

Submissions as to revised draft UCLL and UBA FPP determinations - backdating

13 August 2015

Table of Contents

1.	Summary	2
2.	Backdating is not permitted	3
3.	Framework for assessing whether to backdate	4
4.	What the WACC percentile analysis tells us about backdating	5
5.	Review of Commission's considerations supporting backdating	7
6.	The minority decision on backdating	9
7.	Timing of when the FPP determination takes affect	12

1. Summary

- 1.1 This supplements our other submission today, dealing with issues other than backdating. We again make the general point that the legal requirement to have a fulsome real world evidence based quantified analysis applies to backdating as well. Our clients welcome the majority draft decision not to backdate.
- 1.2 We agree with the majority view that any problems in the past due to under (or over) pricing cannot be fixed by backdating: to the contrary, that adds additional problems. Backdating would not promote competition for the long-term benefit of end-users and, as the majority point out, "may in fact harm them." As they say:¹

In particular, if the prices have been "wrong" since the IPP, then we accept that RSPs' and end-users' levels of investment and consumption may have been distorted to some degree over this period. However, in our view there is nothing to be gained by reversing that "error" by increasing future prices above our central TSLRIC estimate. Specifically, that previous distortion cannot be undone and any forward-looking increase would only introduce a different distortion.

- 1.3 Given this is a draft, we address a number of points in relation to whether backdating should be applied, even though the draft decision is supported.

No backdating possible

- 1.4 The Commission has not engaged in writing with the submission that there can be no backdating.
- 1.5 The rest of this submission, other than Para 2, assumes backdating is available.

Framework

- 1.6 We set our understanding of the framework, much of which reflects what is in the drafts. In summary:
- (a) Whether to backdate or not must be determined by applying s 18 with its **sole** focus (including as to s 18(2A)) on promoting competition for the LTBEU;

¹ Commerce Commission, Draft pricing review determination for Chorus' unbundled copper local loop service, 2 December 2014, footnote 886.3.

- (b) Backdating can only be applied if there is **evidence** supporting that, showing it is both efficient and promotes competition in the LTBEU.
- (c) A real world evidence based quantified analysis is required, if there is to be backdating (ie if there is to be no backdating, evidence and such analysis is not required). We welcome the level of analysis, including quantified evidence and CBA, the Commission is applying for WACC uplift. For the same reasons, s 18 analysis would be required for any decision to backdate.

Learnings from the WACC uplift analysis

- 1.7 Backdating, like WACC uplift, is a form of price uplift. The WACC quantitative analysis shows that there should be no WACC uplift (similarly for TSLRIC price uplift). The conclusions apply also to the form of uplift which is backdating: this implies that the Commission can already conclude not to backdate as that does not promote competition in the LTBEU, the more so as there are additional consumer detriments with backdating, relative to WACC and TSLRIC uplift.

The views in the draft determination

- 1.8 We traverse a number of the matters relied on by the Commission particularly in the backdating section stating all Commissioners' draft views and then in the minority draft decision.

Time delay for new pricing

- 1.9 By reference to Part 4 practice, we propose that the new prices are deferred for 40 working days from the date of final determination.

2. Backdating is not permitted

- 2.1 While the draft UCLL determination records² the submission that there can be no backdating, absent some legal advice, the Commission does not engage with the submission and give reasons, which is required.
- 2.2 As to the submission that backdating is not available prior to 100 days before the determination,³ the Commission concludes⁴ that the statutory power to backdate cannot be "extinguished by a mechanical and contractual payment clause".⁵ However, that conclusion is contrary to the actual position, which is stated in the submission, but not dealt with in the draft decisions. The payment clause is not "contractual". It is statutory. All terms in the STD, both price and non-price are in a statutory instrument – as decided by the Commission itself. Applying normal statutory interpretation, which is how instruments such as STDs are interpreted, the payment clause is unambiguous and must be given effect to.
- 2.3 The rest of this submission assumes backdating is not precluded.

