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**Submissions by CallPlus and Orcon following the further
consultation paper and the workshops**

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1. Summary

Getting clarity

- 1.1. At this stage, just before closing on process and scope, the Commission is considering taking steps that include having the UCLL price contribute to the cost of the Layer 0 and/or 1 path from the cabinet to the exchange, including, it seems, cost related to SLU backhaul. (There are some related proposals that appear equally problematic). But no component of the path between the cabinet and the exchange is part of the cost of UCLL, a service that has nothing to do with the cabinet to exchange backhaul. As to Layer 1 UCLL services, the job of the Commission is to work out the cost of supplying UCLL, and that only encompasses the cost elements in those services. Backhaul from the cabinet to the exchange (Layers 0, 1, or 2) is not a cost component in either SLU or NUCLL as they are both copper-only services. It cannot be included. It can only be a component in services such as UBA, SLU backhaul and commercial services such as commercial UBA variants.
- 1.2. It also seems that UCLFS, SLU backhaul, UCLL, etc are being rolled in together in some way, when the sole exercise is to get the FPP price of only UCLL and UBA, and only cost elements in those services can be included (but those services do become relevant to cost and revenue contribution over shared paths).
- 1.3. It appears to us that it may help to reduce these concerns if there is clarity as to the relevant services, their components, and the specifics of each of the services in the Act and the STDs. We have therefore set out a suggested structure that may assist the Commission, including some clarity around words used such as SLU backhaul, UCLL, etc.

Clarity as to the services being priced

- 1.4. There are two key sequential steps in this TSLRIC process that appear to be being conflated. If they are separated, some issues become clearer. The questions in order are:
 - 1.4.1. What is the service being priced?
 - 1.4.2. What is the MEA of that service?
- 1.5. The services being priced are clearly copper-based services. They extend only over the DSL capable part of the current network. In the case of UCLL, the service does not include the path from the cabinet to the exchange.
- 1.6. Then to the second question. The Act has no restriction on what the MEA can be. If Parliament had intended that, it would have stated so. The standard TSLRIC approach applies, by which the most appropriate MEA is chosen.
- 1.7. We have outlined a number of considerations as to choice and implementation of the MEA.
- 1.8. We have also taken the methodology as proposed by TERA during the workshop and then set out our understanding of the appropriate approach.

Averaging

- 1.9. We explain why there should be one averaged UCLL price (not split into NUCLL and SLU) and one averaged UBA price.

One-off charges

- 1.10. Our application requested that these have an FPP review, and they should be included in the process.

Section 18

- 1.11. We now have valuable guidance from the Chorus High Court judgment and the IM judgment (the latter is summarised in Orcon's TSLRIC WACC submission).
- 1.12. Just as the TSLRIC WACC requires an empirical analysis under s 18, so too does the application of s 18 generally. The need for a quantitative cost benefit analysis follows from the strong statements by the court in the IM judgment. Put another way, there is too much litigation risk to do other than the quantitative cost benefit analysis.
- 1.13. This also requires a focus on efficiencies, etc, solely from the perspective of the end-user, as s 18 is solely about promoting competition in the long term interests of end-users. That calls for a real life efficiency assessment; for example, the Commission should not treat the TSLRIC cost as true cost for these purposes, given the general recognition that TSLRIC over prices end of life legacy assets.

Relativity

- 1.14. The UCLL and UBA service descriptions are unique in requiring specific s 18 focus on relativity. Thus, the Commission should address this without getting to the point of a plausible range, as with other s 18 decisions. The overall structure of the regulatory regime is that competition from copper, including competition from unbundlers, is encouraged as a constraint on fibre. This is the opposite of narrowing relativity for the purposes of encouraging migration to UFB.

The workshops

- 1.15. The workshops have been excellent and they do reduce some of the risk that we next note. The concept of Dr Every-Palmer producing an opinion independently of the Commission's views is also excellent. Both have straw man aspects enabling both stakeholders and Commission staff to develop ideas in ways that could not otherwise be achieved. We are very grateful for that.
- 1.16. Our comments below on timing do not erode those views.
- 1.17. We can see why the Commission has chosen a Chatham House rules approach. However that has some difficulties so we have suggested a way to make these sessions even more valuable.

Timing – the tortoise is faster than the hare

- 1.18. We are particularly concerned that completing the FPPs in less than 8 months will produce sub-optimal outcomes, and, in particular, higher prices for RSPs and for consumers. We have addressed the issues in some detail at the end of this submission, referring also to what appear to be substantial judicial review and appeal risks the Commission is taking. There are signs that any one of ultimately disaffected parties (Chorus, LFCs, RSPs and/or consumers) will take action on the multiple concerns that are raised. We cannot understand why this risk would be taken.
- 1.19. We consider that taking a fast approach now will ultimately end up in prolonging the whole process as well as leading to poor outcomes. As we note, just that is happening at present to the Electricity Authority.
- 1.20. We have made some suggestions, including as to steps that might be taken.

2. Clarity around the approach and the services involved in this FPP

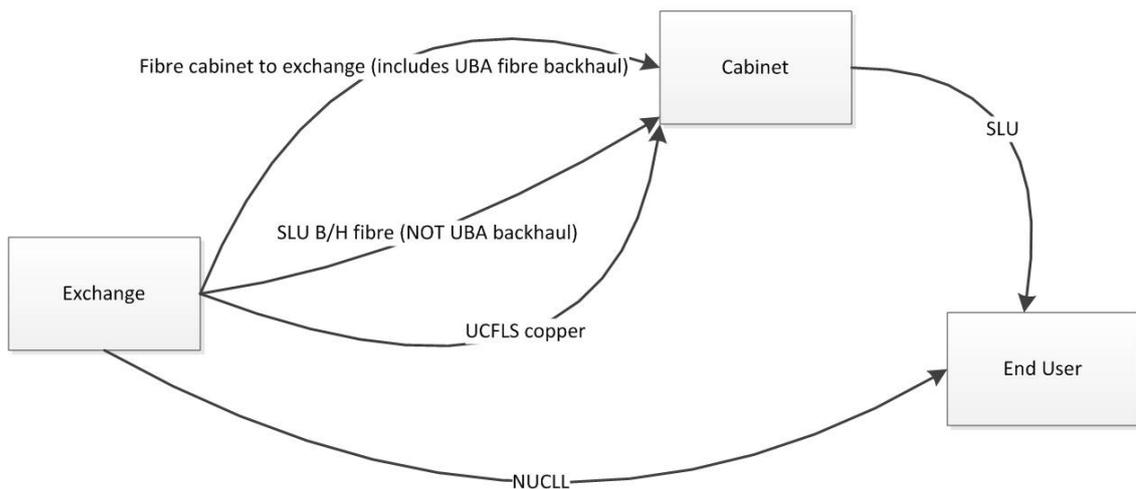
- 2.1. We consider that it is important to be clear about the services involved and what the FPP processes are doing. There are indications that problems in the approach are arising because there is insufficient clarity.
- 2.2. We have already submitted that there are two clear steps in the process, and they appear to be being conflated. Those two steps, in sequential order, are:
 - 2.2.1. What is the service being priced?
 - 2.2.2. What is the MEA of that service?
- 2.3. In this paragraph 2 we address only that first question: what is the service being priced?

What the FPP process is about and what it is not about

- 2.4. The FPPs are about pricing the UCLL (including the SLU and NUCLL services) and the UBA services. That includes pricing the monthly prices and the one-off prices as that has been requested for all three STDs in FPP applications (The Commission's UCLL process paper incorrectly stated that only NUCLL pricing is sought.)
- 2.5. The FPP processes are not about pricing UCLFS as that is part of a separate s 30R process. Although in practical terms the UCLFS pricing can be done in parallel to be efficient, it is clearly separate and involves different issues. UCLFS is relevant to these FPPs solely as a service contributing to payment of cost over shared paths, those shared paths being only:
 - 2.5.1. the UCLL footprint for the UCLL STDs, namely from the cabinet to the end user (where cabinetised) and from the exchange to the end user (where not cabinetised); and
 - 2.5.2. The UCLL footprint plus the fibre from the cabinet to the exchange and the first data switch, in relation to UBA.
- 2.6. The FPPs are also not about the SLU backhaul service. The input into UBA over the cabinet to exchange fibre is not SLU backhaul as that is a service supplied only in tandem with SLU, and access providers cannot self-supply a regulated service. The Commission instead assesses cost on a TSLRIC FPP basis, rather than using the irrelevant IPP SLU backhaul price. Having noted that, we strongly support the Commission undertaking an s 30 R review of the SLU backhaul prices. Undertaking the TSLRIC FPP analysis of the cost input of the fibre backhaul as an UBA input will show the IPP for SLU backhaul is considerably overpriced.

Definitions and abbreviations: a summary

- 2.7. Below we propose and clarify the following definitions, most of which are currently used. There is some confusion due to unclear use of the words and abbreviations:



2.7.1. **NUCLL:** the determined service in the STD for end user to exchange UCLL

2.7.2. **SLU:** the determined service in the STD for SLU

2.7.3. **UCLL:** Both NUCLL and SLU. This is the designated service as defined in the Act;

2.7.4. **UCLL footprint:** this is made up of the copper between the end user and the exchange for non-cabinetised lines and the copper between the exchange and the cabinet in relation to cabinetised lines. It excludes the cabinet to exchange path. The footprint extends only to commercially viable DSL lines.

2.7.5. **FUCLL:** the full copper local loop, namely the UCLL footprint plus the copper backhaul from the cabinet to the exchange. UCLFS is provided over FUCLL (and it is provided over copper beyond the footprint of the DSL-capable network such as in remote rural areas).

2.7.6. **SLU backhaul:** this is only the regulated service used in tandem with SLU. It is not an input into UBA. This needs to be carefully separated from the following.

2.7.7. **FCE:** fibre cabinet to exchange. This is a new definition we are proposing to clearly delineate the SLU backhaul regulated service (which is provided over FCE) from other services provided over FCE: for example, FCE not SLU backhaul is an input into the UBA service (and in this sense, FCE is also an input into the SLU backhaul regulated service).

More detail on that approach.

