



Cross submission by InternetNZ, Consumer NZ and TUANZ in
relation to UCLL FPP Issues and Process Paper

28 February 2014

Public version: there is no confidential version

Summary

1. Thank you for the opportunity to cross-submit.
2. Vector's submission notes that Chorus would achieve an ROI of 19-23%, which is considerably higher than other regulated entities. Its calculations have been verified by Network Strategies. This demonstrates that some care is needed not to overestimate the true cost of the UCLL service.
3. **Consult further in this design and process phase:** Getting this phase right is crucial. Too fast now and that may be regretted later. We consider that there are major risks in not going to another consultation round, ideally based on a further Commission paper. For example, we currently favour a fibre and wireless MEA but we can't land on this as there are so many moving parts and potential unintended consequences. It may be that a copper MEA would be better. We are not sure on present information in view of the uncertainty. We see the RSPs struggling with this too. Additionally, we agree with other submitters that the UBA and the UCLL FPP should be done in parallel for the reasons they give in this process and in the UBA FPP consultation process. Also, there are difficult issues to resolve as to the inter-relationship between the UBA and UCLL FPPs including how the MEAs for each should dovetail, to the extent possible. Hence, a further round of consultation, based on a paper dealing with the key points, would be valuable.
4. We consider that there is a high prospect as things stand that a party or parties will appeal the ultimate determination. All reasonable steps should be taken to reduce that prospect. It is at least possible that, after a further round of consultation, some or all stakeholders will agree facets of the approach, thereby reducing the risk of appeal. It is worth trying to achieve a measure of agreement at the same time as there is further consultation.
5. Even agreement to disagree on certain points is valuable in drawing the Commission's attention to issues that it needs to consider in greater detail.
6. Further consultation will benefit from other relevant inputs, including, depending on time, a decision on the High Court UBA appeal.
7. **Chorus proposal not suitable:** The Chorus top-down proposal, with the price to be decided in 2014, should not be accepted. Quality of outcome is more important than a speedy resolution. The substantial compromises that Chorus propose are likely to lead to an over-estimation of cost, given the top-down nature of the process, information asymmetry and the reality that the Commission and non-Chorus stakeholders will not be able to adequately deal with Chorus assertions.
8. **The MEA is not limited to a copper MEA:** Chorus incorrectly submit that the MEA is limited by the Act to a full copper network. The Act is prescriptive as to the service being provided: a service provided over copper. But it is silent as to the separate question of what approach is used to model the price of that service, in terms of the MEA. TSLRIC uses the modern equivalent asset as the basis for determining price. The Act does nothing to limit what is

well known and understood: the modern equivalent asset is just that: it can be copper, fibre, wireless and/or other technology such as HFC.

9. If Chorus is correct, the model is no longer true TSLRIC and the Commission should apply the Act differently. (We say below that fully depreciated cost of sunk assets is appropriate to use regardless).
10. **Act gives wide discretion to the Commission:** The methodology in the Act gives wide discretion to the Commission, which is able to move immediately to a more fit for purpose methodology, including to vary the TSLRIC model to make it more suitable to the current environment, so that cost price is not over-estimated. The Commission can even depart in substantial ways from a TSLRIC approach, given the way the Act is drafted.
11. Even using a narrow approach to a TSLRIC model, the following is possible and appropriate (as examples of multiple other options available to the Commission to make an unworkable TSLRIC model that over-estimates true cost into a fit for purpose model):
 - a. As the Commission itself has said “where the costs are sunk, historic costs can be used...”. Much of the Chorus proposed modelled network is sunk cost. It is possible to use historic costs for sunk assets.
 - b. Chorus is rolling out UFB anyway and that can be taken as an assumption and not priced into the model: for example, the cost of a copper line is the cost of including the line in a trench built for UFB and/or the cost of adding a copper line to a UFB fibre trench later. In the real world, the availability of the trenches is an assumption that should not be including in the costs in the model: the cost of putting in copper into the trenches is just the cost of the copper itself and laying costs, as the trench cost is being incurred anyway. Similarly as to overhead poles and other equipment. There is support for this in the TSLRIC statutory definition: “forward-looking costs...[take] into account the service provider’s provision of other telecommunications services” (in addition to normal fixed and common cost).
 - c. The MEA is not the full network as Chorus claim: it is limited to the footprint of the DSL-capable network. UCLL was, as always known, never going to be used outside the DSL footprint. Much of rural New Zealand is outside the MEA. Having the full network as the MEA would over-price the service.
 - d. Valuable information on the hypothetical fibre network, if that is the MEA, is available from Northpower and other LFC’s, rather than Chorus. In designing a fibre MEA, the roll-out by Northpower (based more on overhead poles) is a more appropriate type of MEA than the Chorus build (based more on ducting).
12. **Section 18:** We support the way in which the Commission applied s18 to the UBA IPP, and consider that should be applied here too. The Commission made its initial decisions based solely on cost, and derived a plausible range (that is, a range in which the options would all viably meet the objective of determining the most reliable cost price). The choice out of the plausible range was made, taking s 18 into account. We consider it will help the

