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BARRISTERS *and* SOLICITORS

**COMMERCE COMMISSION'S APRIL 2005 UBS**

**DRAFT TELECOMMUNICATIONS ACT**

**DETERMINATION: AN OVERVIEW**

## OVERVIEW

- 1 On Thursday 21 April 2005, the Commission issued its draft UBS determination. This is a big issue for the Internet community. Submissions are due from interested parties (including ISPs) by 5 May. Time is tight. Then there is a conference followed by the final determination. The Commission can change its position in the final determination. This is demonstrated by the radical change between draft and final determinations on unbundling.
- 2 The process and other issues are outlined in more detail in the paper on our website: *Telecommunications Regulation - An introduction to the latest in the Internet-Data Space & what can ISPs and others do about it - April 2005*: <http://www.wigleylaw.com/mainsite/telecommunications-regulation-.html>.
- 3 The UBS draft determination is generally very favourable to TelstraClear, which made the application. If, as Telecom has indicated is likely to happen generally, the benefits obtained by TelstraClear trickle down to the ISPs, they stand to benefit as well, and get a significantly better service than the commercial offering. This assumes of course that the final determination remains unchanged from the draft.
- 4 Even if there are no changes in overall principle, there can be major issues and debate around the detail, including timing and specifics such as the roll-out of automated provisioning services supporting the UBS (OSS Services).
- 5 This paper overviews the draft determination to help the Internet community understand the issues.

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### 1 Introduction

- 1.1 It would be particularly helpful for readers to review our paper above, *Telecommunications Regulation - An introduction to the latest in the Internet-Data Space & what can ISPs and others do about it - April 2005* (see <http://www.wigleylaw.com/mainsite/telecommunications-regulation-.html>). Having provided a broad summary above, we set out an overview of the key components of the draft determination, which is at:  
[http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/Wholesale/WholesaleDeterminatons/ContentFiles/Documents/386331\\_10.pdf](http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/Wholesale/WholesaleDeterminatons/ContentFiles/Documents/386331_10.pdf).<sup>1</sup>
- 1.2 Reference to paragraphs below are to paragraphs in the draft determination.
- 1.3 In its draft determination, the Commission has asked a number of questions. Parties are invited to comment not only on those questions, but on any other matter arising out of the determination.
- 1.4 Part of the UBS regulated services include backhaul from the local loop UBS service itself. It appears that TelstraClear and Telecom have agreed this feature of the service and so it is not dealt with in the determination. This is likely to be an issue that ISPs will need to take up

<sup>1</sup> As a result of an error in the initial determination, the price for commercial UBS was amended, and it's correctly stated later in this paper. For more detail see <http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/Wholesale/WholesaleDeterminatons/ContentFiles/Documents/TCL%20UBS%20Amendment.pdf>.

directly with Telecom. It is not yet clear whether they will get the benefit from any deal done with TCL.

- 1.5 Note that the Commission is constrained to dealing with UBS as defined in the Act. It can't revisit unbundling etc at this point.

## **2 Are relevant markets already sufficiently competitive?**

- 2.1 This is a threshold question for most of the regulated services, given that it is a key driver for regulation. As part of deciding whether it will grant a regulated UBS service, the Commission looks at the markets and the state of competition in those markets.
- 2.2 In this draft determination, it concluded that fixed wireless access (eg: Woosh), and other services provided by TelstraClear, CityLink, and United Networks/Tangent, do not provide sufficient competition in the various markets for assessment purposes. The Commission decided there is one national market for UBS within which there is limited competition. Therefore, UBS is a service that must be provided to wholesalers.

## **3 Pricing of the UBS service**

- 3.1 This is an issue on which ISPs should have particular interest. As is usually the case, the Commission's first step is to set initial pricing for UBS. This can be followed by a final pricing determination, which is based on a more complex analysis. An example this month demonstrates this. The final price for interconnection traffic with Telecom has just been determined on a final basis (but at draft determination stage) at 1 cent a minute. The initial price was 1.13 cents a minute. Telecom must now refund substantial payments to interconnected telcos, if the Commission confirms the draft determination.
- 3.2 For UBS, the initial price for residential has been set at \$26.19 and for commercial at \$28.88 (paras 200, 201). These prices are around those set by Telecom for the commercial UBS service. But, very importantly, this is a fixed price that is available for UBS whatever the downstream speeds are that are provided. For example, if TCL takes a 4mbps service it still pays around \$26.
- 3.3 As Telecom has no direct retail equivalent of UBS, it was necessary to go through the complexities of imputing a retail price. The Commission starts this by reviewing pricing and structure of various Xtra Jetstream offerings. As noted above, a very important conclusion in favour of TCL was that there would be one level of pricing, rather than several to reflect Telecom's own differential pricing of the Jetstream service. If it was otherwise, this would hinder the ability of TCL to differentiate services from Telecom's offerings. That would hinder the promotion of

competition, which is the main driver of the legislation in favour of the long term benefit of end users (paras 162-163).

