 18 June 2010, paragraphs 133-134, page 27
[28] ibid, paragraph 166, page 32
[29] ibid, paragraph 171, page 33
[30] "Recommendations for Final Agreement of the Subloop Working Party", TCF Paper, 6 May 2008 paragraph 3.4, page 1

> "If Telecom come up with convincing reasons why the implementation of this clarification should be unreasonably delayed (or worse) then we would propose an interim commercial solution be provided. This interim commercial solution could simply be that Telecom continues to provide UBA plus resale POTS, but prices it the same as the desired combination of UBA (with POTS) plus SLU/SLES. This would address the primary commercial issue, although not secondary issues such as wholesale local calling for business customers". (Vodafone)

64. Telecom attacked this suggested interim arrangement as further evidence of access seekers, attempts to avoid the SLU regulatory regime:

> "We think that the submission from access seekers confirm that their primary objective is to avoid the cost of cabinetisation that was regulated through the Commission's sub-loop unbundling STD pricing. **This is supported by the fact that the access seekers are willing to take a resold voice and bitstream product in cabinetised areas at the right price**[31]". (Commission emphasis)

65. This submission puts a "spin" on the access seekers' position which is not justified. All of the submissions made it clear that access seekers' willingness to take a resold voice and bitstream product was a transitional arrangement, which recognised the operational problems that Telecom had created for itself. Vodafone, for instance, made it clear that this solution would not address:

> "the product differentiation benefits of access seekers providing their own voice services, but it would be better than waiting for a lengthy implementation delay".

66. In relation to price, the access seekers' position in submissions was that they were prepared to pay the SLU/SLES plus clothed UBA price; i.e. the price they would have paid Telecom, if Telecom had been able to deliver the service that it had promised to deliver, and the price which Telecom's internal business unit was paying for the equivalent services.

Commercial negotiations

67. Telecom, for its part, took the view that in the light of jurisdictional difficulties (which we deal with later):

> "as well as the technical, operational and commercial complexities associated with providing UBA with SLES, we think it is most appropriate for the Commission to allow Telecom Wholesale to continue to negotiate a commercial outcome with access seekers, rather than jumping to regulation[32]."

68. Telecom also submitted:

> "that the best way forward is for the Commission to refuse to regulate and allow Telecom Wholesale and access seekers to resolve the complexities of FTTN commercially[33]."

69. The Commission has encouraged parties to reach a commercial resolution. Cross submissions were received on 17 July and 23 July respectively, and the Commission has delayed making a final decision to allow time for the parties to endeavour to resolve the issues between themselves. Two and a half months have passed, and no commercial resolution has been achieved. It appears that the difference between the price access seekers are prepared to pay and Telecom Wholesale requires has not been able to be resolved.

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[31] Telecom cross-submission, 23 July 2010, paragraph 5, page 2
[32] Telecom submission, 18 June 2010, paragraph 16, page 6
[33] Ibid, paragraph 29, page 8

70. Commercial negotiation having failed, the Commission has no choice but to deal with the Clarification request on its merits.

Jurisdictional issues

71. In its submission, Telecom raised a number of jurisdictional issues, which it said the Commission will need to answer before proceeding with the Clarification.

72. The first issue, which has been discussed above, was that where the access seeker is purchasing the SLU (which was a pre-condition of Chorus providing the SLES service to the access seeker), Telecom will need to provide a new UBA service over an access seeker controlled SLU.

73. Telecom submitted that it was not clear that that service would fall within the UBA service description in Schedule 1 of the Act, or that the Commission could force an access seeker to share the line with Telecom Wholesale. The Commission is satisfied that the UBA service requested by access seekers in these circumstances does fall within the UBA service description in Schedule 1 of the Act.

74. In relation to the line-sharing issue, as noted previously, access seekers are prepared to allow Telecom to use the high frequency compoenent of the line at no charge in this situation so that Telecom (Wholesale) can provide the UBA service.

75. The second jurisdictional question raised by Telecom related to the application of Section 18 of the Act and the UBA pricing principles in Part 2 of Schedule 1 of the Telecommunications Act 2001. Telecom submitted that they:

> "clearly anticipate that, where an access provider is required to provide a regulated service, that access provider will be entitled to recover its costs. Moving away from the principle of cost recovery will be inconsistent with the Act and best regulator practice.[34]"

76. As previously noted however, the UBA price is set under a retail minus construct, so that the regulated price is in fact under Telecom's control. The pricing principle allows an additional charge to compensate Telecom if it does not otherwise recover the costs of its copper local loop network, but in this situation these costs are recovered in the SLU/SLES price payable to Chorus by access seekers. Telecom's attempt to recover an additional uplift to cover fibre costs (i.e. fibre to the cabinet) is not provided for in the UBA Service set out in the Act and is inconsistent with the retail-minus pricing principle which applies to the service. Telecom continued:

> "It is also not clear that there will be any benefit to end-users arising from acceptance of the access seekers' request by way of lower prices or greater innovation. In other words, there is no certainty that the access seekers' request is consistent with section 18 of the Act[35]."

