

VODAFONE NEW ZEALAND LIMITED
SUBMISSION TO THE NEW ZEALAND COMMERCE COMMISSION



**CROSS-SUBMISSION ON FURTHER CONSULTATION PAPERS ON
ISSUES RELATING TO DETERMINING A PRICE FOR CHORUS' UCLL
AND UBA SERVICES UNDER THE FINAL PRICING PRINCIPLE**

Public version

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A Introduction

A1 Vodafone New Zealand Limited (**Vodafone**) welcomes the opportunity to comment on the submission's received in relation to the Commerce Commission's (**Commission**) further consultation papers on issues relating to determining a price for Chorus's UCLL and UBA services under the final pricing principle.

A2 As Vodafone set out in our initial submission on the UCLL Process and Issues Paper, our view is that the Commission has wide discretion to select an approach to TSLRIC modelling:¹

B1 While the Act provides the Commission with guidance, it is not prescriptive on the particular TSLRIC model that the Commission must apply. The approach taken by regulators internationally demonstrates a wide range of potential approaches, driven by different legislative and regulatory frameworks, objectives and timeframes. A similar plethora of approaches to TSLRIC is evident in economic literature. Put simply, there is no single concept of TSLRIC.

*B2 In our view, the Commission is on the right track in selecting a bottom-up TSLRIC model, which it will develop. We also support the potential modern equivalent assets (**MEA**) identified by the Commission, and in particular the proposed fibre and fixed wireless access (**FWA**) MEA.*

A3 Chorus' submissions suggest that this discretion is fettered in terms of the language of the Act, as well as by reference to the practice of regulators in other jurisdictions. Accordingly, Chorus argues that the Commission should model:

- (a) a copper network to estimate the TSLRIC(s) of UCLL and SLU STD services; and
- (b) an MEA that utilises Chorus' actual copper network to estimate the TSLRIC of the UBA STD service.²

A4 Vodafone strongly disagrees with this analysis, and we remain of the view that:

- (a) the Commission retains a wide discretion in determining an approach to TSLRIC cost modelling (including in relation to MEA selection); and
- (b) a proper application of TSLRIC principles, with reference to the practice of regulators in other jurisdictions, strongly supports a conclusion that a fibre and FWA MEA represents the lowest cost solution capable of providing the relevant functionality (and so presents the most appropriate candidate for selection given the limited information available to all parties at this point, for producing an appropriate TSLRIC price).

A5 Vodafone has sought the advice of Webb Henderson and Network Strategies in relation to both the legal and regulatory best practice components of this analysis respectively.³ Their advice is included with, and should be read as part of, this cross-submission.

¹ Vodafone *Submission on the UCLL Process and Issues Paper* (14 February 2014) at [B1] – [B2].

² Chorus *Submission in response to the Commerce Commission's Further consultation on issues relating to determining a price for Chorus' UCLL and UBA services under the final pricing principle* (11 April 2014) at [15] (the **Chorus Further Consultation Papers Submission**).

³ Webb Henderson *UCLL and UBA Price Review – Selection of an appropriate MEA* (29 April 2014) (the **Webb Henderson advice**) and Network Strategies *Cross-submission on UCLL and UBA TSLRIC further consultation paper: Report for Vodafone* (30 April 2014) (the **Network Strategies Cross-Submission Report**).

A6 In addition to addressing these points, this submission also provides further comments (primarily in response to Chorus' submissions) on the Commission's approach to information requests and confidentiality, as well as to backdating.

B Selecting an MEA

B1 The Commission's wide discretion in selecting the appropriate MEA

B1.1 As set out above, our view is that the statutory framework affords a wide discretion to the Commission in determining the MEA. This position is affirmed in the Webb Henderson advice, which broadly agrees with the conclusions on the Commission's discretion that were reached in the Dr James Every-Palmer on MEA selection. The Webb Henderson advice observes:⁴

provided the Commission acts consistently with administrative law standards of reasonableness and fairness, there is very little constraining the Commission's discretion to determine the substantive outcome of the selection of an appropriate MEA

B1.2 This approach can be contrasted to the Chapman Tripp advice, which concludes that the Commission is not entitled to select an MEA that does not enable provision of the range of the service that is required to be provided.⁵ On that basis, Chorus argues that the MEA selected must deliver all functions and retail services that are now delivered via the relevant STD service.⁶ To do otherwise, it suggests, would result in the relevant service being "...redefined by a focus on a TSLRIC analysis utilising MEA if the hypothetical scenario involves a service which cannot process the full functionality which access seekers currently require to provide their existing range of retail services."⁷ Chorus considers that its copper network is the only technology that can deliver the full functionality of current STD services without "additional fixes" necessary to support all services and applications currently consumed by end users.⁸