Commission and stakeholders to establish a clear structure, building on what has already decided by the Commission. The structure we propose is:

- a. At each decision point, the Commission makes its decision based not on s 18 factors but upon the immediate question. For example, what decision will best lead to the optimal estimate of the cost price? What decision will best lead to the most reliable assessment of what is the modern equivalent asset?
- b. If that exercise produces only a range of options which are consistent with that primary objective, then, and only then, would the Commission make its decision based on s 18.

13. **Backdating:** We note that Telecom agrees with our view in our first submission, that the backdating issue should be resolved up front and not later. We adopt their reasons for this as well.

14. **TSO:** TSO should not be a consideration for this FPP: it can be handled by an s 59 reconsideration if necessary, when the facts are known. The future of the TSO is too uncertain.

Further consultation as to process and design

15. The parties in their submissions are a long way from landing on, and submitting on, a sufficiently worked up process and design. We consider that it is critical to have this design phase optimally developed, and there is more to be done in that regard. Speed now would likely be regretted later, and also increase appeal risk. We support the Commission going through a further round of consultation. For example, the Commission might make a preliminary decision on some key points, and then invite submissions on that and upon the detailed implementation of those key points. At present, there are so many moving parts, with risk of unintended consequences by following one approach instead of another, that it is difficult for parties to submit in detail. For us, from our discussions with other parties and from their submissions, this is quite problematic.

16. Say, for example, the Commission said that it is minded to use a fibre MEA for urban, with the hypothetical network having features more like the Northpower UFB roll-out (overhead poles) than the Chorus UFB roll-out (ducts), but that it is considering both options; It becomes easier for all parties to submit in a manner that assists the Commission, and might even lead to a measure of agreement, as noted in the summary.

17. As a further example of how an additional consultation round would assist the Commission and all stakeholders, our initial view is that the Commission should use a fibre and wireless MEA. However, there are some assumptions in that view, including, for example, the question of whether the asset value would be altered downwards to reflect the lower functionality of the copper service relative to fibre. On the other hand, one of the reasons against copper and wireless (wireless in rural areas) as the MEA is the Chorus contention that the reduction of end-users as they migrate to UFB should be taken into account, thereby increasing unit costs and therefore the price. We think that would be an artificial

outcome producing even more over-recovery than TSLRIC+ will otherwise produce. But if the Commission indicates that the unit costs do not diminish in this way, a copper and wireless MEA may be the more suitable MEA. That might therefore become a supportable option.

18. For example it might be possible for the Commission to choose to model costs of a top down copper MEA and also a fibre bottom up MEA, with the eventual lower cost model being chosen.
19. It is clear from the RSPs' submissions that they too are struggling with this, having an each-way bet on issues, and not dealing with some issues.
20. There is also the important issue of the timing of this FPP with the UBA FPP, and the inter-relationship between the UBA and the UCLL MEAs. We agree with the RSP' submissions in this and the UBA FPP processes that they should be handled in parallel.

