

**VODAFONE NEW ZEALAND LIMITED**  
**SUBMISSION TO THE NEW ZEALAND COMMERCE COMMISSION**



**COMMENTS ON PROCESS AND ISSUES PAPER FOR THE  
UNBUNDLED BITSTREAM ACCESS SERVICE (UBA) FINAL PRICING  
PRINCIPLE**

**Public version**

**21 February 2014**

## **A Introduction**

- A1 Vodafone New Zealand Limited (**Vodafone**) welcomes the opportunity to comment on the Commerce Commission's (**Commission**) *Process and issues paper for determining a TSLRIC price for Chorus' unbundled bitstream access service in accordance with the Final Pricing Principle (Issues Paper)*.
- A2 Vodafone notes the Commission's intention that the Issues Paper should be read along with its process and issues paper for the unbundled copper local loop (**UCLL**) final pricing principle determination (**UCLL Issues Paper**). As such, Vodafone refers the Commission to its submission on the UCLL Issues Paper, which should be read in conjunction with this submission.

## **B Recommendations**

- B1 Vodafone recommends:
- (a) that the UBA and UCLL FPP processes be aligned;
  - (b) the Commission should adopt a process which favours quality decision-making over speedy decision-making;
  - (c) because the Commission's reasonable efforts obligation to achieve the UBA FPP by 1 December 2014 cannot be achieved without compromising the quality of the decision, this date should be set aside; and
  - (d) the Commission should create a single cost model for the UCLL and UBA FPP processes, adopting a fibre-to-the-premises (**FTTP**) and fixed wireless access (**FWA**) network as the modern equivalent access (**MEA**).
- B2 The reasoning for these conclusions is set out below, as follows.

## **C Timeline for the UBA process**

- C1 The Commission's proposed process seeks to complete the UBA final pricing principle determination (**UBA FPP**) before 1 December 2014. In our view, a modelling exercise which permits even a reasonable contemplation of a final determination in less than 10 months from the issue of the first principles paper is very unlikely to ensure an outcome which is consistent with s 18 of the Telecommunications Act 2001 (the **Act**).

### **The Commission's reasonable efforts standard should be displaced**

- C2 Vodafone acknowledges the "reasonable efforts" standard for the Commission to complete the UBA FPP before 1 December 2014.<sup>1</sup> However, the current circumstances mean that the Commission will not be able to discharge this obligation.<sup>2</sup> As such, the Commission should favour a process which best promotes the purpose of s 18 of the Act (i.e., one that promotes competition in telecommunications markets for the long term benefit of end-users of telecommunications services).

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<sup>1</sup> Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011, s 78(3).

<sup>2</sup> Vodafone New Zealand *Comments on process and issues paper for the unbundled copper local loop (UCLL) final pricing principle* (14 February 2014) at [C1.6] (**Vodafone Submission on the UCLL Issues Paper**).

C3 We note that reasonable efforts target set in the Act is not a hard date. Parliament had the choice to make the final date a compulsory one.<sup>3</sup> In setting a reasonable efforts standard, Parliament has left an element of discretion with the Commission. If it will not be possible to achieve a quality decision in the circumstances, then the Commission should exercise this discretion to exceed the reasonable efforts date (which, we note, for the reasons set out below, would still reflect the Commission attempting to complete the TSLRIC modelling exercise as quickly as reasonably practicable).

**The IPP decision-making process suggests that a 9 month FPP process is not possible**

C4 In our view, the prospect of the Commission achieving a final UBA FPP determination before 1 December 2014 has been improbable since at least the date of the final UBA IPP determination. It is simply not tenable to expect the more complex FPP cost modelling exercise to be completed in less time than the (relatively) simple benchmarking process required for the IPP.

C5 The UBA IPP process can be summarised as follows:

- (a) the first consultation paper for the UBA IPP process was issued on 26 July 2012, with the Commission initially contemplating the release of a final decision by the end of November 2012;<sup>4</sup>
- (b) in reality, the draft determination was released on 3 December 2012 (coinciding with the release of the final determination for the UCLL IPP);
- (c) following the Government's announcement that the statutory review of the policy framework for regulating telecommunications services in New Zealand would begin immediately, the Commission consulted on its expected timetable for completing the UBA review.<sup>5</sup> At that point, the Commission proposed a final determination date of 15 – 30 June 2013 (11 months from the release of the initial consultation document); and
- (d) ultimately, the final determination was released on 5 November 2013 (15 months from the release of the initial consultation document).

