DRAFT REGULATORY PROCESSES AND RULES FIBRE INPUT METHODOLOGIES DETERMINATION 2020

Submission to the Commerce Commission

PUBLIC VERSION

19 May 2020 DRAFT

EXECUTIVE SUMMARY

1. Vocus' views on the draft Regulatory Processes and Rules Input Metholodogy (RP&R IM) include that:

   (i) **Enduring rules should be included in the IMs:** As a general principle, regulatory processes and rules should be prescribed in the IM unless it would be desirable to enable a different approach to be taken in subsequent resets.

   (ii) **The wash-up mechanism should be prescribed in the RP&R IM:** If for practical reasons, or reasons of convenience, the Commission retains its preference to develop the wash-up mechanism at the same time it develops the Price-Quality Regulation (PQR) determination, the Commission should consider adding the wash-up mechanism to the IM at this (latter) stage.

   (iii) **The Commission should commit to a review of the revenue cap before the 2nd PQR determination:** The Commission should make this commitment to avoid subsequent claims that review of the revenue cap, outside the normal statutory review of the IMs, would undermine regulatory certainty.

   (iv) **The Commission should remove *"knowingly"* from the *"false or misleading information"* re-opener, and allow for a re-opener where Chorus has made unsubstantiated representations:** The re-opener provision for *"knowingly"* false or misleading information is too narrow. Consistent with the Fair Trading Act it should not matter whether the information was *"knowingly"* false or misleading or the Commission can prove it was *"knowingly"* false or misleading. What should matter is simply that the information is false or misleading.

   (v) **The Commission should also be able to re-open the Price-Quality (PQ) path where Chorus does not have reasonable grounds to justify the information the Commission relied on** i.e. where Chorus makes an *"unsubstantiated representation"*.[1]

   (vi) **Vocus supports the draft decision on the date of the regulatory period.**

   (vii) **Vocus supports the limited application of pass-through and recoverable costs.** We agree that industry dispute scheme fees, TCF fees and Council rates should be excluded for the reasons provided by the Commission.

   (viii) **Chorus should NOT be able to allocate the full cost of industry levies to their fibre businesses**. The telecommunications development levy and the telecommunications regulatory levy are allocated amongst liable persons on the basis of qualifying revenue, and this same method should be used to allocate the levies between Chorus' telecommunications businesses.

[1] Drawing on Fair Trading Act terminology.

INTRODUCTION

2. Vocus welcomes the opportunity to submit in relation to the Commerce Commission's *"Draft Regulatory Processes and Rules Fibre Input Methodologies Determination 2020"* (the draft RP&R IM) and the *"Draft Decision – Reasons Paper (Regulatory Processes and Rules)"* (the draft Reaons Paper), issued on 2 April 2020.

3. We welcome that the Commission has, generally, responded to and engaged with the previous submissions in its draft Reasons Paper. This is important for ensuring stakeholders understand why the Commission has different views on some matters, and to enable responses beyond simple repetition of previous submission points.

4. Only having to deal with one component of the IMs has also made responding to the Authority's draft proposals more manageable.

5. If you would like any further information or have any queries about this submission, please contact:

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THE WASH-UP MECHANISMS SHOULD BE INCLUDED IN THE RP&R IM

6. We reiterate that as a general principle, regulatory processes and rules should be prescribed in the IM unless it would be desirable for the Commission to have flexibility to enable a different approach to be taken in subsequent resets. The wash-up mechanism should be included in the RP&R IM, consistent with Part 4 precedent.

7. The Commission's response to the various stakeholders that advocated inclusion if wash-up in the IMs was that *"In our view the approach to calculating wash-ups … should be addressed at the time that our approach to setting PQ paths is developed. … and we consider that the design … is best considered in the context of overall decisions on the allocation of risk and incentives under PQ paths"*. This isn't a reason to exclude wash-up from the IMs. This is a reason to exclude wash-up at this point of time, and for developing the wash-up IM provisions in conjunction with the first Price-Quality Regulation (PQR) determination.

8. The Commission also noted wash-up isn't a matter *"we are required to address in the RPR IM under s 176(1)(c) of the Act"*. Again, this isn't a reason to exclude wash-up from the IMs. Just because the Commission doesn't have to doesn't mean it shouldn't. To paraphrase the Commission's view on the regulatory cap, another matter section 176(1)(c) doesn't require the Commission to address in the IMs, *"We consider that to provide sufficient certainty about the [wash-up mechanism], it is appropriate to specify [the mechanism] in an IM"*.