77. The Commission, in considering the application of section 18 to the present case, must look at all the surrounding circumstances in determining which decision will best promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand. In this particular case, as outlined above, a commercial alternative to unbundling cabinets was proposed by Telecom, and

[34] Telecom submission, 18 June 2010, paragraph 14, page 5
[35] ibid, paragraph 15, pages 5-6

agreed to by the industry, following consultation with access seekers. Chorus' motivation in providing the commercial alternative was two fold; it wished to use the SLES service itself to provide voice services from the exchange in cabinetised areas, and it recognised that SLES as an alternative to unbundling cabinets would lessen the danger of access seekers' infrastructure being stranded in exchanges in the event of cabinetisation.

78. The Commission, in its Annual Telecommunications Monitoring Report 2009, recorded that New Zealand's broadband penetration improved from 22nd out of 30 countries in the OECD to 18th, between December 2006 and December 2008 as a consequence of competitive improvements introduced by the 2006 amendments to the Telecommunications Act, of which local loop unbundling was an important component. As the cross-submission from CallPlus, Kordia, Orcon and Vodafone notes:

> "approximately 50% of all lines are being cabinetised, and this is mirrored closely in existing unbundled exchanges."

79. Chorus recognised that cabinetisation had the potential to significantly undermine LLU rollout, and developed the SLES commercial offer, to be taken in conjunction with UBA, to provide access seekers with another alternative when exchanges in which they had equipment placed were unbundled.

80. The Commission is satisfied that the requirements of Section 18 are best in this case by this Clarification.

81. Telecom, in its cross-submission, raises another reason why it says it cannot provide the service requested. It calls to aid its non-discrimination obligations under the Undertaking:

> "The access seekers' proposal raises a complex non-discrimination issue. For example if Telecom Wholesale offers UBA with resold POTS to unbundlers at ≈ $44.00, Wholesale's non-discrimination obligation would require that Telecom also has to offer these services at around $44.00 to all access seekers[36]."

82. The non-discrimination argument cannot hold, as the UBA price without an uplift will only be payable by access seekers who obtain the SLU/SLES service from Chorus, and have therefore met the cost of the copper network in that transaction. The pre-requisites to that combination of services, as outlined above, included that the access seeker was taking, or had previously taken the UCLL service at the relevant exchange and its equipment either co-located at the relevant exchange was providing service to end users.

83. TelstraClear submitted that:

> "the Commission consider widening the scope [of the Clarification] to include all UCLL lines".

84. For the reasons set out above, it is not appropriate to do so; the service specifically relates to access seekers in unbundled exchanges subject to cabinetisation.

Decision

85. This Decision deals solely with the issue of what price may be charged for UBA when SLES and SLU are also being acquired.

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[36] Telecom cross-submission, 23 July 2010, paragraph 21 (b), page 5

86. The Commission determines that where an Access Seeker acquires SLES and SLU from Telecom (Chorus), and wishes to acquire UBA (without POTS) from Telecom (Wholesale) at the distribution cabinet, the appropriate price is the UBA with POTS price (i.e. no uplift is applied). The Commission considers that in this situation the UBA price without uplift already takes into account the relevant costs, as Telecom has already recovered the costs of its local loop network that would usually be recovered from an end-user of POTS through the SLU and SLES prices. The Commission, therefore, has clarified the UBA STD to reflect this.

87. The Commission considers that the following amendments (set out in column 1 of Schedule 1 (References)) are required in order to clarify the UBA STD under section 58 of the Act:

    a) to the UBA Service Description – Schedule 1 to the General Terms of the UBA STD:

        - a new clause 3.4.1;
        - amendment of clause 3.4;
        - a new clause 4.4.1;
        - amendment of clause 4.4; and,
        - insert a new definition of "Sub-loop Extension Service" and "Sub-loop UCLL Service" in clause 1.3; and,

    b) to the UBA Price List – Schedule 2 to the General Terms of the UBA:

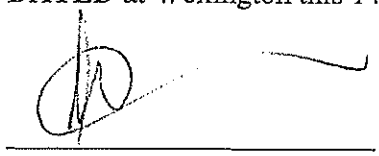
        - a new clause 2.9.