B1.3 We do not agree with Chapman Tripp's view that the Commission is, as a matter of law, precluded from selecting an MEA that (for example) results in some element of change to end user services. In this respect, we prefer the conclusions of Dr Every-Palmer on the Commission's broader discretion in selecting an MEA. In our view, the Commission is not constrained to a copper only MEA by any interpretation of "the service" as used in the statutory definition of TSLRIC. Instead, the ability to "abstract" away from in-use technology for the purposes of modelling an efficient price is inherent to the TSLRIC concept. This is not contingent on the statutory language employed in this context. On this basis, we consider that the Commission's discretion is not constrained by any conclusion that "the service" is a pre-defined concept that requires a particular outcome in the exercise of the Commission's discretion in selecting an appropriate MEA.⁹

⁴ *Webb Henderson Advice* at [4].

⁵ *Chapman Tripp Memorandum on the UCLL and UBA pricing review determinations – legal framework* (11 April 2014) at [21].

⁶ *Chorus Further Consultation Papers Submission* at [61] – [62] and [67].

⁷ *Chorus Further Consultation Papers Submission* at [66.2].

⁸ *Chorus Further Consultation Papers Submission* at [90] – [93].

⁹ This view is set out in further detail *Webb Henderson advice*, which is attached to this submission, and responds to the legal issues identified in both the opinions provided by Dr James Every-Palmer and Chapman Tripp (as they relate to MEA selection), for the Commission and Chorus respectively.

- B1.4 We consider that applying the MEA concept in the way proposed by Chorus would be difficult to reconcile with any orthodox application of TSLRIC. The 'long run' concept within TSLRIC refers to a period over time in which all the inputs that a firm uses to provide relevant services are variable. TSLRIC methodology presupposes that obsolete technology will be replaced by newer technology (which the Commission refers to as a "technically up-to-date or current asset"¹⁰). Chorus turns this principal on its head and proposes instead that MEA selection must not favour modern technology if this would result in any change that might affect end user devices or applications. Accepting this proposition would require the Commission to place greater weight on 'equivalent' at the expense of 'modern' in MEA selection and, in reality, to interpret 'equivalent' as meaning 'existing'.
- B1.5 In addition, with respect to UBA, we do not accept Chorus' contention that its copper local loop network is a given. As set out above, and in the Webb Henderson advice, the Commission has a broad discretion in selecting the MEA for both services. While Chorus may theoretically be correct that "current DSL technology is modern and the lowest cost technology for providing bitstream services *over copper*" (emphasis added), although we do not know, if there is a modern and lower cost approach to deliver the core functionality of the UBA service then this should be considered as an MEA candidate.¹¹
- B1.6 This principle presumably underpinned the Commission's initial view that Vodafone's RBI wireless product may be a suitable input for providing a UBA service. However, we consider that a wider approach is appropriate. Specifically, we do not consider that the Commission is confined to identifying available Layer 1 (or above) access services out of which to construct the UBA service.
- B1.7 In Vodafone's view, it is most unlikely that a hypothetical new entrant, assumed to be taking the place of Chorus and meeting the requirements that Chorus faces,¹² would elect to deploy a network that replicates Chorus' existing copper network. Such a choice would involve substantial risk given the New Zealand Government's policy commitment to fibre, and the structural and legislative changes that it has made to realise transition to fibre. This choice would also be difficult to reconcile with Chorus' own earlier views that the long term interests of New Zealanders are best realised by investment in superior retail services provided over fibre, rather than copper based investment.¹³

B2 How should TSLRIC principles then be applied to MEA selection in this case

- B2.1 Chorus argues that the approach to MEA of other regulators implies that its definition does not allow for any departure from the functionality of the regulated service. Vodafone strongly rejects this analysis and agrees with Network Strategies that:
- (a) in using forward-looking costs in the estimation of a TSLRIC the Commission is required to develop a cost model based on a hypothetical efficient network using the MEA construct;

¹⁰ Commerce Commission *Process and issues paper for determining a TSLRIC price for Chorus' unbundled copper local loop service in accordance with the Final Pricing Principle* (6 December 2013) at [100] (the **UCLL Process and Issues Paper**).

¹¹ See also the discussion below at C in relation to a single MEA common to the UCLL and UBA service.

¹² Chorus *Further Consultation Papers Submission* at [28].

¹³ Chorus *Submission in response to the revised draft determination on the benchmarking review for the UCLL service* (5 June 2012) at [5].

- (b) there is no evidence of regulators elsewhere insisting that the MEA must replicate exactly the full functionality of the legacy network;
- (c) while there are differences in approaches between different regulators, the common thread is the emphasis on 'lowest cost', rather than consistent statements about replicating functionality; and
- (d) the Swedish model provides a particularly relevant precedent for the Commission, showing that it is feasible for a LRIC model to accommodate multiple MEAs, which facilitates lowest cost technology choice.

