

26 August 2014

KiwiRail Holdings Limited  
Level 4, Wellington Railway Station  
Bunny Street  
WELLINGTON

Attention: Andrew Brown, General Counsel

By email: [andrew.brown@kiwirail.co.nz](mailto:andrew.brown@kiwirail.co.nz)

Dear Mr Brown

**Notice to supply information and documents to the Commerce Commission  
under sections 98(a) and (b) of the Commerce Act 1986 via section 15(f) of  
the Telecommunications Act 2001**

1. I attach a notice issued under section 98(a) and (b) of the Commerce Act 1986 (Notice) which requires KiwiRail Holdings Limited to supply the information and documents specified in the Notice to the Commerce Commission (Commission). This letter does not form part of the Notice, but is provided to assist you in complying with the Notice.
2. You may wish to seek legal advice about the Notice.

**The Commission**

3. We (the Commission) are a statutory body established under the Commerce Act. The purpose of the Commerce Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.
4. Section 98 of the Commerce Act allows us to require a person to furnish us with information and produce any documents or classes of documents, where we consider this necessary or desirable for the purposes of carrying out our functions and exercising our powers under the Commerce Act.
5. Section 15(f) of the Telecommunications Act 2001 states that the provisions of section 98 of the Commerce Act apply to the Telecommunications Act.
6. We have functions under both the Commerce Act and the Telecommunications Act. One of our functions under Subpart 2A of Part 2 of the Telecommunications Act is to

**AUCKLAND**

L19, ASB Building  
135 Albert Street  
P.O. Box 105-222  
AUCKLAND 1143, NEW ZEALAND

**WELLINGTON**

L6, 44 The Terrace  
P.O. Box 2351  
WELLINGTON 6140, NEW ZEALAND  
Tel: (04) 924 3600 Fax: (04) 924 3700  
Main Office

**CHRISTCHURCH**

9 Radley Street  
Woolston  
P.O. Box 10-199  
CHRISTCHURCH 8145, NEW ZEALAND

determine the terms (including the price) on which a designated access service must be supplied to access seekers.

### **The Notice**

7. We are reviewing the price to be paid for the Unbundled Copper Local Loop (UCLL) and Unbundled Bitstream Access (UBA) services provided by Chorus Limited, as defined in subpart 1 of Part 2 of Schedule 1 of the Telecommunications Act. We are required to make a price review determination as soon as practicable in respect of the UCLL service (refer sections 47 and 51 of the Telecommunications Act 2001) and we are required to make reasonable efforts to make a price review determination in respect of the UBA service before the expiry of three years from separation day, which is 30 November 2014 (refer section 78(3) of the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011).
8. The Notice seeks information and documents which we consider are desirable for our pricing reviews in relation to the UCLL service and the UBA service. The information and documents sought will help inform our decisions on the costs to be included in our model of the costs that a hypothetical efficient provider investing today in fixed telecommunications networks would incur to access, provision and maintain network infrastructure in the Rail Corridor.
9. This letter and the Notice will be placed on our website.

### **Response to the Notice**

10. The information and documents in response to this Notice must be delivered to the Commission's Wellington office at Level 6, 44 The Terrace for the attention of Keston Ruxton, or by email to [telco@comcom.govt.nz](mailto:telco@comcom.govt.nz) with the subject "Response to section 98 Notice – UCLL and UBA", by:
  - 10.1 **5pm on 12 September 2014** in respect of the information sought in paragraph 4.1 of Attachment A;
  - 10.2 **5pm on 25 September 2014** in respect of the remainder of the information sought in Attachment A.
11. KiwiRail Holdings Limited must provide all information and documents in Attachment A to the Notice in electronic format via email, flash drive or to the assigned extranet site.
12. KiwiRail Holdings Limited must supply the requested information and documents under cover of a letter on KiwiRail Holdings Limited's letterhead, signed by a person with the appropriate authority.

### **Compliance with the Notice**

13. It is an offence under section 103 of the Commerce Act to fail to comply with the Notice, or to knowingly give false or misleading information and documents to us.

14. Given our tight timeframe for completion of these pricing reviews, KiwiRail Holdings Limited should contact us as soon as possible if it will be unable to provide all of the requested information and documents by the due date.
15. When contacting us KiwiRail Holdings Limited must set out in writing:
  - 15.1 why it is unable to comply with the Notice; or
  - 15.2 why it needs an extension of time to comply with the Notice.
16. If KiwiRail Holdings Limited is unable to provide any of the requested information and documents, and/or any of the requested information and documents are not in its control, it must fully explain the reasons and circumstances in its response to each request concerned.