- 3.4 So, the way the Commission got to the initial pricing was to start from the various Jetstream pricings. Jetstream includes value-add ISP services and upstream national and international traffic. UBS doesn't include that. So those components have to be stripped out to get to the initial price for UBS.
- 3.5 As to ISP charges, around \$9 was removed from residential services and between \$9-\$18 (those figures are GST exclusive) was removed for commercial services (paras 168-171).
- 3.6 The next step was to take out the charges built into Jetstream for national and international transmission, given that UBS provides for only local access and not for the upstream carriage of traffic.
- 3.7 The Commission used a fairly complicated (but standard) method of pulling this upstream traffic component out of the pricing structure. Some of it is not clear as confidential aspects of the report have not been disclosed. However the net effect was to get to an imputed retail price, from which 16% has been deducted (as we note next), to get to the initial UBS wholesale prices noted above (see paras 193-201).
- 3.8 The 16% is a deduction based on a definition in the statute. It revolves around the difference in Telecom's costs between (a) supplying the service on a wholesale basis only and (b) supplying the service on both a wholesale and retail basis. In short, the 16% is said to reflect Telecom's saved cost as it is supplying at wholesale not retail. In using the 16%, the Commission has simply taken the same approach as it has already done for other wholesale services and applied the same discount rate. However, it notes it is subject to "*data updating*" (meaning that there is room to change this percentage at this point) (para 198).
- 3.9 ISPs are likely to be able to contribute to this pricing debate and potentially help achieve lower UBS pricing (both now and as part of ongoing deliberations around what the percentage deduction should be).

#### **4 Churn fee**

- 4.1 This of course is highly controversial. It is currently set at a bit over \$100 plus GST. It is difficult to work out where this churn fee is heading from the draft determination except it looks set to reduce markedly. It's difficult to determine the position in view of exclusions from the public version of the determination for confidentiality reasons. The Commission expects TelstraClear and Telecom to agree the figure between them, and that the fee should be based on Telecom's recovery of costs incurred in transferring customers from Telecom retail to TCL wholesale. The Commission did not accept the proposed Telecom methodology. There is an estimated cost of \$36.42 per church

transaction (paras 210-213). All the signs are that the churn fee will reduce significantly from the \$100 add (plus GST).

- 4.2 New connections and Moves, Adds and Changes (MACs) will be based on Telecom retail charges less 16%.

## 5 Restriction on downstream speeds

- 5.1 The Act is clear that upstream speeds are limited to a miserly 128mbps (for the reasons outlined in the Commission's unbundling decision).
- 5.2 The Commission has concluded that upstream speeds will be unlimited and will not be rate-shaped by Telecom. TelstraClear therefore can use the raw bitstream to perform whatever rate-shaping it chooses to provide the variance of downstream speeds it wants (para 226-228). Of course, available ADSL speeds depend on factors such as proximity to the exchange, etc. Telecom maintains that only a few customers can get maximum downstream speeds of around 7.6mbps. Computerworld (at <http://computerworld.co.nz/news.nsf/UNID/8C0FDF36F072456BCC256FEA002CC06B?OpenDocument&Highlight=2,DSL,competition>) report engineers as saying that the low upstream speed means that only around 4mbps downstream speeds can be achieved, as acknowledgement packets saturate the 128kbps upstream channel.
- 5.3 The Commission raises at question 5 the potential instability risks that could arise on the provision of a service such as this (ie: maximum non-rate-shaped downstream speeds and maximum 128kbps upstream speed).

## 6 Latency, Jitter and Contention Ratios

- 6.1 The Act does not allow the UBS service to have real time capability. For this and other reasons, Telecom claims that there should not be specific and technical service parameters including around latency, jitter and contention ratios.
- 6.2 Telecom acknowledged that there should not be any difference between Jetstream and UBS in relation to non-network aspects such as fault repair and provisioning (para 239). Many ISPs would see that as an important acknowledgement as there is a view (rightly or wrongly) that Xtra Jetstream customers are being looked after much more quickly than customers of wholesaling ISPs.
- 6.3 In the face of Jetstream not promising specific service levels to its customers, the Commission decided that Telecom should be required to provide regular reporting on key service parameters to ensure consistency of service is achieved. That report must first be provided by Telecom within 30 days of the final determination and then provided quarterly thereafter. It will be audited.