Performance adjustments

- B2.2 Chorus argues that the performance adjustment that would be required if a fibre network were used to estimate TSLRIC is without precedent and would be so difficult as to be practically impossible.¹⁴ Elsewhere, it appears clear that Chorus' opposition has more to do with concern that such adjustment is "completely untested internationally"¹⁵, than with difficulty inherent in any complex analysis. However, we also note that Chorus also considers that a copper MEA would require effectively the same level of optimisation considerations as implied by a fibre MEA.¹⁶
- B2.3 At a minimum, Chorus suggests that a performance adjustment would require a copper MEA to be modelled in parallel. As indicated in our primary submission at paragraphs C15 *et seq.*, Vodafone has no objection to this approach.
- B2.4 However, we do not accept Chorus' argument that considerations such as the need to avoid confronting additional and unique issues¹⁷ or risking completion of FPP processes by 1 December 2014¹⁸ have any place in the Commission's approach to MEA selection. Indeed, we consider that arbitrarily constraining the Commission's scope of enquiry in order avoid confronting issues that ought to be addressed or to meet a discretionary administrative target would serve to weaken the ultimate decision reached. In this respect we also refer to our primary submission.¹⁹
- B2.5 As we have said in earlier submissions, there is nothing to suggest that the requirement to make a performance adjustment is fatal to application, for example, of a fibre + FWA MEA.²⁰ As identified by Network Strategies, the Commission is equipped to conduct a performance adjustment analysis, but it is also possible that a TSLRIC analysis would conclude that it is not required.²¹ Neither scenario precludes a fibre-based MEA.

¹⁴ Chorus *Further Consultation Papers Submission* at [18].

¹⁵ Chorus *Further Consultation Papers Submission* at [84.3].

¹⁶ Chorus *Further Consultation Papers Submission* at [81].

¹⁷ Chorus *Further Consultation Papers Submission* at [84].

¹⁸ Chorus *Further Consultation Papers Submission* at [86].

¹⁹ Vodafone *Comments on further consultation papers on issues relating to determining a price for Chorus' UCLL and UBA services under the final pricing principle* (11 April 2014) at [H6]– [H14] (the **Vodafone Further Consultation Papers Submission**).

²⁰ Vodafone *Cross-submission on further consultation papers on issues relating to determining a price for Chorus' UCLL and UBA services under the final pricing principle* (28 February 2014) at [C6] (the **Vodafone UCLL Process and Issues Paper Cross-Submission**).

²¹ Network Strategies *Cross-submission Report* at section 7.

B3 Addressing other (non-)relevant functionality

- B3.1 Vodafone remains strongly of the view that the Commission's discretion in adopting an approach to TSLRIC modelling permits the Commission to identify a list of "core" or "relevant" functionality that the MEA should provide. We also consider that an appropriate assessment of TSLRIC principles supports the preliminary list of features identified by the Commission in its UCLL Process and Issues Paper.²²
- B3.2 We disagree with Chorus that certain limitations on MEA selection should be imposed based on:
- (a) hypothetical cost impositions on retailers or end-users; or
 - (b) changes to the retail services that are currently provided (as part of a "copper ecosystem") using existing wholesale services.
- B3.3 As a preliminary point, we note that MEA selection for the purpose of TSLRIC modelling is, as a matter of fact, incapable of having any of the effects referred to immediately above. However, assuming that these matters might be relevant for the purpose of the hypothetical exercise that is MEA selection, the following observations are important:
- (a) To accept that MEA selection turns on whether it will support all end user devices/applications currently using the relevant service really is the tail wagging the dog. On Chorus logic, if there were ten end users who still used teleprinters then the Commission must select an MEA that enabled those teleprinters to continue in use without any need for an adjustment or 'fix' (and the relevant MEA would be this network and no other).
 - (b) If legislative intent had been that the Commission should, as a matter of law, be constrained to selecting an MEA that delivers all functions of the existing service avoids any resulting change to end user services, this is difficult to reconcile with specification of the TSLRIC pricing methodology. Orthodox application of this methodology requires prices to be set with reference to notional cost incurred when delivering the service via a hypothetical network. Clearly, this methodology provides for, and indeed requires, deviation from reality. If Parliament had intended that no such deviation should occur, and that all elements of the Commission's assessment should be anchored to the actual network actually being used to deliver the relevant service, it is not unreasonable to expect that it would have specified a pricing methodology that specifically requires that approach instead.
 - (c) The costs of any adjustment required by changes in service functionality of the type referred to in Chorus' submission will not, in reality, be borne by Chorus. Any costs will be incurred exclusively by end users and/or retailers. For example, the cost of replacing or resolving configuration issues with DSL modems, SKY set-top boxes, security alarms etc. are costs that will be borne by retailers and/or their customers (i.e. end users). In the same way, the replacement of analogue television sets, as part of the Government's digital switchover, imposed no costs on broadcasters, rather costs were borne by viewers of content (again, end users). To the extent that a change in service function required end