2.8. The Act has only one UCLL service. It is solely a service over a copper path, back to the cabinet or the exchange, namely over the UCLL footprint as described above;

- 2.9. The Commission de-averaged UCLL pricing by splitting that single service into two separate services, via the UCLL (which we are calling NUCLL) and the SLU STDs, NUCLL being the copper-only service from the end-user to the exchange, and SLU being the copper-only service from the end-user to the cabinet.
- 2.10. Copper from an active cabinet to the exchange is not included in the UCLL footprint as in the definition in the Act, or, more relevantly, either the UCLL or SLU STD does not include it (and it is the STD that drives the position for these purposes).
- 2.11. The UCLL service only has a footprint where DSL services are available on a commercially viable basis (that is, where the quality of service is such based on distance and line quality, that a DSL service is commercially viable). All copper lines outside that footprint are not to be included in the UCLL and UBA services being modelled. That is consistent with the purpose and context of the Act. The UCLL price (and the UBA price) should not bear the cost of network elements that will never be used by the UCLL and UBA services.
- 2.12. However, the copper from the cabinet to the exchange is part of the UCLFS service, which is a service provided solely over copper paths including over copper between the exchange and the cabinet. In particular, UCLFS is not provided over fibre backhaul between the exchange and the cabinet.
- 2.13. In the Commission's decision not to do a Schedule 3 review of the UCLFS price, the Commission coined the term, FUCLL, to describe that UCLFS footprint. That terminology reflects what is stated in the Act's definition of UCLFS. FUCLL is not the footprint for UCLL as described in the Act.
- 2.14. SLU backhaul is the regulated service provided only as backhaul for the regulated SLU service. The Commission has indicated that it may seek a s 30R review of the pricing of SLU backhaul. If that is because the Commission considers that the regulated SLU backhaul pricing may be too high for use as an input into the UBA FPP process, when determining the price for UBA, that would not be, for the reasons noted above, a correct use of that service. SLU Backhaul is not an input into UBA. It just happens to run over the same fibre path. The input into UBA over the same path is a cabinet to exchange fibre-based path. That is costed not on the IPP SLU backhaul price (which is not relevant anyway) but on the TSLRIC FPP cost of providing an input into UBA over the same path.
- 2.15. To the extent that fibre between the cabinet and the exchange is an element of the ultimate UBA services, that component, like all components making up those services, is to be quantified at cost, applying only the FPP methodology. Although the SLU backhaul regulated service is irrelevant to the FPPs, the price in any event is an IPP and we are now at FPP stage.
- 2.16. To distinguish SLU backhaul from other services carried over the same path, we propose to describe that path generally as "fibre cabinet to exchange" or FCE. FCE is the path over which SLU backhaul, UBA, and commercial services such as UBA variants are provided.
- 2.17. We support a s 30R review of SLU backhaul: the costing of the services in the FPP process, to the extent that is material, will demonstrate actual TSLRIC cost is considerably lower

than the IPP cost. Moreover, this is an opportunity to change the STD service description so that access seekers can acquire less capacity over the SLU backhaul as the backhaul is sized such that it discourages use of the service.

3. Allocation of cabinet to exchange fibre (FCE) costs

3.1. It seems that the Commission is considering allocating FCE cost (and/or, it seems, SLU backhaul), at least at the Layer 0 and/ or 1 level, to NUCLL and SLU. That however would not comply with either the Act or correct costing methodologies:

3.1.1. UCLL and SLU are copper-only services. They are limited to the UCLL footprint. They have nothing to do with fibre between the cabinet and the exchange which is over a different and adjacent path. That much is clear from the Act and from the STDs.

3.1.2. Put another way, fibre is not a cost component in those copper services. The job of the Commission is to work out the **cost** of UCLL. Fibre from the cabinet to the exchange is not a cost element of UCLL. It cannot be included in the UCLL price.

3.1.3. That conclusion is reinforced by:

3.1.3.1. The fact that FCE is outside the service boundaries of the UCLL services (importantly, this FPP process is not of itself deciding the UCLFS price as noted above, but anyway, UCLFS travels over a parallel copper path from cabinet to exchange, not over fibre).

3.1.3.2. The fact that the cost of FCE, when it is used as backhaul for the copper-only service, SLU, is recovered from the separate fibre service, SLU backhaul. To have the UCLL price meeting fibre backhaul cost is double-recovery.

4. The FPPs are for UCLL and UBA, not UCLFS

4.1. It appears that the Commission is also considering including UCLFS cost when costing the only services being reviewed under the FPPs, UBA and UCLL.

4.2. UCLFS is only relevant to the UCLL and UBA prices at the level of sharing of cost and revenue over overlapping paths. Essentially, what is the contribution in relation to the shared assets from UCLFS, which in turn reduces the UBA and UCLL prices?

4.3. It may make practical sense to do the s 30R UCLFS review in parallel but it is important to delineate the two processes and the outcome from each. They are different.

4.4. The TSLRIC cost modelling needs to recognise the multiple use of shared assets. Assets that provide UCLL and UBA services are also used to provide other services. For example, a trench may be shared between interconnection, UCLL, UBA, fibre and other services.

4.5. The Commission needs to be cognisant of the risk of enabling double recovery of common costs if it does not appropriately recognise cost sharing.

- 4.6. TSLRIC methodology requires, and the Act specifically requires, the regulator to take into account the service provider's provision of other services. That is stated in the Schedule 1 definition of TSLRIC, and, as to regulated services and commercial variants of designated services, is also stated in Clause 4B in Part 1, Schedule 1.
- 4.7. Similarly, sub-paragraph (b) of the definition of forward-looking common costs in clause 1 of subpart 1 of part 1 of Schedule 2 of the Act stated that the forward-looking common costs to be included in TSLRIC for the PSTN interconnection network stated that it "does not include any costs incurred by the service provider in relation to a TSO instrument." The Commission held the view that "... a TSLRIC model should not include the costs recovered through the TSO in the final calculation of the cost of interconnection". We would suggest that the same statement could be made in relation to UCLL and UBA. The TSLRIC model should not include costs, including common costs, recovered through the provision of other services such as fibre and UCLFS.
- 4.8. Thus, the revenues (or some other cost attribution method) for Chorus from UCLFS and other services are to be included in the shared asset calculations in the FPPs. That is a matter of taking the regulated price (which, after a s 30R price review, will be based on the FUCLL price where UBA is not supplied) and calculating revenues from forecast demand for UCLFS and other services during the period to be regulated. It is not a matter of determining the FPP or even IPP actual cost of the UCLFS service as that is irrelevant.
- 4.9. It may be necessary to undertake a cost attribution analysis to clarify which part of the UCLFS regulated price is attributed to shared paths, given that some elements are not included in the shared paths.

5. Other services sharing cost including commercial services

- 5.1. The paths used by UBA and UCLL are used of course by other services in addition to UCLFS. That may include regulated services for which the regulated price is used as the contribution, on the basis that this states the estimated revenues when demand is also estimated.
- 5.2. There are multiple commercial services across the same paths. Again, the Commission would need to estimate revenues based on estimated pricing and estimated demand.
- 5.3. Commercial variants of regulated services, particularly UBA, are significant in this regard. The higher pricing obtained by Chorus for higher QoS variants of regulated UBA are to be factored in as a contribution to the cost of the shared paths.

6. Averaging the price of UCLL and UBA

- 6.1. From an efficiency perspective, UCLL and UBA ought be averaged (that is, UBA and UCLL each have one price nationally) and the NUCLL and SLU prices ought be averaged into a single UCLL price. (What to do about UCLFS is a separate question for the s 30R review of UCLFS pricing).

6.2. In any event, the Act requires this:¹

6.2.1. As noted above, it is important to distinguish:

6.2.1.1. The single UCLL **designated** service in Schedule 1; and

6.2.1.2. The two **STDs** that de-average the UCLL designated service into NUCLL and SLU.

6.2.2. For the UCLL and the UBA **designated** services (that is, the UCLL and UBA services in the Act not the STDs), “the Commission must determine a geographically averaged price”. (Clause 4A Schedule 1).

6.2.3. That is “a geographically averaged price” for each of UCLL and UBA.

6.2.4. Thus far, that is a single price for each of UCLL and UBA, so this is not split, for UCLL, into the NUCLL and SLU prices.

6.2.5. Parliament could have elected to have specified geographically averaged prices for each of the NUCLL and SLU STDs but did not do so. The intention is to have single UBA and UCLL prices respectively.

6.2.6. That conclusion is reinforced by the Sch 1 definition of “geographically averaged price” (as used in Clause 4A) as “a price that is calculated as an average of all geographically non-averaged prices for a **designated service** throughout the geographical extent of New Zealand”. (highlighting added). Again, this reinforces the approach of a single price. While the primary focus in the definition is on geographical averaging rather than service type averaging, the definition is such that a “geographically averaged price” includes averaging across different types of service within designated services.

6.3. To give effect to the service averaging for UCLL, if the Commission considers it must separately model the STDs, the solution is as follows:

6.3.1. The non-price terms for each of the SLU and NUCLL STDs remain as they are if that works appropriately.

6.3.2. A decision is made at the outset to model the SLU and NUCLL lines together for pricing purposes, as they will end up being averaged anyway. There is no practical point in modelling separately and then averaging. This also becomes easier given it appears the Commission favours a scorched node approach based on in situ cabinets and exchanges (meaning backhaul cabinet to the exchange can readily be kept separate from UCLL).

6.3.3. Therefore the same STDs are used as at present, but with the same averaged prices.

¹ Or, in the context and purpose of the Act, it should be so interpreted.

6.3.4. If it is necessary to adjust the STDs' non-price provisions, there are two ways this can be done:

6.3.4.1. By terms and conditions in the price review determination, under s 52(d). We agree with Dr Every-Palmer that substantial non-price terms changes cannot be made under that provision. But any changes to accommodate pricing needs seem to be the sort of thing that the provision is designed to cover.