Chorus proposal to determine price in 2014

21. Chorus, with support from Analysys Mason, propose top-down modelling, with the first model to be produced by Analysys Mason, thereby enabling a decision on the price by December 2014.
22. It is far more important to get this right than to try and expedite the process, as much as it is desirable to get certainty sooner than later. The considerably simpler IPP process took a great deal longer. Even the time up to issue of the UCLL FPP Issues Paper – a simple step relative to what follows - is longer than the time proposed from this point to conclude the FPP. Such speed markedly increases appeal risk and other risk that stakeholders will be dissatisfied.
23. Best practice is to avoid the incumbent owning the modelling, illustrated by the Commission having to do its own TSO modelling after Telecom had done the initial model at the Commission's request. It is difficult to remove the distortions from an incumbent-generated model, especially where it is deliberately designed to be top-down.
24. The speed here will greatly magnify the problems, likely leading to a higher UCLL price. A great tactical outcome for Chorus: a poor outcome for RSPs and the focus of the legislation: end-users. That is because:
 - a. A top down model is well established by regulators as leading to inaccurate outcomes even after adjustments are made to enable the model to reflect a hypothetical efficient network. The tight time would make such adjustments very challenging.
 - b. There will not be enough time for the Commission and non-Chorus stakeholders to adequately test and submit upon such a model. There will have to be compromise as this is rushed through. Among other things, that will tend to have the model defaulting to the as-installed network, instead of an MEA;

- c. Information asymmetry will be more pronounced than it normally is with such cost modelling. Realistically, the Commission and the non-Chorus stakeholders will not be able to deal with the issues adequately.
 - d. Chorus has effectively asked for a blank cheque, through its modelling of the replacement cost of its existing assets. Accounting separation is instructive here. In that context, Chorus estimated the gross replacement cost of the assets at over \$12 Billion. The historic cost of the assets is \$1.4 Billion. See the Commission's May 2011 report on Telecom at <http://www.comcom.govt.nz/dmsdocument/9332>. It should be no surprise what estimate Chorus will come back with for UCLL. However, the real policy debate - which needs to be resolved through the process - is as to when it is appropriate to go above \$1.4 Billion. To be addressed would be a combination of historic cost for reused assets and current cost for new fibre investment.
25. Above, we also identify our concern that this initial design and process phase is not sufficiently developed yet and would benefit from further consultation.

Is the MEA limited by the Act to a copper network?

26. We do not agree that the Act requires the Commission to use the copper network as the MEA. We consider that it is open to the Commission to model a different efficient and optimised network that would provide a real world competitive alternative to Chorus's UCLL network.
27. Below, we will develop the point that what is generally understood to be TSLRIC may not limit the Act's treatment of what is defined as "TSLRIC". Therefore, we will use TSLRIC¹ to describe the internationally applied methodology, in its various manifestations. We will use "TSLRIC" to refer to the Act's definition of that abbreviation in Schedule 1.
28. TSLRIC+ as a methodology is not limited to a particular technology as the MEA: to the contrary, the MEA is whatever is the modern equivalent asset, whether made up of copper, fibre, and/or wireless. Chorus is therefore arguing for a construct that is not TSLRIC+, as it differs in one of the most important respects. Its construct limits the MEA to copper.
29. Assume for present purposes that the service being modelled is access to and over the copper network, because that is what the service description states. Relative to that level of prescription, Parliament has chosen not to specify what the MEA will be. Indeed, the definition of "TSLRIC" says nothing at all about MEAs. There is nothing that states that the MEA must mirror the service being priced, and the way in which that service/functionality is provided (over copper). In fact the actual words of the Act do not even require an MEA as part of the construct. Notably, in 2011, Parliament did not change the 2001 definition of "TSLRIC" in any respect. The opportunity was not taken to (a) have the Chorus actual network as the basis for calculating price (as Chorus proposes) even at the IPP stage, and (b) specifying what the MEA must be.