88. The Commission has clarified the UBA STD by making the amendments identified in column 2 of Schedule 1 (Amendments). The reasons for the Commission's Amendments are set out in this decision and in column 3 of Schedule 1.

89. The Commission notes that no appeal is pending in respect of the determination satisfying section 58(1)(c) of the Act.

90. The Commission considers that the clarifications set out in Schedule 1 are likely to best give effect to the purpose set out in section 18 of the Act.

DATED at Wellington this 14th day of October 2010



Dr Ross Patterson
Telecommunications Commissioner
Commerce Commission

Schedule 1

Reference	Amendment	Reason
Insert a new clause 3.4.1 in the UBA Service Description – Schedule 1 to the General Terms of the UBA STD	The Commission proposes to introduce a new clause 3.4.1 into the UBA Service Description as outlined below: **"Applicable UBA Service if Access Seeker is Purchasing the Sub-loop Extension Service and the Sub-loop UCLL Service** 3.4.1 This clause applies where an Access Seeker is purchasing a commercial Sub-loop Extension Service, and a Sub-loop UCLL Service at the cabinet, from Telecom in order to supply a voice service to end-users from the Exchange. Where, in those circumstances, an Access Seeker also wishes to provide a broadband service to end-users using the Basic UBA Service at the cabinet, that Access Seeker: (a) is not required to purchase the Basic UBA Service (with POTS); (b) has the right to purchase the Basic UBA Service (without POTS); and (c) as outlined in the UBA Price List, is only required to pay the price applicable for service components relating to the Basic UBA Service (with POTS)."	This clause explains which Basic UBA Service may be purchased by the Access Seeker at the distribution cabinet in circumstances when the Access Seeker is using the Sub-loop UCLL input and the Sub-loop Extension Service input (both of which are supplied at wholesale) to deliver a voice service to end-users at retail. The Commission notes that clause 3.4.1 assumes that the Access Seeker is purchasing the Sub-loop UCLL Service directly from Telecom (Chorus). The Commission considers that the UBA STD must be clear that the Basic UBA Service (without POTS) may be purchased for access to bitstream at the cabinet, regardless of the price points that are applicable under the UBA Price List. This new clause 3.4.1 is important because it creates a link to the UBA Price List and confirms that even though the customer is purchasing the 'without POTS' bitstream service the Access Seeker is only required to pay the 'with POTS' charge. Only the lower 'with POTS' charge is payable because Telecom is already recovering the costs of its local loop network through the other wholesale inputs that are purchased by the Access Seeker in the scenario outlined in

Reference	Amendment	Reason
		clause 3.4.1. The Commission has considered Vodafone's submission that the UBA Service (with POTS) and the UBA Service (without POTS) be renamed 'clothed' UBA and 'naked' UBA respectively. The Commission considers that this approach would have required making significantly more clarifications to the UBA STD than that outlined in this Draft Clarification, as well as potential amendments to the Telecommunications Act. Therefore, whilst Vodafone's approach has merit, the Commission has decided to take the simpler route. This view applies to all amendments outlined in this Draft Decision.
Amend clause 3.4 of the UBA Service Description – Schedule 1 to the General Terms of the UBA STD	The Commission proposes to amend clause 3.4 of the UBA Service Description by inserting "Subject to clause 3.4.1" (as identified in bold below) in line 3 below as follows: 3.4 The Basic UBA Service can be provided with or without an active analogue telephone service on the same copper pair (with or without POTS respectively). POTS does not form part of the UBA Service. **Subject to clause 3.4.1,** where a 'with POTS' UBA Service is provided, POTS must be purchased from Telecom separately, either directly by the End User from Telecom Retail, or by the Access Seeker or another Service Provider under a separate wholesale service agreement.	This amendment represents a consequential change given the amendments outlined in clause 3.4.1 above.
New clause 4.4.1 of the UBA Service Description - Schedule 1 to the General Terms of the UBA STD	The Commission proposes to introduce a new clause 4.4.1 into the UBA Service Description as outlined below: **Applicable Enhanced UBA Service if Access Seeker is Purchasing Sub-loop Extension**	This clause explains which Enhanced UBA Service may be purchased by the Access Seeker in circumstances when the Access Seeker is using the Sub-loop UCLL input and the Sub-loop Extension Service to