6.3.4.2. Alternatively, changes can be made via s 30R but that is unlikely to be required.

7. High level principles for TSLRIC determination: the MEA

7.1. It should be recognised that defining the services that are regulated and being priced, and establishing the Modern Equivalent Asset (MEA), and consequent prices, for the regulated services are separate and discrete tasks. The MEA can only be determined and modelled once the service is defined. As we outline above, that entails two separate sequential steps:

7.1.1. What is the service being priced?

7.1.2. What is the MEA of that service?

7.2. One example of this is the consideration of the coverage of the MEA network. It can be no larger than the footprint of where the regulated service is available i.e. where DSL services are available.

7.3. We consider this is worth emphasising as the advice provided by James Every-Palmer appeared to blur the distinction between service definition and determination of MEA. This is apparent at paragraph 13 where he mixes definition of the service (the actual service provided by Chorus, the service described in the relevant STD or the designated access service as described in Schedule 1) with the concept of MEA ("a more abstract description ... that is technology neutral and captures [the service's] core functionality").²

7.4. When approached in this two step way, it becomes apparent that Chorus's approach of limiting the MEA to copper is flawed. It is flawed for the reasons identified by Dr Every-Palmer. But there is a more fundamental reason why it is flawed based on the two essential steps. This is set out in detail in the earlier submission by InternetNZ. In short:

7.4.1. As to the first question – what are the services being modelled – this is clearly copper based networks for UCLL (over only the UCLL footprint), with fibre backhaul from cabinets added as to UBA.

7.4.2. As to the second question – what is the MEA of that copper based service – the Act clearly does not limit the MEA to copper. Plus, to do so would be contrary to well-

² Paragraph 13, letter of preliminary views to the Commerce Commission, FPP determination: Issues re service description and the modern equivalent asset, 12 March 2014.

developed TSLRIC methodology, and other forward looking methodologies. There is nothing in the Act that requires a copper MEA.

7.4.3. Approached this way, Chorus's point that only copper can handle things such as faxes and alarm monitoring disappears. In any event, that is not a reason why the non-copper MEA is functionally different. For example, most of us send copies of signed letters by technology neutral scanned documents that are emailed, instead of sending them by fax.

7.4.4. Further, if TSO is relevant (it is not in our view), the best estimate of whether the TSO arrangements will requirement copper based services would be that they will not. What is relevant on this is not what is in place today but will be in place during the regulated period. There is clearly a move away from copper based TSO and USOs generally, and it is also quite possible that Chorus won't be providing the TSO in the future.

What is the appropriate MEA and level of optimisation?

7.5. We have a number of views on selection of MEA and the appropriate level of optimisation to determine the efficient forward-looking costs of UCLL and UBA services. In summary:

7.5.1. The Commission should adopt a bottom-up model;

7.5.2. Selection of MEA should be determined by the lowest cost technology that can deliver the regulated service;

7.6. Where the modern technology offers superior service to the regulated copper service (downward) adjustment needs to be made to the cost calculation to ensure "equivalence";

7.7. The lowest cost technology could be a combination of fibre (FTTH or FTTN), copper, mobile and wireless. The appropriate MEA can only be determined by detailed costing analysis;

7.8. The main constraint on optimisation should be that it reflects what is practical in a real world situation if a nationwide network was built today;

7.9. Chorus is patently incorrect to suggest the Commission is required to mechanically adopt a MEA which replicates all the specific features of Chorus' present copper network and that Chorus' copper network is the MEA.

7.10. Relevant aspects of Chorus actual network are: (i) the TSLRIC modelling needs to model a network that does not extend beyond the DSL footprint of the existing Chorus' network i.e. the modelling needs to assume the same availability of service that actually exists (equivalence); (ii) the TSLRIC price needs to reflect the actual age of Chorus' network i.e. Chorus should not be compensated for the cost of a new network (as reflected by "equivalence"); and (iii) assets that would not be replaced or replicated such as easement rights, ducts and poles should be valued at depreciated historic cost. There is no "forward-looking cost" to model; and

7.11. The Commission needs to ensure that UCLL and UBA services are not allocated an excessive share of common costs; and common costs are spread across all regulated services (including UCLF) and unregulated services (such as fibre).

7.12. We turn not to deal with each of those points.

Preference should be for a bottom-up model

7.13. We consider that the TSLRIC determination would best satisfy the requirement to determine forward-looking costs, and the above Court precedent on determination of the costs of an efficient service provider, by undertaking a bottom-up approach that does not limit technological choice.

7.14. We agree with the European Union that “A costing methodology that provides the appropriate ‘build-or-buy’ signal strikes an appropriate balance between ensuring efficient entry and sufficient incentives to invest and, in particular, to deploy NGA networks and hence deliver new, faster and better quality broadband services ... The bottom up long-run incremental cost plus (BU LRIC+) costing methodology best meets these objectives for setting prices of the regulated wholesale access services.”³

Modern equates to least cost

7.15. We agree with the Danish Business Authority (DBA) that “The MEA is the asset that can produce the stream of services produced by the existing asset at lowest cost.”⁴ The selection of MEA should be determined by what would be the lowest cost technology to supply the designated service.

7.16. We agree with the European Commission that “In light of the principle of technological neutrality [the regulator] should consider various approaches to modelling the hypothetical efficient [new entrant] network depending on the access technology and network topology that best fit national circumstances”.⁵

7.17. The MEA or the network that an efficient service provider would build (in a green fields situation) is likely to vary across the country e.g. consistent with the Commission’s TSO net cost determinations wireless technology is likely to be the lowest cost technology in more remote and less densely populated areas. We agree with the Commission that forward-looking costs and efficiently incurred costs are typically, and should be, used synonymously.

High level of optimisation implied by “modern”

7.18. The Court judgments in the matter of Vodafone’s application for judicial review and appeal of the Commission’s TSO net cost determinations provides useful precedent in terms of

³ European Commission, Commission recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, paragraphs 27 - 29.

⁴ NITA, Model reference paper, 18 September 2008, p.27.

⁵ European Commission, Commission recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, paragraph 37.

what is meant by “efficient service provider” (which parallels the efficiency concept inherent in forward-looking cost methodologies such as TSLRIC) and the appropriate level of network optimisation/deviation from Chorus’ actual copper network.

7.19. The Court judgments also highlight that even if a service is provided by copper it does not follow that the Commission needs to assume the services are provided by fixed line/copper network when it is establishing what the costs of an efficient service provider would be. MEA can include mobile and wireless technology.⁶

7.20. This is supported by Network Strategies’ observations about the Commission’s TSLRIC modelling for the TSO:⁷

7.20.1. The Commerce Commission throughout the 2000s engaged in TSLRIC modelling as the means to cost the Telecommunications Service Obligation (TSO). Over a period of eight years Network Strategies ... reviewed this modelling and developed its own cost models where it believed that the Commission’s model did not adequately reflect modern efficient technologies capable of delivering the TSO. ... We found that in many of the exchange service areas (ESAs) mobile technology was available ... and could deliver the equivalent TSO service at a considerably lower cost than the existing wireline solution. In other words, mobile technology could readily be substituted for the existing TSO service solutions. By definition this, then, is the MEA in these areas.

Real world constraint on optimisation

7.21. The main constraint on the level of optimisation/efficiency assumption should be that the TSLRIC determination reflects what is practical in a real world situation if a nationwide network was built today. We agree with TERA Consultants’ that “The modelled network must be technically feasible. The network must not be too theoretical or experimental, but should reflect the type of network that would be rolled out or developed by operators who were to build a national network today.”⁸

Equivalence: Downward adjustment needed where the modern technology offers superior service and functionality

7.22. Where the MEA is fibre, the Commission would need to make cost adjustments to reflect that fibre may satisfy “modern” but wouldn’t satisfy “equivalent”, given fibre offers capabilities not available from established services.

7.23. We again agree with the DBA definition of MEA that “Where the operating cost or other performance characteristics of the MEA differ from the existing assets, these should be

⁶ This is a notable point of difference to TERA Consultants’ MEA Assessment for the DBA as the DBA specifically excluded mobile broadband from their market decision. [TERA Consultants, Modification and development of the LRAIC model for fixed networks 2012-14 in Denmark, May 2013, footnote 13.]

⁷ Network Strategies, final report for Vodafone New Zealand, Review of the Telecommunications Act 2001 Key issues, 13 September 2013, section 3.2.

⁸ TERA Consultants, Draft Model Reference Paper, Modification and development of the LRAIC model for fixed networks 2012-2014 in Denmark, page 58.

reflected in the asset valuation.”⁹ In respect of this, ERG (now BERC) stated in 2005 that “The new technologies are usually superior in many aspects to the older technologies in terms of functionality and efficiency. However, since MEA values are required to reflect assets of equivalent capacity and functionality, it may be necessary to make adjustments to the current purchase price and also the related operating costs ...”^{10,11}

7.24. The TERA Consultants’ MEA Assessment report for DBA details three adjustments that could be applied:

7.24.1. Adjustment based on consumer preference (which for Layer 1 must be the pricing based on RSP preferences and willingness to buy instead of build given consumers do not purchase Layer 1);

7.24.2. Adjustment based on technologies and performances; and

7.24.3. Adjustment based on costs.¹²

7.25. The purpose of these adjustments is to set the discount that will be applied to the MEA price in order to determine the UCLL and UBA regulated copper prices.

Limits on the relevance of Chorus’ actual copper network

7.26. The relevance of Chorus’ actual copper network should fundamentally be limited to: (i) the age of the network (consistent with the above Court precedent Chorus should not be compensated for the cost of a brand new network); and (ii) assets that would not be replaced or replicated such as easement rights, ducts and poles.

7.27. We agree with Telecom that the TSLRIC determination should recognise “some assets – such as ducts and poles – are unlikely to be replaced or replicated. The Commission should estimate the costs of an efficient provider building a modern network that recognises the reuse of these assets.”¹³ Our understanding is that this is the approach the Commission previously adopted (e.g. for land easements) in the ODV methodology that applied to electricity distribution businesses and Transpower.

7.28. Consistent with this, the European Commission has expressed the view that “Unlike assets such as the technical equipment and the transmission medium (for example fibre), civil engineering assets (for example ducts, trenches and poles) are assets that are unlikely to be replicated ... In the recommended costing methodology the Regulatory Asset Base (RAB) corresponding to the reusable legacy civil engineering assets is valued at current costs, taking account of the assets’ elapsed economic life and thus of the costs already recovered

⁹ NITA, Model reference paper, 18 September 2008, p.27.