¹ Which is how ACCC described TSLRIC, namely TSLRIC plus common cost contribution is TSLRIC+

30. Absent legislative constraints, the Commission's role is of course to determine the cost based price, applying TSLRIC+. Even if the service is one that requires copper, that does not mean that its pricing must or should be based on a copper network. If Parliament wanted that, it would have so stipulated. It didn't. The pricing can and should still be based on the actual MEA whether fibre, copper and/or wireless. The question of what the service is (the Act states it is a copper service) is different to the question as to how that service is priced. The Act permits it to be priced on a non-copper MEA. This has significance not only for the choice of fibre or copper in urban areas, but also the choice between (a) copper and (b) wireless (with some fibre including backhaul) in rural areas.

31. Chorus also argues that only copper can deliver certain services. Assuming that to be so, that does not change the TSLRIC+ approach that the price is to be modelled on the true MEA, whether, fibre, copper and/or wireless. In any event, all services identified by Chorus can in fact be delivered over fibre. Put another way there is the functionality no matter over what medium the service is delivered.

32. In summary:

- a. The Act is prescriptive as to the service being provided: it is a service provided over copper.
- b. But it is silent as to the separate question as to the future cost based price payable for that copper service.
- c. TSLRIC uses the modern equivalent asset as the basis for determining price.
- d. The Act does nothing to limit what is well known and understood: the modern equivalent asset is just that. It can be copper, fibre, wireless and/or other technology such as HFC.

33. **More detailed statutory interpretation:** Although we submit it is unnecessary to undertake a more detailed statutory interpretation, we add:

- a. The Courts (and therefore the Commission) generally have high regard to the overall text of the Act, its purpose and its context. Section 5(1) of the Interpretation Act 1999 requires this: *"The meaning of an enactment must be ascertained from its text in the light of its purpose and its context"*.
- b. Courts, and therefore the Commission, *"can rightly expect to be informed of such social, economic and contextual factors as may affect interpretation. An interpretation, illuminated by such contextual material, which places the statutory provision in its setting, can give a different, and often more satisfactory, result, than one based solely on grammatical and literal considerations. The court is better able to assess the impact of its decision on the relevant communities of interest."*²

² Burrows and Carter, Statute Law in New Zealand (4th ed) page 256. Footnotes omitted

- c. Although it comes in various forms, TSLRIC+ was a well understood regulatory and economic construct when the Telecommunications Act was enacted in 2001. The MEA would be just that: the modern equivalent network, whether copper, fibre, wireless, HFC, and/or whatever other technology would have been available.
- d. The sparse nature of the definition, "TSLRIC", shows that the Commission and the courts must look to broader context to decide what this means. For example, the "TSLRIC" definition requires "forward-looking costs". To economists and regulators forward-looking costs generally meant costs modelled on a hypothetical efficient network.
- e. Again, in the context of what economists and regulators understand, a context that the Commission and the courts can and should take into account, the MEA has a meaning that encompasses whatever network type (copper, fibre and/or wireless) that is the modern equivalent.
- f. Thus, having appropriate regard to context, the MEA of a copper network is not limited to a copper network: to the contrary it is the network that is the modern equivalent asset.

What if Chorus is right on its submission on the Act?

- 34. If Chorus is right, this would be a major departure from TSLRIC+ and therefore TSLRIC+ would no longer apply under the Act, or would apply with substantial modifications. An MEA is not a construct stated in the Act. It is a valuation tool available to the Commission to assist it to model TSLRIC+ costs. The application of some historic costs which are optimised and valued at their depreciated value can be informative of cost in a forward-looking cost-based world.
- 35. "Forward-looking costs" is readily consistent with that, when interpreted without the economic and regulatory backdrop. Chorus cannot have it both ways: argue for its narrow copper network interpretation on the one hand, contrary to what economists and regulators understand, while seeking to retain a favourable interpretation on the other as to forward-looking costs, which is also dependent on what economists and regulators understand.

Can and should the Commission move away from TSLRIC+

- 36. There is another way of looking at this. The definition of "TSLRIC" is sufficiently broad to accommodate modelling that is not limited to TSLRIC+. TSLRIC+ of course has been heavily criticised, the more so in relation to an end-of-life asset where TSLRIC+ produces pricing that is above what is considered to be appropriate cost.
- 37. Significantly, there is no definition in the Act of Total Long Run Service Incremental Cost. There is an abbreviation called "TSLRIC", which is defined in Schedule 1. This at one level could just as well be "ACME". What is defined as "TSLRIC", aka "ACME", is broad enough to

encompass a number of models and variations on the theme which are not necessarily confined to TSLRIC+. The definition of “TSLRIC” is broad and open-textured.