Reference	Amendment	Reason
	Service and the Sub-loop UCLL Service 4.4.1 This clause applies where an Access Seeker is purchasing a commercial Sub-loop Extension Service, and a Sub-loop UCLL Service at the cabinet, from Telecom in order to supply a voice service to end-users from the Exchange. Where, in those circumstances, an Access Seeker also wishes to provide a broadband service to end-users using the Enhanced UBA Services at the cabinet, that Access Seeker: (a) is not required to purchase the Enhanced UBA Services (with POTS); (b) has the right to purchase the Enhanced UBA Services (without POTS); and (c) as outlined in the UBA Price List, is only required to pay the price applicable for service components relating to the Enhanced UBA Services (with POTS).	deliver a voice service to end-users at retail. In those circumstances, the wholesale inputs enable the Access Seeker to replicate a local access and calling service for its customers without having to purchase POTS directly from Telecom. Accordingly, where the Access Seeker wishes to deliver a broadband service from the cabinet, the Enhanced UBA Service (without POTS) is all that is required to be purchased by the Access Seeker. The Commission notes that clause 3.4.1 assumes that the Access Seeker is purchasing the Sub-loop UCLL Service directly from Telecom (Chorus). The Commission considers that this clause is required to be clear that the Enhanced UBA Services (without POTS) may be purchased for access to bitstream at the cabinet, regardless of the price points that are applicable by virtue of the amended terms of the UBA Price List. This new clause 4.4.1 is important because it creates a link to the UBA Price List and confirms (beyond doubt) that even though the customer is purchasing the 'without POTS' bitstream service the Access Seeker is only required to pay the 'with POTS' charge. Only the lower 'with POTS' charge is payable because Telecom is already recovering the costs of its local loop network through the other wholesale inputs that are purchased by the Access Seeker in the scenario outlined in clause 4.4.1.
Amend clause 4.4 of the UBA Service Description – Schedule 1 to the General	The Commission proposes to amend clause 4.4 of the UBA Service Description by inserting "Subject to clause 4.4.1" (as identified in bold below) in line 3 below as follows:	This amendment represents a consequential change given the amendments outlined in

Reference	Amendment	Reason
Terms of the UBA STD	4.4 The Enhanced UBA Services can be provided with or without an active analogue telephone service on the same copper pair (with or without POTS respectively). POTS does not form part of the UBA Service. **Subject to clause 4.4.1**, where a 'with POTS' UBA Service is provided, POTS must be purchased from Telecom separately, either directly by the End User from Telecom Retail, or by the Access Seeker or another Service Provider under a separate wholesale service agreement.	clause 4.4.1 above.
Insert a new definition of "Sub-loop Extension Service" and "Sub-loop UCLL Service" in clause 1.3 of the UBA Service Description	The Commission proposes to introduce new definitions into clause 1.3 of the UBA Service Description as outlined below: "Sub-loop Extension Service" means a commercial service provided by Telecom that allows the copper between the cabinet and the local exchange to be rented to assist in providing an active analogue telephone service to end-users. "Sub-loop UCLL Service" means Telecom's sub-loop unbundled copper local loop network service set out in the description set out in schedule 1 to Service Appendix 1 of the Sub-loop Services Terms of the Sub-loop Services Standard Terms Determination made by the Commission under section 30M of the Act on 18 June 2009.	These amendments qualify as consequential changes.
Insert a new clause 2.9 in the UBA Price List – Schedule 2 to the General Terms of the UBA STD.	The Commission proposes to introduce the following new clause 2.9 into the UBA Price List as outlined below: 2.9 Where clause 3.4.1 or clause 4.4.1 of the UBA Service Description applies: (a) the Access Seeker is only required to pay Telecom the UBA Service (with POTS) charge for access at the cabinet even though the Access Seeker or its end-user is not purchasing	This proposed new clause 2.9 of the UBA Price List confirms that even though the customer is purchasing the "without POTS" bitstream service the Access Seeker is only required to pay the 'with POTS' charge. Only the lower 'with POTS' charge is payable because Telecom is already recovering the costs of its local loop network through the other wholesale inputs that are purchased by the Access Seeker in the

Reference	Amendment	Reason
	the local access and calling service (POTS) from Telecom; and (b) for the purpose of applying the service components in this UBA Price List, the Access Seeker is deemed to be purchasing the relevant service components relating to the UBA Service (with POTS) as requested by the Access Seeker; and (c) for the avoidance of doubt, the Access Seeker is not required to purchase the relevant service components relating to the UBA Service (without POTS) because the prices charged by Telecom for the Sub-loop Extension Service and the Sub-loop UCLL Service already take into account all of the relevant costs of Telecom's local loop network that would usually be recovered by Telecom from an end-user of its local access and calling service.	scenarios outlined in clause 3.4.1 and clause 4.4.1.