¹⁰ ERG Common Position: Guidelines for implementing the Commission Recommendation C (2005) 3480 on Accounting Separation & Cost Accounting Systems under the regulatory framework for electronic communication.

¹¹ In TERA Consultants’ MEA assessment for DBA they suggest “that the investment required for FTTH network would be around 12% higher than the investment in a copper network today”. [TERA Consultants, Modification and development of the LRAIC model for fixed networks 2012-14 in Denmark, May 2013, subsection 2.2.2.]

¹² TERA Consultants, Modification and development of the LRAIC model for fixed networks 2012-14 in Denmark, May 2013, section 2.3.

¹³ Page 1, Telecom, Process and issues paper for determining a TSLRIC UCLL price, 14 February 2014.

... This approach sends efficient market entry signals for build or buy decisions and avoids the risk of a cost over-recovery for reusable legacy civil infrastructure”.¹⁴

- 7.29. The Commission also needs to ensure the modern efficient network, assumed in the TSLRIC modelling, does not extend beyond the DSL footprint of the existing Chorus’ network i.e. the modelling should assume the same availability of service that actually exists (service equivalence). To do otherwise, would assume existence of network that are presently uneconomic to serve, due to cost, and would artificially conflate the TSLRIC price.

Need to ensure UCLL and UBA are not allocated an excessive share of common costs

- 7.30. The Commission should ensure it does not require UBA and UCLL services to bear an excessive share of forward-looking common costs.
- 7.31. The submission by (pre-separation) Telecom on treatment of common costs in the Part 4 IMs is instructive.¹⁵ Telecom warned that loading too much common costs onto regulated services could result in cross-subsidisation of fibre services, would not be competitively neutral and would be “likely to create material distortions in both the regulated and adjacent (potentially unregulated) markets”.¹⁶ We agree with Telecom that the Commission should allocated shared and common costs by applying fully distributed cost principles, which allocate common costs fully across all regulated (including UCLF services) and unregulated services that share common costs and infrastructure.
- 7.32. Telecom’s view contrasted to that of electricity distributors who wanted to be able to charge for new services such as UFB at incremental cost, leaving all other costs including common and shared costs to be recovered by electricity consumers under their regulated default price-quality paths (DPPs). The Commission rejected this stand-alone cost/avoidable cost approach and required shared and common costs to be shared by regulated and unregulated services. Covec describe this as “analogous to the way a TSLRIC model works. This would mean that the cost (and hence price) of the old service would fall once it started sharing assets with the new service”.¹⁷
- 7.33. Covec also, however, warn of a potential pitfall of application of MEA in TSLRIC that the Commission should be cognisant of:¹⁸
- 7.33.1. If fibre is the MEA of the existing copper network, then both copper and fibre networks are interpreted as having the whole cost of a stand-alone fibre network
...

¹⁴ European Commission, Commission recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, paragraphs 34 and 35.

¹⁵ Telecom, Submission on the Commerce Commission’s proposed Regulation of Input Methodologies under Part 4 of the Commerce Act 1986, 15 March 2010.

¹⁶ Paragraphs 2 – 4, Telecom, Submission on the Commerce Commission’s proposed Regulation of Input Methodologies under Part 4 of the Commerce Act 1986, 15 March 2010.

¹⁷ Paragraph 115, Covec, UBA Pricing Issues, 3 September 2013.

¹⁸ Paragraphs 116 - 118, Covec, UBA Pricing Issues, 3 September 2013.

7.33.2. Therefore ... consumers see no benefit from the sharing of assets (eg ducts, fibre). This conflicts with the requirement imposed on electricity lines companies to share common costs across services.

7.33.3. ... Consistency of treatment with regulation of electricity lines companies would ... require that truly incremental costs be recovered only from the service that causes these costs ... the MEA is defined as a stand-alone network instead of one with cost sharing ...

The MEA for rural

- 7.34. It was apparent from the TERA workshop that there has been little focus in this area even at this stage, which was surprising given the Commission is so close to landing on MEA choices and/or has landed in practice on choices.
- 7.35. The fact that the UCLL footprint being costed extends only to DSL-capable lines, which excludes remote lines, does reduce the need for technology other than FTTN and FTTH. Nonetheless, there are services that are likely to be more efficiently supplied by mobile and/or wireless and/or fibre. Importantly, there are reusable assets and third party assets available to provide all or nearly all these services. There are mobile connectivity (confirmed by the Supreme Court in the Vodafone TSO case as a MEA), FWA via RBI (and other providers) and also fibre connections such as to schools. It is important to repeat the point we have already made. Services such as fibre and RBI are committed services being provided regardless. They are reusable assets and/or available assets already for modelling purposes even where not rolled out today.
- 7.36. This point applies not just to rural. It applies to urban as well. The Commission is undertaking multi-year modelling and should take into account assets that will be available during the regulated period. These go to reducing the ultimate price as cost reduces due to use of those assets, including shared use.
- 7.37. Two issues have been raised by and on behalf of Chorus that need specific comment:
- 7.37.1. It is said that mobile services (and by implication, RBI services) do not have the required functionality and speed. In fact they have superior performance over DSL. LTE, offering very fast speeds, is perfectly suited to use over less populated areas, as contention problems largely do not arise. In any event, as Jon Brewer of Telco2 explained in his expert report supporting the InternetNZ submission on the update paper, even in urban areas, LTE is very effective as a path that functions just as well for most customers.
- 7.37.2. It is said that wireless does not split into Layer 1 and Layer 2 and is therefore an unsuitable model. That is a poor reason not to model based on the most appropriate technology. There are ways to apportion pricing as between the two layers. After all, similar adjustments are required when using an FTTH MEA to get the copper pricing, as TERA explain in their Denmark report and as the EU explains in its Recommendation. This is a readily soluble problem.

8. The TERA modelling

- 8.1. In this section we overview our understanding of what TERA will do and then we outline our submissions on that. It is acknowledged that the Commission could in theory alter the model, and also that views were expressed by TERA that might not reflect the Commission's views. Subject to that, what did emerge from the workshop was a relatively fully developed approach to modelling and the MEA, based on scorched node FTTN. It seemed that the thinking on the rural part of the MEA had not been developed particularly far. While it was emphasised that no final decisions had been made on the modelling, it is expected that the time line is so tight, with a need to do work and obtain information early on as that is on the critical path, that there is little choice but for the Commission and TERA to have landed on an approach.

Our understanding of the TERA approach

- 8.2. However, for the purposes of this section of our submissions, we will treat what was said at the workshop as a straw man to be addressed by us, whether or not the Commission is going to go down that path. As to urban (as noted above, rural does not appear to have been developed), the model described was as follows:
- 8.2.1. The nodes on a scorched node basis will be the exchange and the cabinet based on Chorus's in situ FTTN network;
 - 8.2.2. As to reusable assets, the modellers will rely upon what the industry has done, which appears primarily to reflect what Chorus has actually done, for example, when rolling out UFB;
 - 8.2.3. The modelling revolved around copper from the cabinet to the end user, implying an FTTN MEA. It was indicated that other options are possible, and the Commission has not landed on the MEA.
 - 8.2.4. It was acknowledged that, instead of a copper only network from the nodes, it would not be difficult to:
 - 8.2.4.1. make this a fibre network (thereby reflecting an FTTH MEA but using the scorched nodes instead of fibre back to a node more suitable for an FTTH network); and
 - 8.2.4.2. develop the model so that it relies upon poles as well as or instead of ducts.

Our views

- 8.3. Our comments on that straw man are as follows, applying the other submissions in this document:
- 8.3.1. The cost of the backhaul from the cabinets to the exchange (whether Layer 1, 2 and/or 3) should not be included in the cost of UCLL. If anything, it is to be included in the cost of services such as SLU backhaul (as a regulated service sold with UCLL), UBA, and commercial services over that path whether copper or fibre.

- 8.3.2. In relation to the UCLL paths (that is, from cabinet to end user and exchange to end user for non-cabinetised lines), there is a cost assessment only as to UCLL (including SLU and NUCLL) and as to UBA (as to UBA, that assessment extends to the fibre input from cabinet to exchange (FCE)). That is so, except as noted next.
- 8.3.3. The services sharing the UCLL paths (such as UBA, UCLFS and commercial services including commercial UBA variants) have their estimated revenue attributable to the same paths added to the model, thereby reducing the UBA and UCLL prices accordingly. The only need for cost modelling of those services, if at all, is to aid determination of that part of the revenue that is attributable to use of the overlapping UCLL path. It may be possible to do that cost modelling in parallel with the UCLL and UBA modelling but only for the purposes of this subsequent cost sharing step. In other respects, such cost is irrelevant. That includes the cost of UCLFS, which is an issue for the separate s 30R. That process can run in parallel, but that does not change the position that the cost of UCLFS is not relevant to the cost of UCLL and UBA, except as in this paragraph.
- 8.3.4. The UCLL price should be a single price aggregated from the SLU and NUCLL line cost.
- 8.3.5. The UBA price should also be a single price.
- 8.3.6. Relativity between UCLL and UBA is to be determined to reflect a rational build/buy decision and to reflect the relationship between copper based Layer 1 and Layer 2.
- 8.3.7. If a copper/FTTN MEA is chosen:
- 8.3.7.1. it should not incorporate reduced demand to reflect migration to UFB;
 - 8.3.7.2. the part of the service to be excluded from the UCLL price will be the FCE part, that is the path from the scorched node cabinet to the exchange.
- 8.3.8. For the same reasons, an FTTH model, using cabinets and exchanges as the nodes, will need to exclude from the UCLL cost and resulting price the fibre path from the cabinet to the exchange.
- 8.3.9. If a full scorched earth FTTH is chosen, or some variant away from the current TERA model, it is necessary to exclude from the UCLL price the equivalent of any service between the cabinet and the exchange as that is not part of the UCLL service. The cost of that portion (which can be estimated from the split between cabinetised and non-cabinetised lines) is attributable to services other than UCLL such as UBA, SLU backhaul, and commercial services.
- 8.3.10. For this hypothetical network, a pole network should be used where possible, and where permitted by the RMA. That is the least cost option. The Chorus network including UFB should not, as is being said, be the default network for a decision on these issues. As we explain below we are particularly concerned about this and the ease with which Chorus can game and/or take advantage of that approach, especially given the tight time frames.