² Commerce Commission, Draft pricing review determination for Chorus' unbundled copper local loop service, 2 December 2014, paragraph 849.

³ Wigley & Company, Submission on backdating in relation to draft UCLL and UBA pricing review determinations, 20 February 2015, section 5.

⁴ Commerce Commission, Draft pricing review determination for Chorus' unbundled copper local loop service, 2 December 2014, footnote 397.

⁵ Commerce Commission, Draft pricing review determination for Chorus' unbundled copper local loop service, 2 December 2014, footnote 397.

3. Framework for assessing whether to backdate

This is a s 18 issue

- 3.1 The Commission correctly confirms that s 18 is the basis for the discretion to backdate, and s 18 provides “the most important guidance”.⁶ The Commission is referred to our main submission as to s 18 and as the treatment of WACC and TSLRIC uplift and the flow on implications for other s 18 decisions.

Evidence is required

- 3.2 The Commission also correctly states “the need for evidence... in order to carry out the overall section 18 assessment”.⁷ It refers to the need for evidence to show backdating is efficient, and promotes competition in a way that is likely to directly benefit end-users.
- 3.3 However, this is more usefully and accurately framed more directly in terms of s 18: there must be quantifiable evidence provided by the Commission that backdating promotes competition for the long-term benefit of end-users (applying of course the s 18(2) and (2A) refinements).

There can only be backdating if the evidence justifies that

- 3.4 The Commission rightly concludes there can only be backdating if there is evidence justifying that.⁸ This is a particularly significant point. Absent evidence justifying backdating, there can be no backdating. As we outline below, that evidence is not there: in any event the evidence points in the opposite direction.
- 3.5 Significantly, if the Commission decides not to backdate, it is not necessary to obtain more evidence or undertake the analysis next referred to.

Quantitative analysis is required

- 3.6 The Commission has not dealt in writing, as it is required to do, with the submission that a sufficiently fulsome quantitative CBA is required as to backdating: it has only noted the submission, without more.⁹ Quantitative analysis has not been undertaken.
- 3.7 The need to do fulsome evidence-based quantitative CBAs is a central theme of a number of our submissions across the board as to the application of s 18, including as to backdating. While there are concerns outlined elsewhere in this submission on aspects of the WACC uplift and TSLRIC price uplift quantitative analyses, the undertaking of those more comprehensive analyses is welcomed.
- 3.8 Based upon the WACC and TSLRIC uplift decisions, showing no uplift can be justified, there should be no uplift here, for similar reasons. We expand on this below. But if that is not accepted by the Commission, the following applies. For the reasons we have submitted earlier, it is necessary to undertake sufficiently comprehensive quantitative analysis as to backdating as well. We also cannot see any reason why the uplift analysis under s 18 is treated one way, and

⁶ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 851 and 854.

⁷ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 855.

⁸ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 854, 855 and Footnote 399 (the latter confirming that “demonstrably” is unnecessary and instead “evidence” is used as in para 855).

⁹ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 859.

backdating another: they both after all involve the question of uplifted and increased payments, based on the exercise of s 18.

- 3.9 The backdating part of the draft decisions are marked by a qualitative if not impressionistic approach. There is little reference to evidence, but much reference to broad economic concepts without evidential foundation, as to which the IM judgment was firmly critical.¹⁰ There is also reference to broadly based conclusions where the actual evidence before the Commission is contrary to those conclusions, as we outline below, yet that evidence is not referred to.
- 3.10 In the order of \$43M is at stake,¹¹ assuming backdating to December 2014. That large sum points to the need for such quantitative analysis.

Real world analysis and evidence

- 3.11 As we have submitted,¹² the s 18 analysis is different from the TSLRIC analysis before s 18 is applied. The former is hypothetical in nature: the latter is squarely evidence based and based on actual impacts: specifically, what are the impacts/likely impacts on consumers caused by backdating?