²² Commerce Commission *UCLL Process and Issues Paper* at [101] – [103].

users and/or retailers to make adjustments in order to continue to consume the same wholesale or retail services, or to migrate to new wholesale or retail services, these are decisions and costs that Chorus has no involvement in. Accordingly, we do not understand why it would be necessary to include in a TSLRIC model the cost of measures that would enable an MEA to provide the functionality of the relevant service (where the MEA selected is not Chorus' existing copper network).²³ There is no basis for any cost of equipment necessary to address costs of 'technical fixes' that Chorus will not conceivably pay for. This should only be considered where Chorus can demonstrate that it will bear this cost itself. It should not be compensated costs that are borne exclusively by retailers or end users. Finally, we note a change (or loss) of functionality would not alter Chorus' ability to provide a service or determine the amount that it may charge for doing so.

- (d) Change to service functionality in the near to medium term has, in any event, already been assumed by end users and retailers in light of transition from copper access to fibre access, which is gathering pace.²⁴ As Chorus has previously observed, the Government has made a policy commitment to fibre and judges that New Zealand's interests are best served by prioritising innovative new fibre services, with structural and legislative changes made to support this policy.²⁵ The transition to fibre will inevitably require 'fixes' to end user devices and applications of the sort Chorus refers to. In this context, retailers and end users have no expectation of a continuing service in the long term and have adjusted their expectations to account for fibre as the technology of the future.²⁶
- (e) In any event, and relevantly for the purposes of section 18 of the Act, the extent to which MEA selection might (notionally) require certain fixes to end user devices and applications tells us nothing about how end user welfare in aggregate terms might be affected. A requirement that no individual end user should suffer any change to their current usage is unhelpful in considering either consumer welfare or MEA selection. We also note Chorus' prior arguments that greater economic efficiencies are inherent in a fibre network.²⁷

B4 Chorus' obligations outside of the STDs are not relevant

B4.1 Chorus argues that, for purposes of MEA selection, a hypothetical new entrant is assumed to be taking the place of Chorus and meeting the requirements that Chorus faces.²⁸ It suggests that a new entrant delivering the UBA service would have the same equivalence of inputs obligations.²⁹ It also notes that existing regulatory obligations, specifically the TSO, together with 'market

²³ As suggested by Chorus: see Chorus *Further Consultation Papers Submission* at [95].

²⁴ Chorus, for example, had completed just under a quarter of its UFB as at the end of 2013: see Chorus *Chorus interim FY14 result – Reshaping the business to be sustainable* (24 February 2014). See also the discussion in Network Strategies *Cross-Submission Report* at p 6.

²⁵ Chorus *Submission in response to the revised draft determination on the benchmarking review for the UCLL service* (1 June 2012) at [1] and Annex B.

²⁶ See Martin Cave "Regulating the price of copper in New Zealand" (13 June 2012), page 12.

²⁷ See, for example, Chorus *Submission in response to the revised draft determination on the benchmarking review for the UCLL service* (5 June 2012), which notes that directing further investment to copper would be inconsistent with dynamic efficiency and will likely have an adverse impact on productive efficiency. Chorus notes at [161] that "The Government has made a clear decision that new services and applications should be provided over fibre in the future. Redirecting that investment and focus onto copper is not consistent with that policy choice, does not have regard to dynamic efficiency and increases the risk of the UFB investment by delaying fibre uptake."

²⁸ Chorus *Further Consultation Papers Submission* at [28].

²⁹ Chorus *Further Consultation Papers Submission* at [21].

reality' mean that the MEA selected by the Commission must support all functions of the STD service now delivered.³⁰

- B4.2 Vodafone considers that the TSO is of limited relevance for the purposes of MEA selection. As Dr Every Palmer notes in his 12 March advice, the obligations contained in regulatory instruments are historic and contingent in nature and cannot properly operate to constrain the manner in which a hypothetical question is addressed.³¹
- B4.3 Moreover, putting aside the issue of whether regulatory obligations do in fact constrain the Commission's choice of an MEA in the manner that is suggested, it appears to us that Chorus' identification of the obligations that an MEA entrant should be subject to is incomplete. If the Commission were to accept that a hypothetical new entrant would be required to meet all obligations contained in the TSO, for example, then it should, on the same analysis, require that the entrant meet all regulatory and contractual obligations to which Chorus is subject.
- B4.4 Would an entrant that is assumed to be taking the place of Chorus and meeting the requirements that Chorus faces not also be subject to contractual obligations to deploy a fibre network? If so, would these obligations not direct an entrant towards deploying a fibre access network in those areas where these obligations apply? It seems to us that the answer to both of these questions is yes.