8.3.11. However, to the extent that a ducted network is selected, and in any event for a poled network as well, the price needs to be adjusted to reflect the greater cost and performance of the FTTH network.

9. Section 18 analysis

9.1. We now have the guidance on s 18 from the Chorus High Court decision this month. We also have guidance from the High Court's IM decision which were dealt with extensively in Orcon's WACC and TSLRIC submissions.

The focus of s 18

9.2. What is now clear is that, in applying s 18, the Commission is required to undertake an empirical analysis of the effects of any decisions solely from the perspective of the end user, and solely from the perspective of competition, that is competition in the long term interests of end-users. Section 18 (2) and (2A) simply go to clarify and not deviate from that primary requirement. For example, s 18(2A) is not about investment incentives from the perspective of UFB operators, unbundlers, and LTE providers. It has nothing to do with that. It is solely about such incentives in so far as they benefit competition for the benefit of end users. For example, investment incentives for LFCs, Chorus and unbundlers are relevant only to the extent that the new investment promotes competition in the long term interests of end users.

Quantitative cost benefit analysis

9.3. In the Orcon submission on WACC and TSLRIC, it was submitted that, in relation to s 18 and adjusting WACC above the mid-point, it is clear from the IM High Court judgment that an empirical analysis is required, and that means a quantitative cost benefit analysis addressing efficiencies etc solely from the perspective of the end user.

9.4. Put another way, it would be an unacceptably high legal risk for the Commission to do otherwise, given the clarity of the Court's approach.

9.5. The analysis must be done for WACC anyway and that essentially involves the same considerations as are applicable to other s 18 considerations. So the analysis would be done regardless. However, a principled approach has the Commission being legally required also to undertake a quantitative CBA on all other s 18 considerations, in an FPP context. We consider that the IM judgment is precedent requiring such empirical analysis.

9.6. We refer to Orcon's WACC and TSLRIC submissions for the detail in this regard.

9.7. The empirical analysis, from the end-users' perspective, will have regard to points such as those made in today's CallPlus submission that CallPlus and Orcon are important competitive constraints on Telecom, Vodafone and Chorus.

9.8. In this regard, the structure of the regulatory regime is such that copper (UBA and UCLL) is deliberately designed to act as a competitive constraint on fibre. The regime is based on the ladder of investment model, with its build or buy signals. We appreciate that some

have arguments that, for example, the ladder of investment no longer is relevant and that UFB should be prioritised regardless. But that is clearly not a view or an approach that is available under the Act. UFB investment is only relevant insofar as that encourages competition in the interests of end users. The empirical analysis must have that at its centre: Parliament has said that must be so.

- 9.9. A useful starting point is the InternetNZ, Consumer and TUANZ submission on the UBA update paper with the supporting reports from Covec and from Telco2. As was explained in the Orcon WACC submission, the analysis must be far more careful and detailed than the analysis in the update paper and the final determination, which had the problems identified in those submissions.
- 9.10. Section 18 is a real world analysis of efficiencies. It is not bound by legacy constructs such as TSLRIC. It is widely accepted that TSLRIC produces, particularly for legacy end of life assets, over pricing of services. TSLRIC “cost” is not true “cost”. The analysis, which must be empirical, must take account of those real world considerations. So it should take account of other factors such as the continued inflated revenues due to the three year freeze, the effects of averaging, etc.
- 9.11. Of particular importance, as emphasised in those submissions, is the multi-dimensional nature of the required analysis. There cannot be a myopic focus only on price differences, as quality of service differences are a major – and probably dominating - feature.
- 9.12. Also of particular importance is assessing the benefits of Layer 1 and Layer 2 competition solely from the perspective of consumers, as s 18 requires. That must take into account that the regulatory regime is focussed upon having copper as a competitive constraint.
- 9.13. The IM decision also highlights the importance of the fact that the position is different when the capital expenditure has already been committed. This is summarised in the Orcon WACC submission, including as to two-step considerations. The UFB roll out is an irreversible contractual commitment by Chorus and the LFCs. Hence the same investment incentives are not required.

Asymmetry factors are different in telecommunications than in energy

- 9.14. The submissions from CallPlus, Orcon, PricewaterhouseCoopers and Transpower on the setting of WACC for telecommunications services all suggest that the grounds for setting an above mid-point WACC for UCLL and UBA services under Part 2 of the Telecommunications Act are weaker than for price regulation of energy services under Part 4 of the Commerce Act, where the Commission presently applies a 75th percentile WACC.
- 9.15. This can be extrapolated as a general commentary about whether the Commission should err on the side of setting prices too high to address potential asymmetric cost issues. The WACC submissions suggest the Commission should not. CallPlus’ submission also noted the view of Vector that the Commission placed greater weight on erring on the side of high access prices, to address asymmetric cost, in telecommunications than it does under Part 4 of the Commerce Act. We are worried by Vector’s assessment. The Commission should review whether its approach to asymmetric cost in telecommunications and energy is consistent, including whether the Commission places too much emphasis on asymmetric cost when price setting in telecommunications.

9.16. We also note the MBIE review of the Telecommunications Act provides useful illustration of the risks of setting prices for UBA and UCLL services too high (including in selection of WACC). From CallPlus' submission on the UBA and UCLL WACC consultation:¹⁹

“While the Government’s then proposed intervention was of a magnitude larger than the impact of a decision on whether to use an above or below mid-point WACC, the general themes about negative impacts on incentives, investment and roll-out of new technologies (e.g. fibre) are of general relevance to any Commission decision on whether to err on the side of setting copper prices too high rather than risk setting them too low. Examples include:

- It would act as a form of “trade protection” in favour of fibre services, and would not create a level playing field. Fibre should compete on its merits, including by Chorus improving the available UFB broadband speeds, rather than relying on high copper prices to make fibre seem artificially more attractive.
- If the price for copper services is kept too high it could undermine demand growth for broadband services. (It should be borne in mind, in contrast to regulated energy services, that fixed broadband is not an essential service for end-users.) Copper broadband services are a stepping stone for fibre services, so anything that undermines demand for copper services could have negative impacts, over-time, for broadband services.
- Chorus would have incentives to take a go slow approach to roll-out and uptake of fibre services. This is because its investment in fibre services would cannibalise the profitable (and more profitable with a higher WACC) copper services.
- Even if higher copper prices encouraged greater fibre uptake, this would not necessarily be the case in LFC areas that Chorus is not rolling fibre to. This is because Chorus’ incentives would be to set its copper prices below the regulated price, in those areas, in order to compete.
- CallPlus does not consider any of these outcomes would be consistent with the statutory objective in section 18(2A) of the Telecommunications Act and “consideration ... to the incentives to innovate ... and the risks faced by ... investors in new telecommunications services

10. Relativity

10.1. The requirement in the UCLL and UBA service definitions to use s 18 when considering relativity is unique in the Act. By giving this specific direction, in a service description otherwise dominated as to price by a formula, there is a specific direction to adjust the relative pricing to reflect s 18 purposes.

10.2. As outlined above, the overall structure of the Act and the associated UFB regime is to have copper services as a competitive constraint on UFB. That, and s 18, mean that the obligation to consider relativity under s 18 is to endeavour to encourage facilities based competition from unbundlers. That is the opposite of contracting relativity for the purposes of encouraging migration to UFB.

¹⁹ CallPlus, Submission to the Commerce Commission on the technical consultation paper “Determining the cost of capital for UCLL and UBA price reviews”, 28 March 2014, paras 36 and 37.

- 10.3. The relative pricing should encourage competition in the LTBEU, and reflect rational build/buy decisions.

Vital that relativity is confirmed not to risk price or margin squeeze

- 10.4. As the largest unbundler in New Zealand the price relativity of UCLL and UBA services is a critical issue for CallPlus. The Commission is balancing the incentive for further investment in new exchanges against the impact on unbundlers, their investment and their ability to compete. We believe the risks of too high versus too low a relativity between UCLL and UBA are not symmetrical in terms of their impact on consumers and competition.
- 10.5. The additional matters that must be considered regarding application of section 18 to the UBA price determination consists of a requirement that “The Commission must consider relativity between this service and Chorus’s unbundled copper local loop network service (to the extent that terms and conditions have been determined for that service”.²⁰
- 10.6. We consider this requirement reflects that if the TSLRIC determination for the “additional costs incurred in providing the unbundled bitstream access service” is set too low it could result in a price or margin squeeze for access seekers that use UCLL, but not UBA, services. Such an outcome would be contrary to the purpose of Part 2 of the Telecommunications Act to (s 18(1)) promote competition, and would result access seekers making inefficient decisions (contrary to s 18(2)) on whether to use UCLL services or UCLL and UBA services (artificially favouring the latter).
- 10.7. If the differential between UCLL & UBA is set too low clearly unbundlers are disadvantaged. Unbundling has been encouraged by the regulatory regime to this point and the benefits in terms of competition and consumers benefiting from better pricing has been well established by the Commission itself in numerous monitoring reports.
- 10.8. The Commission recognised the importance of unbundling investments in terms of competition. The following is an extract from CallPlus’ submission on the MBIE Review of the Act discussion paper:

CallPlus has fought for unbundling for over a decade. After getting unbundling regulated, within weeks cabinetisation was announced - this is a prime example of the threat of competition encouraging investment from incumbents. CallPlus and others players then successfully fought to get access to UCLFS after the Commerce Commission investigation into Telecoms actions in delaying and denying access. True to its word, once available CallPlus made a significant investment in unbundling.

CallPlus have since then had to deal with the prospect of our costs increasing due to LLU being averaged to accommodate the separation of Telecom and Chorus. We have then had to deal with the Government subsidising a fibre rollout by Chorus.

...