38. Now of course the use of the abbreviation, “TSLRIC” has some meaning in context, but it is not of itself decisive, and many definitions in Acts have extended and even different meanings than the actual words defined. As noted below, Acts also receive evolving interpretations to reflect new developments since the statute was enacted.
39. This is significant here, as, materially, the Act is to be interpreted not as at 2001 but as though it is currently speaking. It takes account of new developments. As Section 5 of the Interpretation Act states, “*An enactment applies to circumstances as they arise.*”. This supports the approach that:³
- “The courts normally apply an “ambulatory” or “updating” approach [to new developments] and find that the Act does cover these developments, provided two conditions are satisfied: first, that these developments are within the purpose of the Act and, secondly, that the words of the Act, albeit by liberal interpretation, are capable of extending to them.
40. Back in 2001, TSLRIC+ was widely used and accepted by regulators, and the copper networks were not in the end-of-life phase they are in now. TSLRIC+ was more suitable.
41. Things have changed. There has been considerable criticism of TSLRIC+, including by Chorus’s experts, CEG, in submissions on the MBIE Telecommunications Review. Many regulators have moved away from TSLRIC+ to other models such as building blocks. The environment is clearly one of moving away from the end of life copper network to fibre and wireless networks, such as the RBI and UFB networks, making TSLRIC+ unsuitable.
42. It is an appropriate interpretation of the Act, taking the perspective of the Act applying today and not 2001, to treat “TSLRIC” more as an “ACME” definition, and apply the words of the definition broadly to accommodate an up to date approach. In terms of the two requirements to be met when applying an Act to modern developments:
- a. The words in the Act permit this, even without taking a “liberal interpretation” as stated in the passage above, but in any event a liberal interpretation permits this;
 - b. Deriving the most reliable assessment of cost, and not over-estimating it, is clearly consistent with the purpose of the Act.
43. On this basis, instead of the square pegs and round holes of TSLRIC+, where TSLRIC+ for an end-of-life service does not produce a true cost price, the Commission could immediately move to a more fit-for-purpose approach.
44. A less radical approach is to stay broadly with a TSLRIC+ construct, adjusted to accommodate modern conditions as above. This includes as to the matters in the following section, which we submit can be achieved anyway with a normal application of TSLRIC+. The

³ Burrows and Carter, Statute Law in New Zealand (4th ed) page 388

Act permits substantial departure from a pure TSLRIC+ model, and that would achieve a more fit for purpose approach.

Options available to the Commission

45. Whether applying the type of interpretation noted in the last two sections, or applying a normal approach to TSLRIC+, the Commission has a number of options available to it to more relevantly and realistically model the cost. The following are just examples of multiple options available to the Commission. Importantly, it is not necessary to move away from a TSLRIC+ construct to achieve this outcome.
46. **Existing reusable assets at depreciated cost:** We agree with the approach outlined by Telecom at Para 23-28 of its submissions on the Issues Paper, in the Vodafone submissions and in the Frontier Economics report. In particular, for the reasons above, the Act is sufficiently broad and flexible to enable this much more sensible approach to end-of-life assets which should not be re-valued and should be fully depreciated. As the Commission itself has pointed out,⁴ TSLRIC can use a combination of historic and current cost elements. As the Commission said, *“Where elements of the cost are subject to realistic replacement, replacement costs can be used, where the costs are sunk, historic costs can be used...”*
47. **Use of fibre ducts and wireless assets:** The hypothetical network operator would be rolling out its copper network (if that is the MEA) at the same time as the UFB and other rollouts proceed. Chorus is doing those roll-outs anyway, with subsidies as well. Just as geographic features are facts that must be used as assumptions in the modelling, so too is the fact that Chorus is rolling out fibre at the same time. The incremental cost of hypothetically adding a copper line to a new trench is largely the cost of the copper. The cost of trenching should not be attributed to the copper network cost as it is a given that this is being done anyway. In LFC areas, the cost to Chorus of rolling out copper is not the cost of trenching etc, but the cost that Chorus would pay the LFC to add copper to its fibre trenches.
48. Similar issues arise as to other existing and parallel infrastructure, such as use of poles owned by the electricity companies.
49. There is also strong support for this approach in the definition of “TSLRIC”. The definition states that *“forward-looking costs...[take] into account the service provider’s provision of other telecommunications services”*. Notably, this is expressly in addition to “forward-looking common costs”. Chorus is rolling out UFB anyway, and RBI services too. That should be taken as an assumption, and the cost of trenching etc not factored into the model.
50. Alternatively or in addition, it can be taken as an assumption that:
 - a. There will be existing UFB fibre ducts and the like, through which copper can be run with minimal additional cost beyond the cost of the copper itself;
 - b. The cost of laying the ducts etc, should not be included in the MEA.