C6 Even when taking into account any delays relating to regulatory review, the experience with the IPP process demonstrates the time required to accurately implement cost-based regulation for Chorus' regulated copper services. These are complicated matters, which require due consideration by the Commission and appropriate time for the Chorus, access seekers, and other interested parties to formulate and communicate their views.

C7 In our view, the final IPP process timeline makes it clear that—exercising reasonable efforts—it will not be possible for the Commission to achieve the FPP final determination before 1 December 2014. This is because the time taken to complete the UBA IPP determination:

- (a) means that the “runway” from parties filing their FPP applications and the 1 December 2014 deadline was, from the very beginning of the FPP process, too short; and

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<sup>3</sup> For example, section 52U of the Commerce Act 1986 required that the Commission **must** determine the input methodologies by a set date (unless granted an extension).

<sup>4</sup> Commerce Commission *Unbundled Bitstream Access Price Review Consultation* (26 July 2012).

<sup>5</sup> Commerce Commission *Timetable for the UBA price review* (letter to interested parties, 6 March 2013).

- (b) is evidence that, if the relatively simpler exercise of benchmarking could not be completed in a period of a little more than 9 months (as is the time now available to complete the FPP before 1 December 2014), then it is not reasonable to expect that the FPP process (which has been generally understood to be significantly more complex) can be completed in such a short period.

**Completing a TSLRIC modelling exercise for the UCLL and/or the UBA before 1 December 2014 is not reasonable**

- C8 Independently from the experience with the UBA IPP process, the circumstances in this case strongly suggest that completing a TSLRIC model for the UBA service (or indeed for the UCLL service) will not be possible before 1 December 2014. As a starting point, we refer to the Commission's own observations:
- (a) international experience suggests that TSLRIC modelling exercises can take several years to complete;<sup>6</sup>
  - (b) there are strong linkages between the UBA and UCLL price review determinations;<sup>7</sup> and
  - (c) the UBA price will have a significant impact on the New Zealand fixed-line telecommunications market.<sup>8</sup>
- C9 With this in mind, we consider that attempting to deliver a final determination for the UBA FPP before 1 December 2014:
- (a) would not leave sufficient time for the Commission to conduct a TSLRIC modelling exercise to an appropriate standard as compared to the experience of regulators in other jurisdictions (as implied in our submission on the UCLL Issues Paper, we also consider that such a timeline would be untenable for the UCLL FPP modelling exercise).<sup>9</sup>
  - (b) would not allow the linkages between UBA and UCLL (including in relation to modelling, cost sharing and other key assumptions – such as in relation to cost of capital) to be appropriately addressed;<sup>10</sup> and
  - (c) would not permit the Commission to take the relativity between UBA and UCLL pricing into account, as it is required to do, when addressing the application of s 18 (because it is not rational to conduct this analysis when the final UCLL price is not known, and we do not consider it tenable for the UCLL FPP process to be completed by 1 December 2014);<sup>11</sup> and
  - (d) more broadly, for the reasons set out in C1.1 – C1.3 of our submissions on the UCLL Issues Paper, pursuing a target date of 1 December 2014 (a little over 9 months from

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<sup>6</sup> Commerce Commission *UCLL Issues Paper* at [15] – [16]. See also MBIE Review of the Telecommunications Act 2001 (August, 2013) at [18] and the discussion in *Vodafone Submission on the UCLL Issues Paper* at [C1.1] – [C1.3].

<sup>7</sup> Commerce Commission *UBA Issues Paper* at [7].

<sup>8</sup> Commerce Commission *UBA Issues Paper* at [11].

<sup>9</sup> We strongly oppose Chorus's suggestion in its submission on the UCLL Issues Paper that an acceptable TSLRIC model for the UCLL service can be developed, consulted on, and implemented before 1 December 2014. We intend to address this point further in our cross-submission on the UCLL Issues Paper.

<sup>10</sup> See *Vodafone Submission on the UCLL Issues Paper* at [C1.7].