Without the presence of players such as CallPlus and our LLU investments, there is a very real risk of a duopoly in the fixed line market of integrated mobile-fixed players. In approving the merger of Vodafone and TelstraClear the Commerce Commission concluded (emphasis added):

” that, post acquisition, Orcon and Slingshot will continue to act as aggressive, price leading competitors in the market. While they lack the scale of Telecom or the merged entity, they are able to compete effectively, especially in areas where they have unbundled (where Vodafone’s fixed network is largest). The Commission

²⁰ Schedule 1, Part 2, Telecommunications Act.

considers that, post acquisition, Orcon and Slingshot will provide competitive constraint on the merged entity
“(Determination 12 Aug 2012 Vodafone New Zealand Limited and TelstraClear Limited [2012] NZCC 33)

If the business models of players like CallPlus fail, then 2Degrees may also be impacted in the future as they undoubtedly need to have a fixed-wireless proposition. The proposed changes may eliminate potential partners in the fixed market which will have negative consequences in the mobile market.

10.9. We accept, as a general proposition, that if both the UCLL and UBA prices are cost based then this should result in an appropriate relativity. As Chorus has argued:²¹

If both UCLL and UBA services are appropriately set on a cost-based approach, then presumptively those are the prices that encourage economically efficient investment between the two services. [emphasis added]

10.10. The qualifications of “should”, “appropriately” and “presumptively” are important.

10.11. The Commission should recognise that establishment of cost-based pricing, particularly forward-looking costs, is inherently imperfect and uncertainties create a risk the Commission calculates a price that is different to the true forward-looking costs.

10.12. If the gap between UCLL and UBA prices is too small (not properly reflecting the cost differences between the provision of the two services) it will result in price or margin squeezes which could have anti-competitive impact (if Chorus was unregulated and set the equivalent price differential) and lessen competition by access seekers such as CallPlus that have invested in unbundling of Chorus’ local loop network. (This would exacerbate the impact of copper to fibre migration is already having on the economics of investment by access seekers in DSLAMs).

10.13. TUANZ is correct to observe that “A number of retail ISPs have invested heavily in the fixed line space in line with the well-recognised “ladder of investment” model. Those ISPs tend to be the ones who have introduced new and innovative pricing strategies (such as roll over data, shared data and so on) and who deliver significantly more value for money”.²²

10.14. Consistent with this the European Commission has recently provided direction on costing methodologies to promote competition and enhance the broadband investment environment that members should “ensure consistent pricing of access products along the same value chain to safeguard the investment ladder principle”.²³

10.15. Professor Vogelsang, in advice to the Commission, has suggested the ladder of investment argument, which would otherwise “[require] an increase of the wholesale UBA price relative to the UCLL price”, should be rejected on the grounds that “UBA bypass would be an outgoing technology” and “The questions here are if the remaining time horizon for copper access is still long enough to justify such investments”.²⁴

²¹ Chorus, Submission in response to the Commerce Commission’s Unbundled Bitstream Access Price Review Consultation Discussion Paper, 24 August, para 20.

²² TUANZ, untitled submission in response to MBIE’s consultation paper, Review of the Telecommunications Act 2001, para 85.

²³ European Commission, Commission recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, paragraph 7.

²⁴ Professor Vogelsang, 5 July 2013, Paper prepared for the Commerce Commission, What effect would different price point choices have on achieving the objectives mentioned in s 18, the promotion of competition for the long-term benefit of end-users, the efficiencies in the sector, and incentives to innovate that exist for, and the risks faced by investors in new telecommunications services that involve significant capital investment and that offer capabilities not available from established services?, para 32.

10.16. CallPlus considers that Professor Vogelsang's rejection of an additional margin between UCLL and UBA services is unsound. The logic of Professor Vogelsang's arguments suggest he may not support continued regulation of UCLL access (if you don't support UCLL, then you would not be worried about whether the relativity of UCLL and UBA makes it uneconomic). Professor Vogelsang's arguments are implicitly based on the Commission making judgements about different technologies (this should be left to the market, the Commission should not be "picking winners"), and straying into matters (whether or not to invest in DSLAMs) that should be left to access seekers.

The Commission should avoid creating anti-competitive price or margin squeeze

10.17. We note the Commission considered the price relativity in the IPP determination for UBA and was "satisfied that the forward-looking cost for the UBA service is likely to provide incentives to unbundle where efficient to do so".²⁵ We agree with the Commission in the particular circumstances of that decision. The Commission had selected a UBA price of \$10.92 which was at the top of the benchmark range. This was the largest margin the Commission could have established. The Commission's statement does, however, beg the question of what conclusion the Commission would have arrived at if the benchmark prices for UBA services had lower, or if the TSLRIC price determination suggests the price should be lower.

10.18. As part of the Commission's price determination it should undertake a price squeeze test to ensure that not only are the absolute level of the UBA and UCLL prices appropriate, but also that the relative prices are appropriate. This is consistent with the European Commission direction that "NRAs may ... apply an *ex ante* margin squeeze test to regulated wholesale inputs in order to ensure that wholesale access pricing of copper-based access products does not hinder competition at retail level or to ensure an adequate economic space between the different copper access inputs".²⁶

10.19. We also consider that the Commission should err on the side of caution (favouring investment) and provide an adjustment to the price of the UBA service for relativity.

11. One-off charges

11.1. There has been little focus thus far on the one-off charges in the UCLL, SLU and UCLL STDs. We have requested FPPs for those charges and are working on the basis they will be included in the modelling. There has been a lack on consultation on this issue, which raises overlapping issues around the sufficiency of consultation, etc.

12. Can the workshops be altered to be even more effective?

12.1. We are very grateful for the presentation by TERA and the opportunity to obtain answers on various issues. Similarly we particularly appreciate the earlier workshops. We think this process of having workshops and feedback like this greatly improves the prospect of a better outcome and also will help reduce the risk of appeals etc. We have considerable

²⁵ Commerce Commission, Unbundled Bitstream Access Service Review, 5 November 2013, para 276.

²⁶ European Commission, Commission recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, paragraph 63.

overall reservations as to the speed with which this process is happening, and therefore the inability to submit adequately, but that is a separate issue. We would not want our strong concerns in that area to derail what is an excellent workshop approach. We would prefer to see a solution that makes this more workable and effective.

- 12.2. For example, multiple new and major issues have been raised in and by the two workshops. Understandably, the Commission's thinking is developing and evolving. The discussions at the workshops bear little resemblance to the formal discussion paper on which we are submitting. Yet we are, rightly, being asked to submit on the big issues being raised. But that is all happening on the fly and that makes it difficult.
- 12.3. This is compounded by the Chatham House rules approach. We can understand why the informality and confidentiality of doing the workshops this way has benefits. In particular, just as it is valuable having Dr Every-Palmer producing a straw man opinion – largely independently of the Commission - to help focus the legal issues, and without binding the Commission, it is highly valuable to have a safe environment for Commission staff and other stakeholders to raise and float issues in a way that does not commit the Commission. That has accomplished a great deal in our view for the Commission and for other stakeholders. But we think there are some practical and public law issues that make this approach difficult. Here, the challenges have become much larger due to the tight time constraints.

Can the workshops be made even better?

- 12.4. It might help for the Commission to discuss workshop design options with the few parties actively participating in this process. The last thing we want is for this relatively free flow of information to stop. One option, to try and mirror the Chatham House benefits, could be to have those attending comparable workshops signing up to NDAs, limiting sharing of information to particular people in organisations. The NDAs can also have an acknowledgment that the views expressed are not necessarily those of the Commissioners, etc.

13. The Sprint, the tortoise and the hare

Introduction

- 13.1. We are very concerned and surprised by the Commission's decision to complete the final pricing principle (FPP) TSLRIC determination for UCLL and UBA services by 1 December 2014.²⁷
- 13.2. We understand that the Commission considers assurances from TERA that they can get the modelling done to fit into that time frame is the basis for this approach. Our impression also is that the Commission is relying on a stronger focus on more robust project management to drive this through.

²⁷ Commerce Commission, media release, Commission confirms UCLL and UBA decision by December, 28 March 2014.

- 13.3. This timeframe will prevent interested parties from submitting meaningfully on the substance of the Commission's proposed TSLRIC methodology and draft determination. There simply cannot be enough time, within less than 8 months to both fully develop a TSLRIC model and prices and to also enable interested parties adequate time to fully review and submit on the Commission's proposals. This is apparent from the collapse of the consultation into a single omnibus draft determination consultation, which collapses multiple stages of the TSLRIC development process that should be consulted on prior to the draft determination and prior to undertaking the modelling development work, yet only allows 20 days for submissions. That also raises issues around legitimate expectation and public law, given this radical departure from the well established expectation that the Commission will properly consult at each step.
- 13.4. A risk that the Commission faces if it undertakes a more condensed process, and/or limits the consultation it will undertake before the draft determination, is that considerable time and resource could be expended, on undertaking the initial modelling, that would be wasteful if submissions indicate the method is flawed and/or does not best promote the long-term interests of end-users. The Commission could find it then needs to go backwards in its process, and undertake remodelling, which could result in the process taking longer than it otherwise might if the Commission had taken a more staged process. However, a greater risk may be, as noted above, that the Commission has no choice but to prioritise getting the FPPs out the door, over a correct approach.
- 13.5. We fear that the Commission's process will leave access seekers and end users exposed to the risk of the Commission getting it wrong and making a draft determination that is substantially above appropriate TSLRIC cost. This risk is not symmetrical, because the Commission will be dependent on Chorus for a significant amount of data (which we will only get to review within a short timetable), and is the only party likely to have the resources to undertake its own TSLRIC cost modelling.
- 13.6. This will put Chorus in a position where it has ready developed alternatives to aspects of the Commission's modelling that it does not like i.e. that result in a TSLRIC price lower than Chorus' own modelling.
- 13.7. We would not be so concerned about this if it would be enough that, as has happened in nearly every Commission Telco Act process in the last few years, the originally budgeted timelines have pushed out. In the past, aspirationally short time lines have extended, further consultation undertaken, etc, to largely solve the problem (although that has not always happened, the UBA update paper and its treatment in the UBA determination being an unsatisfactory material example).
- 13.8. But on these timelines, and in these circumstances, speed at the start becomes very difficult to fix later.