C A single model for UCLL and UBA should be adopted

- C1 Chorus considers that the UCLL and UBA services should be modelled separately.³² In particular, it argues that the Commission must undertake "standalone assessments of the MEA".³³ The view that a UBA MEA should assume Chorus' copper network seems central to this argument.
- C2 As the Chapman Tripp advice notes, parallel work may be efficient and permissible in the context of UBA and UCLL price review processes. We agree with this as a principal of approach. There is no restriction on the Commission using the same cost model and/or any discrete ingredient within a single cost model to generate price review determinations for both the UBA and UCLL services. Whether to do so is a matter for the Commission's discretion, but we note that broad considerations relating to administrative efficiency, cost and resources, complexity of analysis would all tend to support selection of a single MEA rather than an alternative approach.
- C3 In addition to the positive case for selecting a single MEA, as noted in paragraph C14 of our primary submission, the Commission cannot use different MEAs where doing so would result in inconsistent logic and analysis as between its final determinations for each service.³⁴ To the extent that inconsistent logic and analysis does result as between determinations, this would in principle expose any determination based on this logic to risk. We doubt that evidence would support the Commission contemporaneously drawing different conclusions in relation to MEA.

³⁰ Chorus *Further Consultation Papers Submission* at [68].

³¹ James Every-Palmer *FPP determination: Issues re service description and the modern equivalent asset* (advice to the Commerce Commission, 12 March 2014) (the **12 March Advice**) at [39].

³² Chorus *Further Consultation Papers Submission* at [132]-[137].

³³ Chorus *Further Consultation Papers Submission* at [134].

³⁴ Vodafone *Further Consultation Papers Submission* at [C14].

C4 As Network Strategies notes in its report provided with this cross-submission, using the same MEA in cost modelling exercises for UCLL and UBA price review determinations is consistent with regulatory practice elsewhere and is likely to result in MEA assumptions are consistent for both services. In particular, this approach also reflects the strategy of an efficient operator and as such complies with the final pricing principle. Contrary to Chorus' suggestion, an efficient operator would not deliver a bitstream service on the assumption of an inefficiently deployed UCLL.

D The importance of wireless for rural customers

D1 Vodafone's view remains that a fibre-based solution for the majority of customers is likely to represent the most appropriate MEA in this case. However, regardless of the wireline solution selected for the majority of customers (i.e., whether it is copper or fibre based), an appropriate MEA must include a wireless solution for certain rural customers.³⁵

D2 We do not accept Chorus' contention that a wireless solution is ineligible as an MEA candidate for either UCLL or UBA. Specifically, for the reasons set out above in section B, Chorus' restrictive view that the MEA must as a matter of law represent the full-functionality of its existing copper network cannot be accepted. This view is inconsistent with the orthodox application of the TSLRIC pricing methodology. It follows then that the Commission should reject the additional criteria, as well as the "pass / fail" approach to assessment set out by Analysys Mason, that underpin Chorus' analysis.

D3 Instead, we agree with the Commission's preliminary analysis on the relevant functionality of the MEA, identified in its UCLL Process and Issues Paper. In particular:

- (a) **Copper:** We agree with the Commission's assessment that its preferred option is to favour "modern" over "equivalence" in the case of any copper requirement, permitting a wireless MEA on this ground.
- (b) **Layer 2 input:** We agree with the Commission's assessment that a wireless solution can be utilised to deliver a Layer 2 (or higher) service.³⁶ This is properly a matter for the Commission's expert judgement, having regard to relevant factors. Chorus' argument that a wireless solution should be rejected because it does not permit a Layer 1 service should be rejected because:
 - (i) as acknowledged by Analysys Mason, an access seeker adding further Layer 2 services is possible;³⁷ and
 - (ii) the likely candidate areas for wireless "zones" (assuming a geotype approach is adopted) in a TSLRIC model will invariably reflect areas where there has been no unbundling using UCLL (making Analysys Mason's assertion that there would be no "economic space" for a competing Layer 2 provider in a wireless solution moot);³⁸

³⁵ See Vodafone *Submission on Further Consultation Papers* at [C5] – [C8].

³⁶ Commerce Commission *UCLL Process and Issues Paper* at [115].

³⁷ Analysys Mason *Report for Chorus: Response to the Commission* (12 February 2014) at p 17 (the **Analysys Mason Initial Report**).

³⁸ Analysys Mason *Initial Report* at p 24.