<sup>11</sup> Telecommunications Act 2001, s 19(b) and Schedule 1.

today) is likely to lead to a decision-making process which inappropriately favours speedy decision-making over quality decision-making. This is particularly concerning when, as observed by the Commission, the UBA price that will be set through this exercise will have a significant impact on the New Zealand fixed-line telecommunications market.

C10 We also note that Chorus, in its response to the UCLL Issues Paper, supports the Commission undertaking the UCLL and UBA FPP processes in parallel. Chorus observes that:<sup>12</sup>

*... The UBA FPP requires the calculation of "additional costs" which means it is necessary and appropriate for the Commission to ensure that costs of UCLL are understood (to ensure there is no under or over recovery)...*

C11 We agree with this assessment, but do not agree with Chorus that it is feasible to complete both the UCLL and UBA processes (or indeed one or the other on its own) by 1 December 2014. We strongly oppose Chorus' proposal that the Commission should direct Chorus to develop the cost model, and do not believe that this is a realistic route to achieving a quality outcome in a timely fashion.<sup>13</sup>

C12 We recognise the uncertainty that the delay between the IPP price taking into effect and the FPP price being settled can create.<sup>14</sup> However, this is an issue which applies in relation to any FPP determination. As set out in our submission on the UCLL Issues Paper, the Commission can address this through its s 18 analysis in relation to any decision as to whether or not any change in price between the IPP and FPP should be backdated.<sup>15</sup>

C13 Accordingly, we recommend that the Commission adopts a timeline for both the UBA and UCLL FPP processes in which it is confident a high quality outcome, reflecting the significant impact that its decisions will have on New Zealand's telecommunications market, will be delivered.

## **D Choice of the Modern Equivalent Asset**

D1 Vodafone considers that the UCLL and UBA FPP processes should be conducted together. As part of this, we consider that a single TSLRIC cost model (with a single MEA) should be built for both the UCLL and UBA FPP.<sup>16</sup>

D2 In our view, the most appropriate MEA for Chorus' UCLL service is a combination of a fibre-to-the-premises (**FTTP**) network, with fixed wireless access (**FWA**) for rural areas.<sup>17</sup> The calculation of the cost to deliver the UBA service should be modelled using this network (with an appropriate adjustment to reflect the difference in the available MEA services and the UBA services).<sup>18</sup>

D3 We do not support the Commission's preliminary view that the appropriate MEA for the UBA service should utilise Chorus' copper based inputs, potentially with rural broadband initiative (RBI)

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<sup>12</sup> Chorus Submission in response to the Commerce Commission's Process and issues paper for determining a TSLRIC price for Chorus' unbundled copper local loop service in accordance with the Final Pricing Principle (14 February 2014) at [2.7].

<sup>13</sup> We intend to respond to this more fully in our cross-submission on the UCLL Issues Paper.

<sup>14</sup> Commerce Commission UBA Issues Paper at [10].

<sup>15</sup> See discussion in Vodafone Submission on the UCLL Issues Paper at section C4.

<sup>16</sup> Vodafone Submission on the UCLL Issues Paper at [C1.5] – [C1.7].

<sup>17</sup> See discussion in Vodafone Submission on the UCLL Issues Paper at sections E2 and E3.

<sup>18</sup> See discussion in Vodafone Submission on the UCLL Issues Paper at section E4.

fixed wireless in place of copper in some rural areas.<sup>19</sup> This is in contrast to the Commission's preliminary view on a suitable MEA for UCLL using a mix of fibre with FWA. In our view, a single (optimised) MEA should be adopted for the cost model for both the UCLL and UBA services. A TSLRIC cost-price should not permit Chorus to be compensated for any inefficiencies in its underlying copper network at the layer 2 level (the UBA uplift), as much as it should not be compensated for inefficiencies in the layer 1 level (the UCLL input).

- D4 We note, in terms of any adjustment, the most appropriate approach may be that adopted by the Danish regulator: ensuring that the cost of providing the regulated service using the existing access technology sets a ceiling for pricing using the TSLRIC model.<sup>20</sup>

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<sup>19</sup> Commerce Commission *UBA Issues Paper* at [17].

<sup>20</sup> *Vodafone Submission on the UCLL Issues Paper* at [E4.4] and at Recommendation 20.