THE COMMISSION SHOULD COMMIT TO REVIEW WHETHER THE REVENUE CAP SHOULD BE REPLACED WITH A PRICE CAP FOR THE 2ND REGUALTORY PERIOD

9. Vocus submitted that the initial version of the RP&R IM should not prescribe a revenue cap, and the form of control component of the IM should be reviewed immediately after the first PQR determination.

10. We again reiterate that as a general principle, regulatory processes and rules should be prescribed in the IM unless it would be desirable for the Commission to have flexibility to enable a different approach to be taken at subsequent resets. Given a revenue cap is being adopted for the first regulatory period because of legislative directive, the Commission should grant itself the flexibility to review whether a revenue cap should apply for the 2nd and subsequent regulatory periods. If a revenue cap is included in the initial RP&R IM the IM may need to be re-opened before the end of the first regulatory period.

11. The Commission should, at least, commit to reviewing whether a revenue cap should be retained during the first regulatory period. The Commission should make this commitment to avoid subsequent claims that review of the revenue cap, outside the normal statutory review of the IMs, would undermine regulatory certainty.[2]

12. The Commission has skirted around the issue of whether, and when, it will review the application of the revenue cap noting: *"We consider that the process and timing for determining the form of control in future regulatory periods should not be covered in the RPR IM. Rather, in considering any change to the form of control, eg, from a revenue cap to a price cap, we would follow the process for considering changes to the IMs set out in ss 179 and 181 of the Act"*.

WE REMAIN OF THE VIEW THAT THE RE-OPENER PROVISIONS ARE TOO NARROW IN RELATION TO FALSE OR MISLEADING INFORMATION

13. Vocus remains of the view that the error and *"knowingly"* false or misleading re-opener provisions are too narrow.

14. While the Commission did not explicitly engage with our proposal to include a *"materially incorrect"* re-opener, it has evidently rejected it.

15. An alternative option the Commission should consider would be to: (i) simply delete the word *"knowingly"*, and/or (ii) include a new re-opener provision where the supplier has made an *"unsubstantiated representation"* and the Commission relied on that information in making or amending the PQ determination. Both these options draw on Fair Trading Act precedent.

[2] The Commission has, appropriately, only undertaken review or amendment of the Part 4 Commerce Act IMs in limited circumstances, outside of the statutory review of the IMs.

16. A problem with the term *"knowingly"* is that the Commission not only needs to prove the information is *"false or misleading"* it also has to prove Chorus *"knowingly"* provided *"false or misleading information"*.

17. The Fair Trading Act avoids such problems as it does not include a *"knowingly"* test. A breach can occur even when it is unintentional. For example, the Fair Trading Act requires that (section 9) *"No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive"*, (section 10) *"No person shall, in trade, engage in conduct that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for a purpose, or quantity of goods"* and (section 13) *"No person shall, in trade, in connection with the supply or possible supply of goods or services or with the promotion by any means of the supply or use of goods or services … make a false or misleading representation …"*.

18. Breach of the Fair Trading Act does not require the supplier *"knowingly"* or intentionly provided false or misleading information, and neither should the re-opener provisions..

19. The Fair Trading Act also requires that *"A person must not, in trade, make an unsubstantiated representation"*. The Act states that *"A representation is unsubstantiated if the person making the representation does not, when the representation is made, have reasonable grounds for the representation, irrespective of whether the representation is false or misleading"*, but *"This … does not apply to a representation that a reasonable person would not expect to be substantiated"*. This would provide a reasonable basis for a re-opener.

20. In short, we do not consider it would be to the long-term benefit of end-users if Chorus could financially benefit at their expense from providing information which the Commission relies on which Chorus does not have reasonable grounds to justify, or that is false or misleading.

OTHER MATTERS

21. Vocus has the following views on other matters:

    (i) **Vocus supports the draft decision on the date of the regulatory period:** In support, we reiterate the Chorus' fibre regulatory period should not coincide with gas pipelines, electricity distribution and/or electricity transmission regulatory periods. We also support Chorus and the LFCs "*all … hav[ing] the same disclosure year so interested parties (including the Commission) can assess performance more easily".*

    (ii) **Vocus supports the limited application of pass-through and recoverable costs.** We agree industry dispute scheme fees, TCF fees and Council rates should be excluded for the reasons provided by the Commission.

    (iii) **Chorus should NOT be able to allocate the full cost of industry levies to their fibre businesses**. costs. The telecommunications development levy and the

telecommunications regulatory levy are allocated amongst liable persons on the basis of qualifying revenue, and this same method should be used to allocate the levies between Chorus' telecommunications businesses. This should be addressed in the IM cost allocation rules.