An example of the problem with unrealistic timelines

- 13.9. This is only an example; even if it is fixed, there are plenty of other similar issues.
- 13.10. The question of reusable and shared assets, such as ducts and poles, is a key question for the FPP process. It should not be assumed that Chorus makes efficient use of reusable and

shared assets. For example, Chorus sharing of poles and ducts with local electricity lines is a lot less than is being observed with the other LFCs, such as the use of poles by the LFC in Whangarei.

- 13.11. It was apparent that TERA is largely intending to rely on the approach by Chorus in this regard (for example, its actual choices about using existing ducts). More widely, it is apparent that TERA will be highly reliant – far more than we anticipated – on the information and network assets of Chorus. TERA said that the question of what reusable assets are available on networks does not have a general international trend. Therefore the reliability of the information provided by Chorus cannot be checked in that way. For that and other reasons, TERA are not auditing the information provided by Chorus.
- 13.12. Chorus has strong incentives to provide information that favours their position. Past experience here and internationally indicates that this situation is turned to advantage; is gamed; and is problematic. Unchecked, this can and likely will make a big difference in the determined prices.²⁸
- 13.13. Chorus has a considerable head start over the Commission and over other stakeholders. They hold the information. There is a further problem. Confidentiality constraints make it even harder for parties outside the Commission to verify the position.
- 13.14. The parties have 20 days to submit on the information and model when produced. That simply does not reflect the complexities and the realities of TSLRIC modelling and is contrary to international practice by regulators, regulators that have done multiple cost models and can expedite matters, contrary to the position here.
- 13.15. Stakeholders will not be able effectively to deal with the reusable asset issue. This will be made even harder as the LFCs, as sources of information about other approaches, also have incentives that are parallel to the Chorus incentives.
- 13.16. Particularly importantly, the Commission will not have the time to adequately vet the information or the approach. There are strong incentives to largely accept the Chorus and LFC data, unvetted. There is also simply no time to vet the material.
- 13.17. That is a trap for the Commission that plays beautifully to Chorus. Ultimately that plays directly against the interests of consumers for whom the Commission is the s 18 custodian.
- 13.18. All this wouldn't matter so much if, like in the past, problems such as this get ironed out. But here the problems can become irreversible. Let us say that an RSP, after the model is released for comment, has a compelling and correct argument favouring a different approach on reusable assets (or any other matter). By then all the leg work has been done on the model, and the reality is that, on most issues, it is too late to go back. This problem is compounded, incidentally, by the indication that the Commission may not consult again on the model before it is released in September.

²⁸ By way of example, we would contrast the pre-Chorus split Telecom's calculation of the net cost of the TSO and PSTN interconnection TSLRIC against the Commission's own calculations. The difference is stark.

- 13.19. Put another way, a big factor in considering the valid argument put forward by the RSP is the disruption to the timelines caused by a change of tack. In reality there would not be effective and proper consultation as the timeline drives the position. It is too late.
- 13.20. It is apparent that a key reason why the Commission has gone for tight time lines is the comfort it has from TERA that it can do the modelling in the timeframe. TERA might do a fine job, with the information they are given. But this is a classic case of Garbage in Garbage out. TERA intend, on the issue in this example, to use Chorus's data which will be largely unvetted in reality, and will largely not take account of other information. Garbage in. Garbage out.
- 13.21. A 20 day consultation period is in reality not a proper consultation at all on a matter of this complexity. And that of itself implies a breach of public law and Telecommunications Act requirements as to consultation.
- 13.22. We think all this should be self-evident including from the history that follows, but we are seeing an unwavering commitment from the Commission.
- 13.23. We regret the need to be this clear, but we consider that this problem is so large that we need to expressly state that there are likely to be breaches of public law and the Act, which will lead to poor outcomes for RSPs and consumers. We are confident that affidavit evidence from retired regulators from overseas would conclude that there are major problems with this approach should it be necessary to take this matter further on appeal or judicial review. Regulators with experience in telecommunications cost modelling, presented with what is happening here, would, we consider, conclude that the process and its speed is inadequate by a considerable margin. At risk is not just that RSPs might take action. Other disaffected parties might instead or as well, including Chorus and consumers.
- 13.24. We note however that judicial review may prove to be an option only when the process is completed given the principles applicable to judicial review (and an appeal is only available then anyway). So the FPP process may need to conclude before court action is taken, thereby further delaying matters and possibly leading to the FPP having to start over.
- 13.25. We add also that the rate of change reflected in what we have been told at the workshops, when completely new issues were raised, and the reality that TERA have to get on and start their work based on a certain approach, raises a real question around lack of consultation and possible pre-determination. While it is said that the Commission may have consulted adequately, it does not look that way to external stakeholders. It would be a justified conclusion that this has the appearance that OIA requests and discovery may disclose problems in this area.
- 13.26. Often, these problems, from a public law perspective, can be sorted out by consultation on the draft determination so that any errors earlier in the process are fixed. However, as noted above, the reality is that it will be too late by then to change path, and in reality there is no genuine consultation on major issues that affect the critical path as there is no time left. Public law requires real consultation. That would be so even if adequate time was given on which to consult and comment. That is not happening which is a further problem.

13.27. It is not at all apparent why the Commission is prepared to take such self-evident risks in doing this so fast and by cutting out consultation steps. While there is always a prospect of a judicial review or appeal and there are judgment calls and risks for the Commission in that regard, we assume the Commission would want to take reasonable steps to reduce litigation risk. The speed here virtually invites the disaffected parties, whoever they are, Chorus, RSPs or consumers, to issue proceedings.

13.28. The tortoise often beats the hare.

What the Commission has said and done cannot be reconciled with this speed

13.29. Past history speaks for itself, making it hard to understand why this is happening.

13.30. The Commission's original timeframe anticipated a decision by November 2015. We considered that time-frame to be ambitious and note Telecom's comment that it was "aggressive given the size and importance of the modelling task required".²⁹

13.31. The Commission's initial Issues Paper pointed out that "International experience and process suggest that TSLRIC modelling processes can take several years to complete in the extreme".³⁰

13.32. The Commission itself took some 26 months after the TelstraClear's application for a PSTN interconnection TSLRIC determination to produce a draft determination (15 November 2002 to 11 April 2005).

13.33. The Commission went on to note that "The question of the appropriate time period for completing a cost exercise necessarily involves consideration of potential trade-offs. In principle a more thorough TSLRIC exercise will take longer to complete but may result in a more accurate estimate of forward looking costs."³¹ A clear theme from submissions, apart from that of Chorus, was that the Commission should prioritise a robust TSLRIC determination over a fast determination.

13.34. Getting this done in less than 8 months cannot be reconciled with that. We appreciate that, if the Commission maintains the momentum of its new focus on project management, greater speed can be achieved, appropriately. But that can never achieve this sprint while meeting the requirements of the FPP.

13.35. There are some other benchmarks from the Commission's history which compellingly point to why this is highly problematic. They include:

13.35.1. Design and scope has not been completed after a year from when the UCLL FPP started. Now the detailed and really hard bit is to be done in 8 months.

²⁹ Telecom, letter to the Commerce Commission, UCLL FPP issues paper and timetable, 4 December 2013.

³⁰ Paragraph 16, 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.

³¹ Paragraph 17, 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.

- 13.35.2. It is difficult to understand why the UBA FPP should take around half the time that the “quick and dirty” UBA IPP has taken. A newly found focus on project management cannot explain this. The whole idea of the IPP, as the Fletcher report confirms, was to have a speedy proxy of the FPP, the latter involving much more time and cost. This alone should surely be sending a signal to the Commission that there are problems.
- 13.35.3. In relation to the UCLL and UBA IPP price determinations, it took the Commission 11 months from draft decision on the UBA IPP (3 December 2012) to final decision (5 November 2012), with the initial discussion paper released on 26 July 2012. The Commission released its final decision on the IPP price for UCLL services on 3 December 2012, after initiating the pricing review on 7 July 2011. Yet the full TSLRIC model is to be done in under 8 months.
- 13.35.4. There is the TSO history referred to below, and the PSTN FPP had a much more extended timeline than this.
- 13.35.5. The Commission’s TSO decisions being overturned on appeal to the Supreme Court is salutary. TSLRIC modelling is a complex exercise. While the Commission has undertaken TSLRIC type cost calculations for TSO services this was some years ago, and the Courts found there were serious deficiencies in the Commission’s methodology. These deficiencies resulted in overstatement of the net costs of the TSO which, due to legislative changes removing the TSO cost provisions in the Telecommunications Act, were never resolved.
- 13.35.6. There is the Commission’s prior PSTN interconnection TSLRIC work, referred to below.
- 13.35.7. There is also the Part 4 Commerce Act history, referred to below.

13.36. The majority of Commission processes have extended beyond the budgeted time. Yet the Commission has said that it **will** get the FPPs done by 1 December, not that it is **targeting** that date. We are not aware of any Commerce Commission precedent that would support this timeframe or indicate it is realistic. To the contrary, the history over the last few years has been one of setting aspirational timetables and for those not to be met, by a substantial margin, in most cases.

Cut corners?

13.36.1. It may be that the Commission has elected to cut corners instead of doing the FPP more robustly. While some compromise judgment calls are possible (for example, the choice between scorched earth and scorched node), compromise beyond that is not permitted by either the Act or by public law.

13.37. We wish to be clear that:

13.37.1. The nature of the FPP, in statutory context, is that a sufficiently thorough approach must be taken; and

13.37.2. We do not depart from our position that this should happen.

A further example: empirical cost benefit analysis

- 13.38. As we point out above for example, the Commission is required to undertake an empirical cost benefit analysis when applying s 18. Corners cannot be cut in that process and, from the IM High Court judgment, to do so would be an appealable error of law. Framed another way, to do other than a quantitative cost benefit analysis would be to take unnecessary appeal risk.