Caveat

- 3.12 We continue the caveat in our earlier submissions: the observations in this submission are a guide to issues to include in the quantitative analysis. The necessary analysis calls for much more evidence and analysis than we identify. Moreover, there are the multiple issues in the parties' submissions where the Commission has not engaged in writing, as legally required, with those submissions.

4. What the WACC percentile analysis tells us about backdating

- 4.1 As noted above, the WACC and TSLRIC uplift quantitative analyses, which conclude there should be no uplift as net benefits to consumers are not established, show that there should be no backdating here. We explain this in more detail below.
- 4.2 We now apply that framework, by reference to the analysis for the WACC uplift. There are any number of ways the Commission could provide an uplift to access prices.
- 4.3 It could adopt an above mid-point WACC, which it has done under Part 4 of the Commerce Act. This option has the attraction that the impact of the uplift is transparent.
- 4.4 The Commission can also provide uplifts through generousities in its cost modelling. Network Strategies have submitted, consistent with WIK's review of the TSLRIC modelling, that the Commission has produced draft TSLRIC prices that are at the upper end of the spectrum, rather than a central estimate.
- 4.5 There are any number of decisions the Commission has made which result in uplift – adoption of scorched node, limited FWA and valuing re-usable assets at

¹⁰ For example, *Wellington International Airport Ltd & Ors v Commerce Commission* [2013] NZHC, 11 December 2013, paragraphs [1440], [1462], [1483] and [1745].

¹¹ This is based on an assumed \$4 increase in price

¹² See for example our other submission of 13 August 2015

ORC are examples. The Commission has only quantified the financial detriment of its valuation of re-usable assets.

- 4.6 Backdating also provides a temporary/one-off uplift. The \$4 uplift from the IPP to the revised draft FPP translates to a \$43m windfall for Chorus if backdating is applied for a 12 month period.
- 4.7 The WACC percentile analysis demonstrates the costs to end-users from uplift in prices (including the wealth transfer from end-users to Chorus) substantially exceeds the potential benefits. It does so, even though the quantified analysis likely overstates the benefits from uplift.
- 4.8 The WACC percentile analysis is sufficient – particularly given the margin between costs and benefits – to reasonably conclude uplift of any form, including backdating, is not in the LTBEU.
- 4.9 Providing uplift through backdating does not fundamentally change the implications of the WACC percentile analysis – it just adds complications (adding to the potential detriments). For example:
 - (a) Different access seekers will adopt different retail pricing strategies in response to potential backdating: CallPlus has given evidence of the implications of this, in relation to Spark’s price increases differentially between product lines, and the implications for CallPlus.
 - (b) The detriments to end-users could exceed the assumed \$4 per month (\$43m in total) if some access seekers adopt a risk averse strategy and raise prices by more than \$4 (to protect against the FPP prices being higher than the draft prices) and/or any copper broadband price increases result in commensurate fibre broadband price increases to maintain relativity.
 - (c) Not all access seekers have increased prices, or been able to fully pass-through the potential increases, to reflect potential backdating of the \$4 increase. The impact on competition of some access seekers recovering (or more than recovering) the potential backdating costs, but other access seekers being financially impaired would need to be assessed. For example, neither Snap nor Trustpower increased their prices.
 - (d) The Commission is yet to assess the impact on competition of access seekers not knowing their current costs (the UCLL and UBA costs they will incur prior to December 2015) – but knowing that if they increase their market share/reduce their expected retail margins they are exposing themselves to greater backdating risk. Successful competitive operation becomes about who can estimate the final FPP prices the most accurately (that is quite a lottery, as we identify below), and who has the financial clout to cope with getting it wrong, rather than about who is the most efficient (least cost) and provides the best services to end-users.
 - (e) There is also complication from the fact that uncertainty about whether backdating will occur, plus the initial draft decision to backdate, means some of the detriments will occur anyway, because some access seekers have increased prices in response to the initial draft decision to backdate anyway – some of the detriments could now be seen as a “sunk cost” to end-users. The minority decision has suggested this as one of the reasons for adopting backdating. Such an approach would result in a bias

towards backdating – and could result in it being adopted even if it is not in the LTBEU.