⁴ As quoted by Telecom at Para 25 of its submission

- c. Similarly as to other facilities such as using overhead poles and existing ducts with capacity.

51. **Model only the DSL footprint not the full network:** Chorus says that the “full copper network” should be modelled. We assume that includes that part of the network outside the footprint of MSANs. The well-known context at all times was that lines were only going to be unbundled over DSL-capable lines. (Chorus in its submission seems to say that it has broader UCLL obligations as to Telecom, but that is not so as Chorus does not sell UCLL to Telecom: it supplies different input products). To the extent that it is relevant, that is significant context in interpreting the legislation. In short, only the DSL-capable footprint (of an efficient provider) is to be taken into account when modelling the MEA. That footprint will be no bigger than the Chorus’s current DSL footprint (that is, the footprint over which a DSL service can be provided so that it is workable: this will exclude many end users that are too far away from the MSAN).
52. Similarly if fibre and wireless are the MEA. The relevant assets are only those fibre and wireless components that are within the copper DSL footprints of an efficient network operator (and no wider than Telecom’s actual DSL footprint).
53. **Using actual data:** Just as Chorus information might be informative, if the inherent bias risk toward sub-optimal and inefficient cost allocation is accounted for, so too will information from efficient FTTH network builders such as Northpower and other LFCs. We encourage the Commission to use their data in modelling the hypothetical network. In particular, it is submitted that the hypothetical network, if fibre, should be based more on overhead poles (eg; Northpower) than ducting (eg; Chorus).

Application of section 18

54. Section 18 has less of a role in the process than Telecom submits. The approach by the Commission in the UBA IPP determination is the better path. That IPP process had two steps: firstly, make the decision based solely on cost factors; second, if that produces a plausible range (that is, a range that can equally meet the objective of establishing cost), only then apply s18 to make the decision. Delineating the process in the way the Commission has done, and by setting up a clear framework as outlined below, will bring clarity to the process for the Commission and for submitters. Similarly as to issues such as the MEA. The first question is: what decision will result in the most accurate MEA? If that can only produce a plausible range, only then is s 18 used to choose from the range of options.
55. Why this is so is explained in our submissions in the High Court UBA appeal, which are enclosed, at Paras 9 to 11 and 44-82.
56. The Commission describes its approach as confining its decisions to the framework and confines of the IPP and applying s 18 only within that framework and confines. While that is supported, the difficulty is that this makes it quite unclear as to when and how s 18 is to

be applied, and that uncertainty is problematic for submitters, and also for achieving certainty of regulatory outcomes. It is not clear what this means. This is why we propose that the Commission has a more granularly defined process. This will also make the process clearer and easier overall.

