



COMMERCE COMMISSION

859137

**APPLICATION FOR PRICING REVIEW DETERMINATION
UNDER SECTION 42
TELECOMMUNICATIONS ACT 2001**

This note on procedure and application form is issued by the Commerce Commission (“the Commission”) under subpart 4, Part 2 of the Telecommunications Act 2001 (“the Act”). Interested parties should read the note and complete the form if they wish to apply for a pricing review under section 42 of the Act.

WARNING

Under section 103 of the Commerce Act 1986 it is an offence for any person (individual or corporate) to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission.

NOTE ON PROCEDURE

Section 42 of the Act provides that if a determination is made under section 27 or section 30M (“standard terms determination” (“STD”)) of the Act regarding the price payable for a designated access service, a party to that determination may apply to the Commission for a review of that part of the determination that relates to the price.

Section 42 does not apply to a determination made under section 30M if the price payable was included under section 30P(1)(a), in accordance with the applicable final pricing principle in a price review determination.

Prescribed manner, information and fee

Under section 43 of the Act, any application made under section 42 of the Act must be in writing, be given in the prescribed manner, contain the prescribed information and be accompanied by the prescribed fee. Applicants can meet these requirements by complying with this note and completing the attached form. The Commission expects applications to be comprehensive and provide all information available to the Applicant that may help justify the price (or prices) sought and demonstrate how it is consistent with the applicable pricing principles in the Act.

Pursuant to section 43 of the Act, applications must also be received within 25 working days after the date the applicant received a copy of the relevant section 27 determination or after public notice of the STD.

If there was no initial pricing determination made and the only term at issue is a discount specified in the initial pricing principle, the Commission seeks information concerning attempts at negotiation.

Upon receipt of an application the Commission considers is complete and meets all the necessary requirements, the Commission will:

- notify the potential parties to the determination that the application has been received;
- provide a copy of the application to the other party or parties to the determination;
- request that the parties to the determination comment on the matter by written notice to the Commission not later than 10 working days after the notice from the Commission is received; and
- give public notice of the application.

Price calculation by Access Provider (if required)

On receiving an application the Commission considers is complete and meets all the necessary requirements, the Commission may require the access provider to calculate the price payable for the designated access service. Under section 45 of the Act that price is required to be calculated in accordance with the applicable final pricing principle and any regulations or requirements of the Commission relating to the final pricing principle. The access provider must provide the Commission with a statement that sets out how the price was calculated and the information on which the calculation was based.

There are heavy penalties under section 156B of the Act for access providers who, without reasonable excuse, fail to comply with section 45 of the Act or knowingly provide false or misleading information.

Draft Determination

As soon as practicable after the completion of any requirements under section 45 of the Act or, if the Commission does not request the access provider to calculate the price, after receiving an application under section 42 of the Act, the Commission will prepare a draft pricing review determination, give a copy of it to parties to the determination, and give public notice. The public notification will include the closing date for submissions on the draft pricing review determination, which will be within 30 working days from the date of publication of the draft determination,

Determination

As soon as practicable after submissions are received and any further consultation has been undertaken, the Commission will prepare a final pricing review determination. Section 52 of the Act sets out the matters that must be included such a determination.

After the determination has been prepared, the Commission will give copies to the parties and public notice. The public notification will not contain information for which confidentiality has been requested and accepted by the Commission.

Costs

Under section 55 of the Act:

- (1) The costs of the Commission in relation to a determination or application for a determination (including the costs of any expert advice) must be met by the parties to the determination, in the proportions directed by the Commission in writing.
- (2) The Commission's costs in relation to a pricing review determination in relation to a standard terms determination, may be met:
 - (a) in the manner provided under subsection (1); or
 - (b) by way of a levy under section 11; or
 - (c) by a combination of the ways referred to in paragraphs (a) and (b).

Under section 56 of the Act parties must bear their own costs. However, under section 56(2) the Commission may require a party to meet some or all of another party's costs if the party has materially contributed to any costs or unreasonable delay.

In order to meet the Commission's costs in relation to a pricing review determination, the Commission requires an initial, upfront payment of \$22,500 (GST inclusive). Payment of this amount must accompany any application under section 42 of the Act. In the event of two more parties making a joint application, only one application fee of \$22,500 (GST inclusive) is required.

The Commission will record all the costs it incurs from the time it receives an application so it can, if desired, invoice parties to the determination on a periodic basis as the determination proceeds.

In respect of an application in relation to a determination under section 27, the application fee paid by the applicant will appear as a credit on the applicant's first progress invoice. If for any reason the total costs billed to an applicant are less than \$22,500 (GST inclusive), the balance of the initial payment will be refunded.

In the event of a pricing review determination in relation to an STD, the application fee may only be credited to the applicant if the Commission does not recover the costs of the pricing review determination by way of the levy.