- 4.10 The Commission has also not identified any evidence based benefits from backdating – in terms of promoting competition for the long-term benefit of end-users – that is unique to backdating and not captured by the WACC percentile analysis.
- 4.11 What should be concluded is that:
- (a) The WACC percentile analysis makes it clear that any uplift, including from backdating, is not in the LTBEU – this is sufficient to conclude against backdating;
 - (b) The qualitative analysis we and others have provided indicates that if the WACC percentile type analysis was specifically adopted to backdating it would show even larger detriments; and
 - (c) The minority decision does not undertake close evidential analysis, framed upon the sole consideration: promoting competition in the LTBEU.

5. Review of Commission’s considerations supporting backdating

- 5.1 This section addresses those parts of the draft decisions as to backdating that are shared by all three Commissioners. Our observations throughout the following paragraphs are subject to the need to do a fulsome evidence-based quantified analysis.
- 5.2 There is a further overriding point. While the majority Commissioners note that they cannot bind future Commissioners as to backdating,¹³ a decision is relevant in setting precedents or, at least guidance, going forward and in providing guidance to stakeholders. That is why it has been submitted that the Commission ought firmly decide against backdating generally (save for limited exceptions such as abnormal and gamed delay, or, as with UCLFS, where the need for backdating was well known and quantified by all parties). Any on-going uncertainty for future decisions is a s 18 efficiencies issue.
- 5.3 We turn now to the topics in the draft determination, in the order in which they appear.

Application of Telecom v Commerce Commission

- 5.4 It is not enough simply to say that backdating is consistent with the Court of Appeal decision¹⁴ (and in any event, it is not, for that decision, if anything, has backdating to December 2012). To arrive at that point, the Commission must engage in writing with submissions against that conclusion, to the effect the judgment cannot be applied in this way. This has not happened here or elsewhere in this draft, there being reference only to March 2014 legal advice.¹⁵ Considerable submissions have been made since but are not addressed.

¹³ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 887.

¹⁴ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 878.

¹⁵ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 849

Chorus and RSPs can estimate the outcome of FPP modelling

5.5 The draft UCLL decision states, as a conclusion:¹⁶

Chorus and a number of RSPs are sophisticated participants in telecommunications markets and are likely to be in a position to estimate the outcome of TSLRIC modelling.

5.6 The footnote to this statement¹⁷ identifies the submissions for and against that conclusion without addressing those submissions, as is required such as when conclusions are drawn in draft. Those submissions include the following evidence, showing that even the large players such as Chorus cannot realistically estimate the FPP price, let alone smaller players, of which there are many:

- (a) Chorus stated that it did not expect the initial draft FPP to be as high as it was.¹⁸
- (b) Now to the two firms widely regarded as among the leading and most experienced cost modellers internationally (so if anyone knows the likely FPP price, it is them (and Chorus)).
 - (i) Analysys Mason reported that the final price should be in the range of \$80-\$100.¹⁹ That calculation has been firmly criticised but even if discounted by a third, the price is far more than the price in the draft determinations.
 - (ii) WIK did an expert report stating that the FPP prices should be \$21-24.²⁰
- (c) The majority in the UCLL draft determination recognise the problems. For example, they say²¹ that “TSLRIC modelling requires significant judgement so results can vary dramatically”.
- (d) All of the Commissioners recognise the problems, for they say:²²

The nature of a TSLRIC modelling exercise means that we have had to make a number of judgement calls as to how the service should be modelled and the parameters that should be used. We note in this regard that TSLRIC modelling is subject to a considerable degree of uncertainty and that for any given decision there is likely to be a range of options upon which reasonable people may disagree.

¹⁶ At Para 879.

¹⁷ Footnote 420.

¹⁸ Wigley and Company submission, March 2015.