57. In summary:

- a. The primary objective of the UBA and UCLL IPP FPP process is to derive a price based solely on cost. Although broadly stated, the service description of the FPP price, and “TSLRIC” are solely about cost. Section 18 is secondary to that. The High Court submission explains how the service description and s 18 and 19 are reconciled in this way. The same point applies to both the UBA IPP and the UCLL FPP. In particular, it is important to look to the broader context and purpose across all of Part 2 of the Act and Schedules 1 to 3.
- b. Most of the difficult decisions can be resolved by the Commission by solely applying factors other than s18. Doing otherwise takes the Commission away from a cost based price. Essentially, the question is usually, “What is the best decision we can make to derive the cost based price?”
- c. On the path to deriving the cost based price, there is a tool to determining that price which is not cost based. That is the determination of what is the MEA, which as noted above is just that: what is the modern equivalent asset of the asset being modelled. The same approach is taken to that question as is taken to cost based decision points. The Commission first assesses what is the MEA. If it cannot deduce the single most appropriate MEA on that basis, it can turn to s18 to resolve the impasse between the two or more choices. In other words, s 18 can be used to choose from a plausible range of possible MEAs. All this of course is done in this design and process phase so that a single MEA is chosen from the outset.
- d. That MEA is comprised of a combination of fibre, copper and/or wireless, built to the modelled level (eg if a fibre MEA, then the chosen combination of ducting and overhead poles).
- e. Section 18 is not at all about deriving a cost based price. It is about efficiencies and s 18(2A) objectives. That is different. Applying s 18 to the questions above takes the Commission away from a cost based price. Of course, cost based pricing is often regarded as the most efficient, but that does not mean that a s18-based decision is the same as a cost-based decision. “What **is** the cost?” is a different question from “what **should** the price be, taking into account efficiencies, etc?”.
- f. Sometimes, as to a particular decision during the process, the Commission is faced with a range of choices which are consistent with a cost based price (or consistent with the most suitable MEA). None of those options is better than the other. Then, and only then, can and should the Commission use s18 to resolve the impasse from that plausible range.

- g. This is what the Commission did in the UBA determination. All of its decisions were purely cost based (that is, based on costs evidence and costs reasoning), until it reached the point of a range of choices it could not resolve. That was the “plausible range”. Only then did the Commission use s 18 to make the choice from the plausible range. We think that is right and applies here and also to the choice of MEA.
- h. We consider that it is very important that the Commission continues to carefully delineate the approach in this way, by having two clearly defined sequential steps, stated in its scoping and process decisions in this process:
 - i. When the Commission is making decisions at each step it carefully and solely does so based upon costs evidence and costs reasoning, or upon factors as to what is the best MEA, without regard to s 18;
 - ii. If, and only if, the Commission reaches a situation where there are equally viable choices for achieving a cost based price or an MEA (a plausible range), does the Commission use s 18 to make the choice.
- i. This approach also has the benefit of reducing the major risk of double-counting s 18 factors at each stage. However, even on the two step approach noted above, the Commission will need to exercise care to avoid the magnification of s 18 effects, as it has identified in its Process and Issues Paper.
- j. As it happens, the Telecom submission on the High Court appeal comes closer to the above view than its submission to the Commission. Telecom states at Para 2(c) of its High Court submission:

“[I]t is important to consider what the legislature intended in terms of the interaction between section 18 of the Act and the IPP. Section 18 itself provides no information about what the efficient cost of the UBA service is, or how it should be estimated. Section 18 cannot drive a result that takes the Commission outside the scope of the IPP, or drive a result that adds a “premium” over and above the result delivered by the IPP. Rather, section 18 will guide the exercise of the Commission’s judgment within the IPP process itself. Ultimately, section 18 cannot displace the need for the Commission to make a decision based on evidence of efficient costs obtained through the proper application of the IPP.”
- k. The proposed two-step process will provide a valuable framework for the Commission and submitters, and it would meet the s18 and 19 requirements of the Act.

Backdating

58. Following our submission supporting not having backdating and that the decision on this should be made early in the process, we also agree with the points made by Telecom in its submission, concluding also that the Commission should signal early on that it will not backdate.

TSO

59. We submit that the TSO should be disregarded in all respects on this FPP. In particular, the future of the TSO is unclear. There are a number of options on the table in the Ministry's review. Certainly the status quo cannot be assumed: to the contrary, a different approach involving fibre and RBI is likely, and Chorus (and Telecom) may not have TSO commitments). This is too uncertain and the Commission cannot make reliable assumptions. The way to deal with this is by way of reconsideration of the determination under s59, based on change of circumstances.