**APPLICATION FOR PRICING REVIEW DETERMINATION
UNDER SECTION 42
TELECOMMUNICATIONS ACT 2001**

Date: 6 December 2013

The Director
Telecommunications Branch
Commerce Commission
PO Box 2351
WELLINGTON

Pursuant to section 42 of the Telecommunications Act 2001 (“the Act”) notice is hereby given seeking a **pricing review determination** for a designated access service.

Enclosed is the proof of the required initial payment of \$22,500 (inclusive of GST).

We acknowledge that we may be required to meet any additional application costs incurred by the Commerce Commission (“the Commission”). We agree to make periodic payments, as invoiced, to reimburse the Commission for a portion of the costs it incurs in completing the determination requested. Furthermore, we acknowledge that in relation to the application and the determination we may be required to meet some or all the costs that were incurred by the other party to the determination (including costs incurred by the Commission that were invoiced to the other party).

**DETERMINATION DETAILS
TO BE COMPLETED BY ALL APPLICANTS**

THE PERSON GIVING NOTICE

- 1 Notice is hereby given by Telecom New Zealand Limited (‘**Telecom**’)
All enquiries regarding this application should be made to:

John Wesley- Smith
General Manager Regulatory Affairs
Telecom New Zealand Limited
Level 9, Telecom Central – Boulcott
42-52 Willis Street,
Wellington
DDI: +64 (0)4 4989435; Mobile: +64 (0)27 4735638
Email: john.wesley-smith@telecom.co.nz

PRICE AND SERVICE DESCRIPTION

*Provide a detailed description of the service for which a **pricing review determination** is sought and specify the specific price or prices for which a review is sought.*

- 2 Telecom seeks a review of the price for the designated access service entitled Chorus' unbundled bitstream access service ("UBA"). Specifically, those parts of the Final Determination on the benchmarking review for the unbundled bitstream access service issued by the Commerce Commission ("**Commission**") on 5 November 2013 (Decision No. [2013] NZCC 20) ("the **Determination**") that relate to:
 - 2.1 The final decision regarding the prices payable for UBA which will come into effect on 1 December 2014. Specifically,
 - 2.1.1 the UBA service recurring charges set out in section 2 of the Table of UBA Charges in Schedule 2 of the UBA Price List which are specified as taking effect from 3 years from Separation Day; and
 - 2.1.2 certain of the UBA Service Transaction Charges set out in section 1 of the Table of UBA Charges in Schedule 2 of the UBA Price List which are specified as taking effect from 3 years from Separation Day.

JUSTIFICATION FOR APPLICATION

On what grounds is a determination being sought? Explain in detail why the applicant considers, given the purpose of the Act, that the Commission should make a determination:

- 3 The grounds on which a determination is sought are as follows:
 - 3.1 Telecom is a party to the Determination - it is an Access Seeker for UBA and the largest purchaser of UBA. Telecom therefore has the right to apply for a pricing review under section 42(1) of the Act.
 - 3.2 Chorus Limited (“**Chorus**”), the regulated UBA Access Provider, has informed the New Zealand Stock Exchange that it intends to apply for a review of the Determination and request that the Commission apply the FPP. This was set out in a statement entitled “Chorus takes next steps in copper pricing review” published on the Exchange on 2 December 2013.
 - 3.3 We do not dispute the underlying analysis and approach adopted by the Commission. However the very nature of the IPP benchmarking requirements under the Act means that the Determination prices will always be an estimate of the true TSLRIC cost-base price. It is for this reason that the final pricing review, which requires a different methodology to determine prices, is available.
 - 3.4 Setting the UBA price at a level that most accurately reflects the cost of providing the service will best enable Telecom and other parties to consistently provide competitive services to end users of Telecommunications services in New Zealand and therefore enables the Commission to best give effect to the purpose of the Act.
 - 3.5 A final pricing review determination would ensure that:
 - 3.5.1 the most accurately modelled TSLRIC cost-based price is set for UBA;
 - 3.5.2 the parties have certainty that their input prices are cost-based.

In the circumstances, Telecom also files this application to protect our process rights during the UBA FPP Pricing Review and to ensure that we are fully engaged in all discussions and consideration of issues relevant thereto.

PARTIES TO DISPUTE

- 4 Identify the parties to the determination if the determination was made under section 27 of the Act:

The Determination under review is deemed by section 78 of the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011 to be a STD under section 30M of the Act, and is therefore not a determination under section 27.

We set out the parties in this section for completeness.

- 4.1 Telecom New Zealand Limited is an Access Seeker and purchaser of UBA under the Determination;
- 4.2 Chorus Limited is the Access Provider of UBA under the Determination.

REQUIREMENTS FOR APPLICATION

5 *If an initial determination has not been made and the only term at issue is the discount specified in the applicable initial pricing principle, provide answers to the following questions*

5.1 N/A – an initial determination has been made.

6 *If an initial determination has been made, what factors does the applicant consider indicate that the price or prices set in the initial determination were not appropriate?*

6.1 We are not making this application on the ground that the prices in the Determination were not appropriate.

6.2 However the application of the IPP has been criticised by Chorus as not adequately approximating the cost-based price that would be established by the FPP, which creates some uncertainty for the parties to the Determination about the extent to which the prices reflect true costs.

