Wigley+Company solicitors

13 March 2015

Stephen Gale
Telecommunications Commissioner
Wellington

Dear Stephen

FPPs

This letter enquires if the Commission will now revisit its timetable, particularly as to the statutory draft determination currently timetabled for around 2 months away.

The submissions raise a large number of matters which, it is submitted, cannot be dealt with in time for a legally compliant statutory draft determination in May. The inference is that continuing with the current timeline will lead to legal error by the Commission as to how it is handling the required process steps and how it is handling the substantive issues. As to substantive matters, those often come back to process errors by the Commission, it is submitted (for example, the absence of engaging with submissions, as is legally required).

This letter does not address the multiple other concerns raised in the submissions that point to more time and input being appropriate: the focus of this letter is on the more direct legal requirements (although the Supreme Court TSO decision shows how far the courts will go on a review of facts where an appeal as to law only is possible).

As has been submitted, the December draft determination purported, incorrectly, to be the statutory draft determination and that, if it was the statutory draft, it would not have been legally compliant. Substantial change would be required. For example, the Commission did not engage in writing with key submissions, as the law requires it to do. It is submitted that, if the Commission engaged with those reasons, the draft decisions would be different (e.g. as to choice of UBA MEA).

It is submitted that remedial steps should be taken now, thereby avoiding the need for litigation and delay in the process: it is therefore better to be clear and upfront about the concerns, partly because there has been little or no written engagement with those concerns by the Commission.

These issues arise in a number of places so we give only one example here: the absence of evidence based empirical analysis in relation to s 18 (which is also an obligation that applies to all other facets of the FPP process).

Instead of an evidence based empirical analysis, the Commission has largely relied on the sort of high level observations for which the High Court (a Judge and two highly experienced economists) firmly criticised the Commission in its IM decision

The Commission has proceeded in this way, despite the following points, of which only one is enough to legally require evidence based empirical analysis, but taken together, it is submitted that the requirement to do so is particularly strong from a legal perspective:

1. The Court of Appeal authority requiring the Commission to undertake quantitative cost benefit analysis;

2. The Commission's own clearly stated requirement in telecommunications matters of this nature that an evidence based quantitative CBA is required (and the fact of its implementation of such evidence based quantitative CBAs on a number of occasions[1]);

3. The IM judgment's firm criticism of the Commission's approach of not undertaking adequate evidence based empirical analysis;[2]

4. Contrary to the position on the FPPs, the Commission remedied the position on Part 4 WACC, in light of the IM judgment, by undertaking evidence based empirical analysis. It is submitted that it is difficult to understand why the Commission is doing the opposite here and that it continues to rely upon an approach that was disapproved by the court. (A simple example out of many: the High Court did not accept that the Commission could simply rely upon the unsupported statement that dynamic efficiencies trump static efficiencies: yet that is exactly what the draft determination does).

5. All the above points have been submitted on, including back to the IPP, and they raise relatively straightforward differences between (a) what the Commission is required to do (and what it does) and (b) what it is doing here.

6. At no stage however has the Commission engaged in writing with those submissions (contrary to its legal obligations to do so).

7. It is difficult to see how the Commission could explain to a court how it is handling this process, when:

    a. the process it is adopting is legally incorrect, in the face of such clear legal material as outlined above including clear direction from the courts;

    b. it is, without giving any reason or any answer to submissions on the point, departing so much from its clearly stated past practice in telecommunicaitons and from its practice under Part 4 (where it did the opposite of what is happening here, following the IM judgment).

The legally required evidence based empirical analysis - prepared to a sufficient standard - could not be completed before the May date for the statutory draft determination. There is not enough time. Similarly as to multiple other issues that have been raised. If that draft statutory determination is not deferred, implicit will be an error of law.

There are quite a number of other steps that cannot be completed by May either, in a way that is legally compliant, such as the necessary re-working of the UBA modelling

[1] Professor Voselgang's reference to challenges in quantifying benefits and detriments is limted to remote implications: this is expressly dealt with by the Commission's treatment still requiring quantitative analysis where available, as stated in the LLU decision.

[2] It is submitted that the Part 4 decision, and the Court of Appeal decision noted above, are not materially distinguishable and they create legal obligations in telecommunications, in the overall context.

to fix the UBA MEA choice (when the process requirement to engage with submissions on the point was not followed) and the treatment of re-usable assets contrary to Supreme Court authority and the Commission's own practice on TSO.

As noted above, much to be preferred is to see compliance rather than the need to litigate later as to process and substantive alleged errors. The shape of such litigation would need to await the statutory draft determination even if continuing on the current path makes it implicit there will be then error of law (whether by (a) declaratory judgment and/or judicial review before the final determination (that is the course CallPlus took in the related matter of the Minister's handling of the "copper tax" issues) or (b) by appeal and/or judicial review after the final determination). Should the matters not be resolved, while we do not have firm instructions (that is not possible until the statutory draft determination is available as the detail determines what is appropriate), it is anticipated, from discussions, that there would be litigation as to the Commission's alleged process and substance errors, given what is at stake.

As appears from submissions, there is particular concern with what is happening generally on this FPP including as to the choice of speed ahead of other factors, which end up being reflected in the matters to which there is reference above and in submissions. This letter deals with only one facet.

There is, additionally, one specific issue, arising out of submissions: will the Commission confirm that it will hold a statutory conference after the formal draft determination is issued. If not, we have been asked to advise further as to the legal position of such a radical departure from long standing Commission practice, even though the Act does not expressly require such a conference. To be clear, a conference before the statutory draft is welcomed even though it is not a statutory conference. That is because an iterative approach is valuable. But a conference after the statutory draft determination is sought to address the latter: anything before then is to a large degree in the dark, as many of the submissions made so far show.

Finally, it is submitted that these issues (and the multiple issues raised by others) should not be solved by tinkering with minor changes to the approach such as extending timelines of the existing structure here and there. A fulsome rethink would be best (via a process workshop as Spark suggest is a good option).

Yours sincerely

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