**Further enquiries**

17. Please direct any enquiries in relation to the Notice to Keston Ruxton at the Commission's Wellington Office, direct dial 04 924 3673 or email: **keston.ruxton@comcom.govt.nz**.

Yours sincerely



Elisabeth Welson  
Commissioner

## Relevant extracts from the Commerce Act 1986

### Section 98

#### Commission may require person to supply information or documents or give evidence

Where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under this Act, the Commission may, by notice in writing served on any person, require that person -

- (a) to furnish to the Commission, by writing signed by that person or, in the case of a body corporate, by a director or competent servant or agent of the body corporate, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or
- (b) to produce to the Commission, or to a person specified in the notice acting on its behalf in accordance with the notice, any document or class of documents specified in the notice; or

...

### Section 101

#### Notices

- (1) Any notice given by the Commission under or for the purposes of this Act shall be sufficiently given if it is in writing under the seal of the Commission or is signed by the chairperson, or by one or more of the members of the Commission, or by any persons purporting to act by direction of the Commission, and is served in accordance with section 102 on the person or persons primarily concerned therewith or on any person or organisation deemed by the Commission to represent the person or persons primarily concerned therewith.

....

### Section 103 (relevant provisions)

#### Offences

- (1) No person shall –
  - (a) without reasonable excuse, refuse or fail to comply with a notice under ... [section] 98; or
  - (b) in purported compliance with such a notice, furnish information, or produce a document, or give evidence, knowing it to be false or misleading; or

...

- (2) No person shall attempt to deceive or knowingly mislead the Commission in relation to any matter before it.

...

- (4) Any person who contravenes subsection (1) or subsection (2) or subsection (3) commits an offence and is liable on summary conviction to a fine not exceeding \$10,000 in the case of an individual, or \$30,000 in the case of a body corporate.
- (5) Proceedings for an offence against subsection (4) may be commenced within 6 months after the matter giving rise to the contravention was discovered or ought reasonably to have been discovered.



## Section 106

### Proceedings privileged

- ....(4) A person shall not be excused from complying with any requirement to furnish information, produce documents, or give evidence under this Act, or, on appearing before the Commission, from answering any question or producing any document, on the ground that to do so might tend to incriminate that person.
- (5) A statement made by a person in answer to a question put by or before the Commission shall not in criminal proceedings or in proceedings for pecuniary penalties of this Act, be admissible against that person.
- (6) Nothing in subsection (5) applies in respect of—
- (a) proceedings on a charge of perjury against the maker of the statement; or
  - (b) proceedings on a charge of an offence against section 103.
- ...
- (9) Anything said, or any information furnished, or any document produced or tendered, or any evidence given by any person to the Commission, shall be privileged in the same manner as if that statement, information, document, or evidence were made, furnished, produced, or given in proceedings in a court.
- (10) For the purposes of clause 3 of Part 2 of Schedule 1 to the Defamation Act 1992, any statement, document, determination, clearance, authorisation, or decision made by the Commission in the exercise or intended exercise of any of its functions or powers shall be deemed to be an official report made by a person holding an inquiry under the authority of the Parliament of New Zealand.

## **Relevant extracts from telecommunications legislation**

### **Telecommunications Act 2001**

#### **Section 15**

##### ***Application of Commerce Act 1986 and Crown Entities Act 2004***

The following provisions of the Commerce Act 1986 apply with any necessary modifications:

...

(f) section 98 (Commission may require person to supply information or documents or give evidence):

...

(k) sections 101 (notices) and 102 (service of notices):

(l) section 103 (offences):

...

### **Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011**

#### **Section 78**

...

(3) The Commission must make reasonable efforts to complete the pricing review determination before the expiry of 3 years from separation day.