6.3 We support providing greater certainty to the industry that they are paying cost-based prices as the means of best promoting the purpose of the Act.

TERMS OF DETERMINATION

7 Propose the price or prices the applicant considers should be payable for the designated access service, and justify why the price proposed is appropriate.

The information supplied should show how the price proposed meets the relevant pricing principles in the Act.

7.1 We are not yet in a position to provide Commission with information that would allow us to propose an appropriate price following application of the FPP.

7.2 We propose that prices that reflect the reasonable TSLRIC costs to provide the UBA service should be determined, once all necessary information to determine that price is available to the Commission and parties to the Determination.

7.3 We intend to make more detailed submissions on how that price should be determined and what a likely final price should be during the FPP process.

7.4 We anticipate that, among other things, a potentially complex approach to the assumptions that underpin the cost model is likely to inform the approach.

7.5 Further information in support of the proposed price, model assumptions and proposed process will therefore be provided during the course of the FPP process.

7.6 We will provide more detailed submissions on why the application supports the purpose of the Act during the scoping phase of the FPP process.

8 Propose the terms and conditions on which the applicant considers the determination should be made, and justify each why each term and condition proposed is required.

- 8.1 We intend to make more detailed submissions on terms and conditions during the FPP process.
- 9 Propose the actions (if any) that the applicant considers a party to the determination must do or refrain from doing, and justify why each action proposed is required.
- 9.1 We propose that the Access Provider should continue providing the UBA service in accordance with the Determination terms and to a standard and level no less than currently provided and expected by Access Seekers.
- 9.2 In particular, after the UBA conference and following a request by Commissioners, a number of retail service providers (“RSPs”) wrote to the Commission setting out certain risks relating to UBA handover constraints.¹ The RSPs expressed concern that Chorus could indirectly raise the price of the regulated service by imposing a surcharge for the throughput levels that are not currently charged at a premium.
- 9.3 Throughput settings are a key determinant of UBA service performance and, necessarily, form part of the regulatory cost models against which the IPP price was benchmarked.
- 9.4 The UBA STD service description does not specify any particular throughput for the regulated service (save a per customer minimum of 32kbps over a 15 minute period). In practice, Chorus (and predecessor provider Telecom) provides the EUBA service without constraint and has progressively increased the throughput level of the BUBA service for which no surcharge applies. This is the service that the Commission benchmarked for the purpose of the IPP.
- 9.5 We propose that, during the course of the FPP process, the current UBA service performance against which the Commission set the benchmark price be maintained. In other words, the Commission should require that Chorus maintain, rather than be permitted to degrade, the current broadband performance experienced by end users whose service is based on BUBA or EUBA(0) while the FPP is being considered. We therefore consider that Chorus:
- 9.5.1 Must continue to provide that the BUBA service and the EUBA (0) service with at least the same minimum baseline throughput provided at the date of the Determination and as set out in the RSP letter; and
- 9.5.2 Must refrain from charging any surcharge, premium or amount of any nature over and above the price set out in Schedule 2 of the price list for BUBA where throughput is provided at 75kbps or lower and for any throughput dimensioning on EUBA(0).
- 9.6 We intend to make further submissions on this matter during the FPP process.
- 10 In respect of a determination under section 27 of the Act, propose the period of time for which the applicant considers the determination should apply, and justify why the period proposed is appropriate.
- 10.1 N/A

¹ Letter from Call Plus, Orcon, Vodafone and Telecom to Dr Stephen Gale dated 10 July 2013

DECLARATION

THIS application is made by

Telecom New Zealand Limited

Telecom hereby confirms that:

- all information specified by the Commerce Commission (“the Commission”) has been supplied;
- all information known to the applicant/s which is relevant to the consideration of this application has been supplied; and
- all information supplied is correct as at the date of this application.

Telecom undertakes to advise the Commission immediately of any material change in circumstances relating to the application.

Dated this 6th day of December 2013.

Signed by Melissa Anastasiou:



General Counsel
Telecom New Zealand Limited

I am an officer of the company and am duly authorised to make this application.

CONFIDENTIALITY

12 Do you wish to request a confidentiality order for:

12.1. Specific information contained in or attached to the application?

12.1.1. We do not wish to apply for any information in the application filed today to be confidential.

12.1.2. We reserve our right to require that any of the information submitted during the FPP process is maintained as confidential.

PLEASE NOTE

- The declaration is to be made only by the applicant. It may not be made by a solicitor or other adviser acting on the applicant's behalf.
- The wording in this declaration may not be varied by the applicant.
- If this declaration is not completed, the Commission may decline to register the application.
- Registration of an application can, if desired, be effected on receipt by the Commission of a facsimile copy or email of a completed application together with the confirmation of deposit of the appropriate fee to the Commission's account. The original documentation must be forwarded to the Director, Telecommunications Branch, Commerce Commission, PO Box 2351, Wellington, within 3 working days of registration. For account details, contact the Commission on (04) 924 3600.