We also note that Analysys Mason concedes, in principle, that a wireless solution is appropriate for at least for “ultra-rural” areas, observing that:³⁹

Ultra-rural customers may be served using wireless, but this is a separate issue to the selection of the MEA to serve (say) 99% of the population. These ultra-rural customers are often not even provided with broadband services, and UCLL is not a product used to serve them. In general, cost modelling can (if required) take these ultra-rural customers into account. (emphasis added)

In our view, the restriction to “ultra-rural” is not appropriate and is inconsistent with the relevant TSO obligations (if Chorus’ arguments regarding its applicability were to be accepted). The Commission should instead be guided by the TSLRIC principles set out above (i.e., the lowest cost solution). Nevertheless, the principle remains that a wireless solution for rural customers is a credible MEA candidate.

- (c) **Point-to-point:** Again, we agree with the Commission that wireless technology can be deployed as a point-to-point network.⁴⁰
- (d) **Cost, best-in-use technology and services:** We have addressed each of these issues in our earlier submission, but for completeness restate the view that we consider wireless technology is capable of providing the core characteristics of the UCLL service. The threshold for cost can be determined by assessing the point at which it becomes economic to deploy a wireline solution and, in terms of available bandwidth, we note that the density of rural areas (especially in the context of utilising digital dividend spectrum) ensures that appropriate capacity will available to end-users.

D4 We do not accept Chorus’ contention that a wireless solution is not an appropriate input for UBA. As set out above, our view is that a single MEA and cost model should be preferred for both UCLL and UBA. On this basis, we consider that Vodafone’s RBI network provides useful information for understanding the wireless component of a fibre and FWA MEA, but as set out in our earlier submissions we do not believe that the Commission is constrained (or that it would be the appropriate outcome) to utilising the actual RBI service.

D5 Finally, accepting that there are strong legal and policy reasons for including a wireless component in the appropriate MEA for both the UCLL and UBA services, we note that there is no practical impediment to the Commission adopting this approach. Instead, as Network Strategies observe, the Swedish model provides a strong precedent for the feasibility of LRIC modelling incorporating multiple MEA components.⁴¹ Similarly, the Commission can draw on earlier New Zealand experience from TSO cost modelling.⁴²

E Basing decisions on the best available information

E1 Ensuring that industry participants provide the Commission with the best available information to inform its decisions in relation to the TSLRIC cost model, and to form the basis for the

³⁹ Analysys Mason *Initial Report* at [1.4.2].

⁴⁰ Commerce Commission *UCLL Process and Issues Paper* at [115].

⁴¹ Network Strategies *Cross-Submission Report* at p 11.

⁴² Network Strategies *Cross-Submission Report* at pp 11 - 12.

assumptions and inputs that underpin it, is critical to the quality of the price review determinations that will result from the current process. We acknowledge that information requests pursuant to statutory powers are likely to be the appropriate way for the Commission to gather this information.

- E2 While the Commission has previously stated that it would be issuing compulsory statutory information requests to “Chorus and other industry participants”⁴³, we note that s 98 requests that have been published so far are confined to Chorus and Vodafone. In our view, this is materially insufficient and ignores most obviously a number of significant network operators who will provide an essential reference point for assessing the appropriate costs to underpin the TSLRIC cost model.
- E3 Pursuant to ss 98(a) and (b) of the Commerce Act 1986, and s 15(f) of the Act, the Commission may request information and document from any person where it considers that this is necessary or desirable for the purposes of carrying out its functions and exercising its powers. The use of statutory powers is potentially subject to a proportionality test, in the sense that the Commission should consider whether there is any appropriate but less intrusive means of obtaining information, and where this is the case it should prefer the least intrusive means.⁴⁴ However, subject to this consideration statutory provisions confer on the Commission broad discretion in terms identifying information that it considers relevant for the purpose of performing a function. They also give the Commission the ability to obtain information from any person that reasonably considers is likely to hold relevant information.
- E4 Having regard to the scope of these powers, and the need to secure the best available information to support its decision-making, we consider that the Commission should look to other network operators which Chorus itself has characterised as competitors. For example, in a 2013 management commentary, Chorus identifies the following operators of “Other networks” as its competitors:
- (a) Vodafone;
 - (b) Vector;
 - (c) FX Networks;
 - (d) Kordia;
 - (e) Regional fixed wireless access network operators (such as Woosh, CallPlus and Now); and
 - (f) the three local fibre companies (Northpower, Ultrafast Fibre, and Enable Networks) which are deploying fibre networks in 9 of the 33 UFB candidate areas (together, the **LFCs**).
- E5 In our view, the major fibre providers (Vector, FX Networks and the LFCs) are an essential starting point for understanding modern, efficient costs for deploying fixed access networks. This is especially the case given that a fibre MEA is a highly likely candidate for the purposes of TSLRIC analysis. All of the operators listed above, and especially Vector and the LFCs, have considerable and recent experience deploying fibre access networks) and, even if a copper MEA is preferred,

⁴³ Commerce Commission *UBA Process and Issues Paper* at [18].