¹⁹ James Allen, Analysys Mason, Chorus UCLL and UBA models briefing, 4 December 2014.

²⁰ WIK-Consult, Report for Spark New Zealand and Vodafone New Zealand, Submission In response to the Commerce Commission’s “Draft pricing review determination for Chorus’ unbundled bitstream access service” and “Draft pricing review determination for Chorus’ unbundled copper local loop service” including the cost model and its reference documents, 20 February 2015, paragraphs 11 and 12.

²¹ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 887.

²² Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 458.

- 5.7 It is unrealistic to suggest that any party can estimate the price beyond such a broad range so that sensible decisions could be made ahead of the final decision.
- 5.8 This is an example of the importance of evidence in this assessment, rather than broad statements without evidential foundation (here, contrary to that evidence).
- 5.9 The Commission also states that "...there should be symmetric probabilities of an IPP above or below an FPP..."²³
- 5.10 No evidence or analysis is given for this conclusion. Even if it is accurate, the potential broad range of prices makes this immaterial. But in any event we cannot see any reason why there are symmetric probabilities.

Incentives to delay the process²⁴

- 5.11 The Commission controls the timing of the process and it has been submitted extensively that the Commission is going too fast, contrary to the interests of consumers. Even if this is a relevant factor, it is minor if not irrelevant relative to the other factors against backdating. The Commission in any event has not dealt with the English Court of Appeal authority on the point in our submissions and cross submissions prior to the conference.

Impact on investor confidence²⁵

- 5.12 Given the uncertainties and wide ranges outlined above, it is not apparent why backdating can be said to engender investor confidence. To the contrary, it can be said that backdating creates more uncertainty (and the FPP can end up being lower than the IPP anyway). It is also not apparent why such investor confidence, as to backdating, promotes competition in the LTBEU: even section 18(2A) is **solely** about promoting competition in the interests of the **consumer**. Further the court in its IM judgment has made it clear that generic statements around such conclusions cannot be made and must be supported by specific evidence.
- 5.13 In the end, like all matters under review here, the answer lies in what a sufficiently robust evidence based quantitative analysis tells the Commission.
- 5.14 This issue is also raised in the minority draft decision²⁶ and the same submissions apply.

6. The minority decision on backdating

Application of Telecom v Commerce Commission²⁷

- 6.1 This is dealt with at paragraph 5.4 above: the draft does not engage in writing with the extensive submissions to the contrary, as is required. A more "efficient price" does not justify backdating. The efficiencies that must be considered under s 18(2) lie well beyond the narrow issue of an efficient price: as we have

²³ Commerce Commission, Draft pricing review determination for Chorus' unbundled copper local loop service, 2 December 2014, paragraph 873.1.

²⁴ Commerce Commission, Draft pricing review determination for Chorus' unbundled copper local loop service, 2 December 2014, paragraph 880.

²⁵ Commerce Commission, Draft pricing review determination for Chorus' unbundled copper local loop service, 2 December 2014, paragraph 881-882.

²⁶ Commerce Commission, Draft pricing review determination for Chorus' unbundled copper local loop service, 2 December 2014, paragraph 899.2.

²⁷ Commerce Commission, Draft pricing review determination for Chorus' unbundled copper local loop service, 2 December 2014, paragraph 897.

submitted, most recently in our other submission today. It is important to distinguish “efficient” price which is essentially the lowest cost for the HEO from “efficiencies” in the sense of static and dynamic efficiencies, of which “efficient” price is but one factor. Whether or not to backdate requires a static and dynamic efficiencies analysis.

- 6.2 More important though is to recognise that application of s 18, which this is, is about real world evidence and not hypothetical, where evidence and quantitative analysis is necessary. We deal with this more extensively in our main submission.