## **Notice to supply information and documents to the Commerce Commission**

### **Sections 98(a) and (b) Commerce Act 1986**

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**To:**

KiwiRail Holdings Limited  
Level 4, Wellington Railway Station  
Bunny Street  
WELLINGTON

Attention: Andrew Brown, General Counsel

#### **Purpose of the Notice**

1. We (the Commerce Commission) are reviewing the price to be paid for the Unbundled Copper Local Loop (UCLL) and Unbundled Bitstream Access (UBA) services provided by Chorus Limited, as defined in subpart 1 of Part 2 of Schedule 1 of the Telecommunications Act 2001 (Telecommunications Act). We are required to make a price review determination as soon as practicable in respect of the UCLL service (refer sections 47 and 51 of the Telecommunications Act 2001) and we are required to make reasonable efforts to make a price review determination in respect of the UBA service before the expiry of three years from separation day, which is 30 November 2014 (refer section 78(3) of the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011).
2. The purpose of this Notice is to obtain information and documents relevant to our price review determinations for the UCLL and UBA services.
3. The Notice is issued under sections 98(a) and (b) of the Commerce Act, and section 15(f) of the Telecommunications Act.
4. We consider it is desirable for KiwiRail Holdings Limited to provide us with the information and documents specified in **Attachment A** to this Notice to assist us in making the price review determinations.

#### **Date and place of response**

5. The information and documents in response to this Notice must be delivered to the Commission's Wellington office at Level 6, 44 The Terrace for the attention of Keston

Ruxton, or by email to [telco@comcom.govt.nz](mailto:telco@comcom.govt.nz) with the subject "Response to section 98 Notice – UCLL and UBA", by:

- 5.1 **5pm on 12 September 2014** in respect of the information sought in paragraph 3.1 of Attachment A;
- 5.2 **5pm on 25 September 2014** in respect of the remainder of the information sought in Attachment A.
6. KiwiRail Holdings Limited must provide all information and documents in Attachment A in electronic format, via email or flash drive.
7. KiwiRail Holdings Limited must label and identify all information and documentation, and explain which information relates to which paragraph of this Notice.
8. KiwiRail Holdings Limited must supply the requested information and documents under cover of a letter on KiwiRail Holdings Limited's letterhead, signed by a person with the appropriate authority.

Dated at Wellington,  26 August 2014

Signed by:



Elisabeth Welson  
Commissioner



## ATTACHMENT A

1. For the purposes of this Notice, the following terms have the following meanings:
  - 1.1 **KiwiRail** means Kiwirail Holdings Limited, its interconnected bodies corporate (as defined in section 2(7) of the Commerce Act), business units or joint ventures.
  - 1.2 **Rail Corridor** means railway infrastructure, railway lines, and railway premises, as defined in the Railways Act 2005.
2. For all information requested please provide:
  - 2.1 a file (in .csv format) listing the name of each file provided, the information contained within the file, the date the information was queried and the date the file was prepared. Where different dates apply to pieces of information within the same file, these should be recorded in separate rows. Please also indicate the extent to which confidentiality is claimed in respect of the content of each file.
  - 2.2 a glossary of terms used in Kiwirail's response to this notice.
3. The Commission requires the following information.

### Information and documents requested

4. To the extent they are available (for example, in the form of quotations provided to prospective telecommunications network operator customers over the past two years) a current set of representative KiwiRail charges, inclusive of any recurring lease or licence fees, that an operator of fixed line telecommunication services would incur to access, provision and maintain network infrastructure in the Rail Corridor in each of the following scenarios:
  - 4.1 To **cross** the Rail Corridor at rail-road crossings or any other such permitted crossings.
  - 4.2 To install network infrastructure assets **along** the Rail Corridor by aerial, surface mounting or underground means in accordance with KiwiRail specification for the installation of pipelines on Railway land – E1322.
  - 4.3 To lease or purchase rights in any duct or on any pole line owned, commissioned, or managed by KiwiRail.
  - 4.4 To attach network infrastructure (e.g. Fibre optic cables and ducts) along rail bridges, over-bridges and tunnels (e.g. Wellington to Wairarapa tunnel).
5. Please provide the following documentation for KiwiRail's five largest (by value) telecommunications network operator customers (inclusive of Chorus Limited) to

allow the Commission to calculate Railway Corridor access charges on a per instance or per metre basis, as may be appropriate:

- 5.1 contracts currently in force in relation to the services described in paragraphs 4.1 to 4.4 above;
  - 5.2 itemised invoices for the past three billing periods in relation to the services described in paragraphs 4.1 to 4.4 above.
6. Please provide, to the greatest degree of specificity possible, a general indication, in the form of GIS, .shp file or otherwise, of where telecommunication network operators have installed infrastructure (e.g. cables and ducts) within KiwiRail's Rail Corridor.