Another example: the workshops

- 13.39. Without going into the detail on the workshops, which as noted above are highly valuable, what is apparent is that the Commission's thinking has developed well beyond and away from the formal consultation being undertaken. These changes show that time is needed to get things right. By way of example, one of the benefits of the workshops was the revelation that the Commission was considering (in fact, seemed to have decided upon) having the UCLL price funding the cost of cabinet to the exchange backhaul. This was part of a package which would have seen the modelling undertaken in breach of the Act in a fundamental and major way, as noted above. Absent the workshop, it seems we would have got to September and the error would have been revealed, and possibly only fixed on appeal.
- 13.40. The costs of an asset that is not a component of the service being costed are not to be included in the cost of that service is a straight-forward proposition and clear based on the Act and on cost methodologies. Fortunately the problem can be detected and sorted now due to the workshops. But what of problems that are not revealed until September, when an error of that simplicity is made?
- 13.41. We wish to be very clear that we do not criticise the Commission for that simple error. Rather, this is complex stuff, and needs to be carefully worked through, including by consultation. Hence we welcome the approach at the workshops, including putting forward points that end up not having legs. Having problems with the simple things implies that some disinfecting sunlight and time will help. What else lurks?

TSO modelling

- 13.42. We refer the Commission to its TSO cost determinations (which has close parallels to a TSLRIC price determination), its PSTN interconnection TSLRIC draft determination, its IPP determinations including for UCLL and UBA services, and to its implementation of price control under Part 4A of the Commerce Act 1986, and then under the revised Part 4 of the Commerce Act.
- 13.43. The first TSO cost determination for 2001-2002 was not completed until 17 December 2003, 18 months after the period it applied to, and 21 months after consultation commenced, with the Commission's consultation paper on the matter issues on 22 March 2002. Even with the precedent of the first TSO cost determination, the TSO cost determination for 2002-2003 was not completed until after another 15 months on 24 June 2005. The third TSO cost determination took longer than the second and wasn't completed until two years after that, on 23 March 2007.

Commerce Commission's PSTN interconnection TSLRIC draft determination

- 13.44. The Commission's process on its TSLRIC PSTN pricing determination (which settled before the FPP was finalised) is salutary.
- 13.45. The Commission received an application from TelstraClear for a TSLRIC determination on 15 November 2002.
- 13.46. The Commission undertook a series of consultation papers on interconnection pricing (5 April 2002), application of TSLRIC Pricing Methodology (2 July 2002), and principles for implementation of TSLRIC pricing (20 February 2004) prior to undertaking the TSLRIC modelling.
- 13.47. The Commerce Commission then issued a draft determination (some months after it had originally intended) on 11 April 2005. This was 26 months after the initial application. Submissions were due on 26 May 2005 and cross-submissions on 10 June 2005.

Part 4 Commerce Act

- 13.48. The new Part 4 of the Commerce Act was substituted to replace the pre-existing Part 4 and 4A on 16 September 2008 (Commerce Amendment Act 2008). It then took the Commerce Commission until December 2010 to make input methodologies (IMs) determinations, and then 30 November 2012 for the Commission to apply the IMs in price resets for electricity distribution (26 July 2013 for gas pipeline businesses).

Choice of model and MEA

- 13.49. We are surprised that the Commission is not more fully developing the possible options around MEA and model design, and appears headed down a scorched node path reflecting FTTN. We consider that it would be advisable for the Commission to consult on the appropriateness of the proposed TSLRIC model that TERA Consultants and the Commission plan to use, proposed changes to the model to "New Zealandise" it (assuming the model isn't being built from scratch), and modelling design and assumptions BEFORE undertaking the TSLRIC modelling exercise, and before reaching a draft determination. Basically, we think the Commission should consult on the terms of reference/consultant brief and/or TERA Consultants' proposed approach to developing the TSLRIC model/price determination before TERA Consultants embark on the substantive TSLRIC modelling work. [minimise risk of getting it wrong]
- 13.50. A risk of the Commission faces if it undertakes a more condensed process, and/or limits the consultation it will undertake before the draft determination, is that considerable time and resource could be expended, on undertaking the initial modelling, that would be wasteful if submissions indicate the method is flawed and/or does not best promote the long-term interests of end-users. The Commission could find it then needs to go backwards in its process, and undertake remodelling, which could result in the process taking longer than it otherwise might if the Commission had taken a more staged process. However, a greater risk may be, as noted above, that the Commission has no choice but to prioritise getting the FPPs out the door, over a correct approach.

The tortoise, the hare, and the Electricity Authority

- 13.51. The experience with the Electricity Authority's transmission pricing methodology (TPM) review highlights some of the pitfalls of a condensed process. With hindsight, the tortoise would have been faster than the hare.
- 13.52. The Authority went from consulting on a decision making and economic framework to then consulting on a fully developed TPM proposal, collapsing problem definition, consideration of alternative methodologies, selection of a preferred alternative methodology, and development of the preferred alternative into a single consultation paper released in October 2012. Submissions made to the Commission at the start of its process recommended a more staged process.
- 13.53. The problem the Authority then faced was that its preferred option was universally (near consensus) rejected, and they were criticised for not adequately defining the problem (the building blocks for determining appropriate policy solutions) or properly considering a range of alternative solutions. The Authority has had to backtrack and has subsequently released additional Working Papers that attempt to remedy the original defects and criticisms 18 months later.
- 13.54. If the Authority had undertaken a more staged consultation process it would have meant it would have been able to undertake consultation earlier (it spent about 6 months producing the bundled consultation paper, without engaging with stakeholders and interested parties), and could have been much more advanced in its policy development process at this stage. Most recent submissions suggest the Authority has made little progress over the last 18 months and the concerns arising from the initial consultation paper still remain.
- 13.55. We do not believe the UCLL and UBA FPP determinations need to take years. The Commission can and should leverage the work and international precedent that exists for TSLRIC price determinations. Various of the work the Commission has already done in other jurisdictions, such as the approach to valuation of easements, determination of cost of capital, etc, should provide useful precedent.

What would a prudent and robust consultation process look like?

- 13.56. We note that s 47(d) of the Telecommunications Act limits the amount of time for submissions on the draft determination to 30 working days, which is around 5 weeks compared with the proposed 20 days.. This is a very tight timeframe but outside of the control of the Commission. 5 weeks is needed as to the draft determination. But that certainly assumes that the Commission has adequately consulted before on the steps leading up to the draft, rather than the single omnibus approach. Similarly there can be consultations thereafter. That is simply doing what the Commission currently does.
- 13.57. What should be clear from this submission is that the Commission's truncated process for determining a TSLRIC price for UBA and UCLL services severely exacerbates this by bundling the consultation on the draft determination, including draft determinations for both UCLL and UBA concurrently, with consultation on various inputs into the draft determination such as (non-comprehensive): (i) model used to calculate the TSLRIC price;

(ii) model documentation; (iii) data used in the model; (iv) methodology and assumptions used to calculate the TSLRIC price. For example, submission on the Commission's proposed MEA will be part of the consultation on the draft determination.

- 13.58. We do not consider this reasonable.
- 13.59. The Commission's PSTN interconnection TSLRIC process provides a more reasonable process.
- 13.60. As noted above, the Commission undertook a series of consultation papers on interconnection pricing (5 April 2002), application of TSLRIC Pricing Methodology (2 July 2002), and principles for implementation of TSLRIC pricing (20 February 2004) prior to undertaking the TSLRIC modelling.
- 13.61. These papers canvassed the Commission's formation of views and proposed approach to matters such as the level of optimisation (scorched node v scorched earth), bottom-up versus top-down, technology choice, approach to asset valuation and depreciation etc PRIOR to the Commission embarking on the TSLRIC modelling. This is a conventional Commerce Commission approach and should be the approach adopted for the current consultation.
- 13.62. The Commission's previous proposed consultation process for the UCLL TSLRIC determination was also much more manageable, consisting of multiple stages for consultation on the TSLRIC methodology, the Requirements Document for the UCLL TSLRIC model, and the draft determination.

What are the appropriate consultation steps?

- 13.63. We consider that an appropriate consultation process would consist of the following steps (non-exhaustive):
- 13.63.1. Release for consultation of the model that is being used for the TSLRIC determination. We presume it will be an off the shelf TERA model, rather than built from scratch. There is no obvious reason why this could not be released before TERA "New Zealandise" the model.
- 13.63.2. Consultation on each of the components of the proposed methodology and assumptions, e.g. proposed MEA, prior to development of the model and its application. We are very concerned that the Commission appears to believe it can make a judgement on the appropriate MEA on the basis of the consultation to date without undertaking any cost analysis of the different MEA options.
- 13.63.3. Consultation on the proposed inputs e.g. the Commission's assumptions about demand growth, projections of capex and opex, data provided by Chorus and other parties (under s 98) for input into the model etc.
- 13.63.4. Consultation on proposed amendments to the off the shelf TSLRIC model that the Commission and TERA believe are needed to "New Zealandise" the model.
- 13.63.5. Consultation on the revised TSLRIC model.

- 13.63.6. Consultation on the draft determinations, with consideration of whether to consultant on the UCLL and UBA draft determinations on a phased basis rather than concurrently. (The Commission consulted on its electricity and gas default price-quality path determinations on a staggered basis, with gas following electricity, even though much of the issues it had to work through were equally applicable to electricity and gas.)
- 13.64. None of the above is trivial or realistic to be bundled into one single consultation. We are not aware of any Commerce Commission precedent for any consultation on cost or price determinations of an equivalent scale.

14. Confidentiality

- 14.1. The Commission has a long running and well understood confidentiality order regime that by and large has worked well. Therefore, we suggest the “if it ain’t broke, don’t fix it” approach.
- 14.2. There has been an important change. Chorus is upstream from the RSPs and is no longer a competitor in that sense. Confidentiality orders are overwhelmingly about concerns as to competitors sharing information. That no longer applies. Given the disinfecting nature of sunlight, the information that Chorus can keep confidential should be kept to a bare minimum.

15. Concluding remarks

- 15.1. TSLRIC modelling is a complex exercise. While the Commission has undertaken TSLRIC type cost calculations for TSO services this was some years ago, and the Courts found there were serious deficiencies in the Commission’s methodology. These deficiencies resulted in overstatement of the net costs of the TSO which, due to legislative changes removing the TSO cost provisions in the Telecommunications Act, were never resolved.
- 15.2. The Commission’s priority should be to get the FPP determination right, over rushing to a decision. The determination of IPPs for UCLL and UBA that take affect from December 2014 negate the need to make an unduly rushed FPP determination.