Promote incentives to get more accurate FPP prices into the market sooner²⁸

- 6.3 One reason given is to remove incentives for parties to delay: as submitted at paragraph 5.11 above this is a minor factor to take into account, if a factor at all, relative to other efficiency factors against backdating.
- 6.4 The other reason is that backdating “encourages parties to adopt their own estimates and/or Commission drafts of the FPP prices”.²⁹
- 6.5 We have outlined at paragraphs 5.5 - 5.10 above why it would be unsafe to use parties’ own estimates, as the evidence before the Commission shows.
- 6.6 However, the view that stakeholders are actively encouraged to use Commission drafts to “get the more accurate FPP prices as into the market place as early as possible” is, in our submission, against the interests of consumers, and fraught with problems. As in all matters in this submission, ultimately these issues fall to be decided following a fulsome quantified analysis. Thus, our submissions here are subject to that point.
- 6.7 The majority decision frames the position well:³⁰

We also have a concern about giving draft decisions significant price signalling status: in our view this is not consistent with the legislative scheme. A draft is intended to allow parties to give views that inform the final decision: it is not a quasi-final decision itself, and may be significantly amended.

- 6.8 Inevitably draft decisions, discussion papers, etc, will be used by parties to make assessments about what will happen in the future and that may inform their decision making prior to final draft. That is an inevitable by-product of the all-important Commission process of consulting iteratively, although the negative impact of this can be reduced by careful drafting and caveating of the documents. It is far more valuable (ultimately for consumers) that iterative papers are produced, with the price signalling that may entail, and uncertainties, than to not do multiple drafts at all.
- 6.9 It is one thing to have some unavoidable price signalling as a consequence of a pro-consumer iterative process: it is quite another to have price signalling that is deliberately intended to drive market changes including price changes prior to

²⁸ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 889.

²⁹ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 899.1

³⁰ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 888.

the final decision, for the reasons given by the majority. The current situation, where the December paper stated brief reasons quite different generally from the current reasons, provides an example: that paper expressly stated it was intended to give send price signals. As a direct consequence, prices have risen, and, if the majority view prevails, consumers have unnecessarily paid more. The different approach by the majority, quoted above, is significantly to be preferred. For example, if drafts are elevated to deliberate price signalling, that is likely to reduce the ability to have valuable iterative drafts.

Backdating is best for LTBEU as the most efficient price is applied and responded to sooner³¹

- 6.10 As outlined above, that which is the most efficient price (ie: the cheapest price for the HEO) is only part of the broader static and dynamic efficiencies analysis to be undertaken.
- 6.11 It simply does not follow that the “most efficient price” backdated, produces “the best platform for competition in the long-term interests of end-users”. Or, more to the point, that does not follow unless demonstrated by the evidence and analysis which all Commissioners agree is required. Notably, the minority decision has little evidence to support the conclusion, notwithstanding what was said by all Commissioners as to required evidence, and by the judge and two expert economist lay members in the IM judgment (as we outline again in our other submission today).

What happened to prices after the December 2014 announcement³²

- 6.12 The minority judgment deals with this at Para 902, and this is the only paragraph where it relies on direct evidence (evidence that all Commissioners acknowledge is required).
- 6.13 Contrary to the evidence before the Commission and noted in various submissions, the minority state “Spark’s price increases [after the December 2014 paper] meant that its shareholders would not bear the cost of lump sum backdating to 1 December 2014.” Spark, in fact, will not recoup a high proportion of any backdated sum at current figures. The same applies to CallPlus: they, in addition, face the distortions caused by Spark’s differential price changes. The figures are stated in confidential versions of their submissions before the conference.
- 6.14 Moreover, some RSPs have not been able to or have chosen not to increase their prices, such as Snap and Trustpower. This in turn highlights a key point that is omitted from the minority decision: there are numerous small RSPs that are affected by backdating, beyond Chorus, Vodafone, Spark and CallPlus, where the minority almost exclusively focusses. (We note in passing that differential payment by claw back by small players instead of lump sum is not legally available as we note below, but then that deals with only part of the problems for the seemingly ignored small RSPs.)
- 6.15 If there is no backdating, some RSPs will have received additional sums not otherwise received, on account of the December 2014 paper. However the over-simple concept, it is submitted, of using such receipts to justify backdating as some RSPs have benefitted is not justification. This is a complex scenario with