⁴⁴ See, by analogy, *Tranz Rail v District Court*, at Wellington [2002] 10 TCLR 552.

because the overwhelming majority of cost is driven by Layer 0 inputs (such as ducting and pole access), these operators will in all case be an essential source of current (and essential) information to inform the Commission's price review process.

- E6 We also recommend that the Commission seeks information on commercial terms of access to Layer 0 infrastructure. As has been acknowledged by industry in relation to this consultation process, the majority of the UCLL and SLU costs are in the civil components of the service (regardless of MEA choice).⁴⁵ As such, understanding the existing and potential operators for a network operator (in the context of deploying a nationwide MEA) to reduce these costs through infrastructure sharing is essential. In terms of current examples, which serve as a useful starting point for this analysis, we note that:
- (a) Chorus itself has reported that it has concluded a deal with the Greymouth electricity lines companies, Westpower, to deploy UFB fibre on Westpower's existing power poles (along with an agreement with local company Electronet to carry out the construction in the region).⁴⁶
 - (b) Northpower has had considerable success with its overhead UFB fibre deployment, with (for example) TUANZ attributing the success of their roll-out in part to its use of overhead deployment and innovations in relation to customer lead-ins:⁴⁷

[...] Northpower has pioneered a new approach to connecting properties to the network. Instead of digging a trench and putting all the equipment under ground, they put everything in a box on the pole outside the customer's house. Overhead fibre lines are impossible to tell apart from the power lines and Northpower has designed and built a splitter box that sits on the pole making it both quick to deploy and easy to revisit should the need arise.

Each box serves four households (with another four splitters in place for any future unbundling move) and as a plug and play unit is so simple even I could connect each house, although I'm happy to say I wasn't allowed to have a go.

The time to connect each property is reduced - on average it takes a couple of hours but the record is just over an hour from the time the team of two arrived on site to fully connect to the house. Mason says the advantage is twofold - a faster deployment and a cheaper one. Much cheaper than digging trenches and laying cable and much less invasive.

- (c) Utility operators (such as electricity lines companies), and other companies with assets such as poles and ducts have strong incentives to offer access to adjacent network industries (as a way to both share costs and generate additional revenue).

F Approach to confidentiality

- F1 As set out in our primary submission, Vodafone strongly opposes a confidentiality process that would limit access to confidential information to external counsel and experts only.

⁴⁵ Chorus *Submission on Further Consultation Papers* at [93].

⁴⁶ Chorus *Ultra-fast broadband on the horizon for Greymouth* (media release, 17 December 2013), available at: <http://www.chorus.co.nz/ultra-fast-broadband-on-the-horizon-for-greymouth>

⁴⁷ Paul Brislen *Fibre to the Country* (TUANZ, 30 October 2013), available at: <http://tuanz.org.nz/blog/2013/10/29/fibre-to-the-country>

- F2 There is no requirement for a s 100 order to be made. Whether an order should be made, and the scope of any order that is made, are both matters for the Commission's discretion. Making a s 100 order is required only where context demands this.⁴⁸ The terms of any s 100 order must be balanced with the need to ensure a robust and fair decision making process. A key element of any such process is that the information relied on by the Commission in making its decision is verified and tested. The nature of this information in this case means that a controlled disclosure to industry participants is likely to be necessary as this appears to us the only practical means by which this can occur. Any s 100 order must recognise these circumstances.
- F3 Chorus seeks a s 100 order that would allow only external counsel and experts to see subject confidential information. It concedes that in-house lawyers, rather than external counsel, may "manage the confidentiality process"⁴⁹ but it is suggested that they might do so without necessarily sighting the subject confidential information.
- F4 Chorus states that its position is based on the following principles:
- (a) appropriate protection of confidential information, including that only information relevant to the exercise is subject to this regime and confidential information is made available only to those who really need to see it;
 - (b) provision of sufficient transparency for parties to effectively participate in the Commission's processes; and
 - (c) simplicity of administration.⁵⁰
- F5 For the following reasons Vodafone consider that an order on terms suggested by Chorus would not in fact comply with these principles:
- (a) It would have the effect of preventing parties from drawing on expertise within their own organisations (i.e. internal advisors) in order to provide comment on matters that affect them. Confining disclosure to external advisors only clearly conflicts with principles of avoiding unnecessary costs and burdens on business, and the effective and efficient conduct investigations.
 - (b) To comment on some types of information, and in particular to draw the Commission's attention to any inaccuracies, or incomplete or misleading information, internal advisors will "really need" to see the subject information. Parties must be able to understand and prepare their responses to Commission findings, and this requires a high degree of transparency and disclosure. This is a critical element of the consultation process and the Commission's ability to reach properly reasoned decisions. Some parties have not engaged external advisors in the price review process to date (therefore, by definition, there is no external party with knowledge of the parties underlying business information that can test information supplied by other parties or Commission analysis based on this).