- 6.4 The proposed performance parameters are set out at Appendix A on page 62 (see also paras 244-252) and these should be closely reviewed.
- 6.5 If the service parameters are strong, and the Commission remains of the same view in the final determination, this is a great outcome for TelstraClear (and, potentially, ISPs).

## **7 Interleaving**

- 7.1 Interleaving is used on a per port basis within a DSLAM to improve the performance for the subscriber, to make the connection more reliable, and to extend the geographic range of ADSL services. Telecom currently has a policy of always having interleaving turned on (paras 254-255).
- 7.2 Interleaving however increases latency and therefore impacts on real time applications such as VoIP. So there is a real downside to interleaving, reflected, as TelstraClear note, in a reduced ability to do online gaming. Note also that to switch off interleaving can increase the real time capabilities of the network (eg: VoIP). That goes against the UBS definition in the Act. Expect this issue therefore to be highly contested in this and the overall context of the draft determination.
- 7.3 Given that interleaving is done on a per port basis and TelstraClear can make a decision in each case as to whether or not to turn off interleaving, the Commission has left that choice to TelstraClear. Telecom must switch interleaving off for particular ports when requested by TelstraClear. The Commission has left is open for Telecom to request the Commission to approve an appropriate charge for this service (para 266).

## **8 Usage limits on data downloads**

- 8.1 TelstraClear and Telecom have agreed that, in effect, it is up to TelstraClear to impose usage limits on its customers (para 268).

## **9 Operational Support**

- 9.1 TCL requested a phased program for implementation of efficient direct electronic interfaces between TCL's and Telecom's operational support systems (OSS) for service inquiry, service ordering, provisioning, fault repair processes, etc (para 271).
- 9.2 The Commission noted that TelstraClear must provide a level of operational support, whether manual or automated, such that there is no material difference in provisioning of fault repair for retail customers, whether the service supplied to retail customers by TelstraClear or Telecom (para 276). The proposed Telecommunications Carriers Forum (TCF) Code on Churn is intended to cover issues such as this. The Commission left this on the basis that the TCF churn code or the parties

themselves would sort this out (but if they can't they can come back to the Commission).

- 9.3 This is an area where there can be technical reasons why there are difficulties and delays. But it is also an area where it might be claimed that an incumbent is not providing appropriate service, taking too long, etc (in correctly maintaining that this is driven by technical reasons). It can be expected that this will be a contentious area. If number portability is anything to go by, there may be ongoing problems in this area.

## **10 Static IP addresses**

- 10.1 The Commission has concluded that Telecom must provide the services in such a way that static IP addresses are not precluded.

## **11 Future bitstream availability in new areas**

- 11.1 TelstraClear requested that Telecom make available wholesale UBS services in areas where at least 35 people have requested service. They said that Telecom should also provide at least 3 months notice of expected ADSL availability in particular areas. Telecom in reply noted that this would force it to make unacceptable investment decisions, and that they needed to be able to react quickly to market conditions. The Commission's solution is that Telecom must tell TelstraClear of the expected completion of upgrading of its network to support ADSL immediately the operational decision has been made to carry out that upgrade (para 291). This will reduce some of the first mover advantage that Telecom has had.

## **12 Refund on Telecom bill following transfer of customer?**

- 12.1 Where a Jetstream customer is transferred to a TelstraClear UBS service, Telecom must refund the Jetstream customer for any unused portion of a billing period, and TelstraClear is charged only from the date the transfer is implemented. This has been a point of contention for ISPs.

## **13 Rebates for failing to meet service levels**

- 13.1 TelstraClear sought this but the Commission instead stuck with the remedies available in the High Court where Telecom fails to meet the requirements of the regulated service.

## **14 Other terms of the UBS regulated service**

- 14.1 The Commission specifically questions whether there are other terms that should be included in the determination (question 11 on page 58).

## **15 Conclusion**



- 15.1 While generally very favourable to TCL, and therefore likely to be available to ISPs, there remain a large number of issues to be resolved and potentially changed between this draft and the final determination.

Wigley & Company is a specialist technology (including IT and telecommunications), procurement and marketing law firm founded 11 years ago. With broad experience in acting for both vendors and purchasers, Wigley & Company understands the issues on “both sides of the fence”, and so assists its clients in achieving win-win outcomes.

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