⁴⁸ As the Court of Appeal noted in *Commerce Commission v Air New Zealand Limited* [2011] NZCA 64 at [46], making a s 100 order is a serious step and before the Commission does so it should satisfy itself that such an order is necessary in the context of the particular investigation being undertaken. Any orders made, and their scope and duration, should be kept under review. Depending on the stages of the investigation, the weight to be accorded to different factors may vary. Further, any orders must be tailored to the circumstances of the case.

⁴⁹ Chorus *Further Consultation Papers Submission* at [184].

⁵⁰ Chorus *Further Consultation Papers Submission* at [182].

Even where parties have previously engaged external advisers, the effect of a s 100 order on terms sought by Chorus would be to force parties to extend terms of engagement to include review and verification of information supplied to the Commission, work that could equally well be done in-house. Indeed, external advisers may in any case not have the degree of knowledge of the New Zealand market and context that is necessary to undertake this review and verification. Again, the Commission must consider these circumstances when considering the extent of any s 100 order.

- (c) Moreover, even under Chorus' proposed approach, internal advisors would need sufficient knowledge of the subject information to be able to instruct external advisors as to the work that should be done to test and verify it, which will almost certainly require a degree of knowledge of the subject information.
- (d) Ultimately, for some parties, the cost of engaging external advisers in order to comply with an approach to review and verification of confidential that was not established at the outset of UBA and UCLL price review processes is likely to be such that they elect not to participate, with the result that parties ability to participate in consultation is affected by an 'inequality of arms'.

F6 In summary, we cannot see any compelling rationale for the restrictive and unworkable approach suggested by Chorus. Parties including Chorus will in a variety of contexts (including due diligence exercises) acquire sensitive commercial or confidential information in circumstances where no statutory protection applies to the treatment of that information, and where parties are expected to put in place protections that control distribution of the information and avoid its use for any purpose other than that for which it was supplied. These protections, including provision of personal undertakings regarding treatment of confidential information, could equally well be used in the present case to address issues that Chorus claims would arise if internal advisers were given sight of confidential information.

F7 Ultimately, if the Commission doubts that sufficient protections can be put in place to allow internal adviser to receive and control confidential information, it can still facilitate the involvement of internal advisers by establishing a data room and allowing them to make use of that room to prepare a proper and considered response to the Commission draft findings, including by i) discussing matters between themselves; ii) without disclosing confidential information outside the room, using other materials available to them and testing the robustness of the Commission's economic modelling.

F8 Finally, we have difficulty with Chorus suggestion that the in-house counsel should be limited to managing process issues associated with a s 100 order. There is no proper basis for confining in-house counsel in this way. Both fall within the definition of a "lawyer" within section 6 of the Lawyer Conveyancers Act 2006 and are subject to identical professional obligations and sanctions. External counsel have no greater ability to "partition their minds" in avoiding future conflicts than internal counsel. They should therefore be treated identically.

F9 This equality approach would be consistent with the position taken by regulators and courts in other jurisdictions. For example, the UK competition authorities and the Competition Appeal Tribunal have permitted disclosure to be made to in-house counsel (and, indeed, internal experts more generally) in order to test information and analysis as required to discharge statutory

functions.⁵¹ This approach reflects a point often made that there is no real distinction to be drawn between the position of in-house counsel and external counsel.⁵²

G Backdating

- G1 Subject to the following limited comments, our views in relation to backdating remain as set out in our primary submission.
- G2 Chapman Tripp has advised Chorus that backdating of a price set by a price review process is required as a matter of law. It considers that where courts have analysed and opined on provisions of the Act the Commission is required to adhere to such analyses and opinions.⁵³ Whether a court has directed that a certain course of action should be taken, or has simply made an observation that does not require any particular action, is expressed to be irrelevant. It seems to us that accepting this argument would bind the Commission to following an extremely broad range of judicial statements that may not provide guidance in any true sense. We disagree with this proposition.

⁵¹ See, for example, orders relating to confidentiality ring made in *British Telecommunications PLC v Office of Communications (Ethernet Determinations)* 1205/3/3/13.

⁵² Ruling on interventions, confidentiality and permission to appeal *Virgin and others v. Ofcom* [2010] CAT 16 at [30].

⁵³ Chapman Tripp *Memorandum on the UCLL and UBA pricing review determinations – legal framework* (11 April 2014) at [28].