³¹ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 900

³² Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 901.

multiple reasons why this should not be so, ranging from some RSPs having to stump up with the full backdating as they have not increased pricing, through to no evidence and no justification for the conclusion that a wealth transfer from consumers and RSPs to Chorus promotes the LTBEU. As an example of the multiple issues to be analysed quantitatively, Access Seekers not knowing the cost of UCLL and UBA services they are using would have a chilling impact on competition – competing aggressively to gain market share and/or setting low retail prices (relative to cost) would exacerbate Access Seekers exposure to the risk from incurring unknown prices for UCLL and UBA services.

- 6.16 In the end, the only test is whether competition is promoted in the LTBEU. The minority decision is little focussed on the end-user and promotion of their interests, let alone any evidence supporting that. For example, the s 18(2A) issues are addressed only from the perspective of Chorus,³³ when it must be shown that additional payment to Chorus benefits consumers (including offsetting detriments such as higher retail prices).

RSPs' incentives and financial position³⁴

- 6.17 The minority draft decision notes that “Spark, Vodafone and CallPlus’ new owner’s financial strength will limit the impact of exposure to future lump sum backdating on their ability and incentives to finance investment”.³⁵
- 6.18 This essentially says that backdating is acceptable if Access Seekers (and their owners) can afford the financial hit. This seems at odds with the Commissioners’ concern about reassuring infrastructure investors. Moreover the smaller RSPs are not addressed nor are the central focus: the end users.

Regulatory consistency³⁶

- 6.19 The minority note that “a policy of backdating is more conducive to regulatory consistency, which is vital to sustain confidence in the regulatory regime”. It is necessary for such a conclusion to be arrived at only after careful analysis of the evidence. The broadly stated nice-to-haves of regulatory consistency and certainly cannot simply be parachuted into backdating in this way, and again the IM judgment counsels against such broad brush conclusions without evidence. Moreover, one can say that backdating creates a great deal more inconsistency and uncertainty, against the LTBEU, than having backdating. In the end, though, it is evidence based quantified analysis and only that which can justify having backdating.

7. Timing of when the FPP determination takes affect

- 7.1 We do not support the FPP determination taking affect at the same time as the Commission releases the FPP determination. We consider that there should be a 40 working day period between release of the FPP determination and the FPP prices taking affect.
- 7.2 In a workably competitive market, wholesale suppliers would provide retailers with advance notice of any price change, with sufficient time for the retailers to

³³ It is not shown why RSPs are not included

³⁴ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, p aragraph 902

³⁵ Commerce Commission, Further draft pricing review determination for Chorus’ unbundled copper local loop service, 2 July 2015, paragraph 902.

³⁶ Commerce Commission, Draft pricing review determination for Chorus’ unbundled copper local loop service, 2 December 2014, paragraph 903.

adjust their retail prices to end-users. If advance notice is not given there will be a lag between the UCLL and UBA price change and retail price changes.

- 7.3 The approach in the electricity and gas industries provides useful precedent.
- 7.4 The Commission's EDB DPPs, which took effect on 1 April 2015, were released on 28 November 2014 – this is 4 months in advance of the price change taking affect.
- 7.5 Section 53M(7) of the Commerce Act requires that “No default price-quality path applies to a supplier until the date specified in the relevant [section 52P](#) determination, which must be a date at least 4 months after a summary of the determination is published in the *Gazette* under section 52P(7)(b)”.
- 7.6 Clause 9.4 of the Electricity Authority's Interposed Model Use of System Agreement requires EDBs to give retailers 40 working days' notice of the price change.³⁷
- 7.7 This in turn enables electricity retailers to meet the obligation in clause 5.5(a) of the Model Retail Contract for Domestic Consumers' to provide no less than 30 days' notice of any change in price.³⁸
- 7.8 There are similar arrangements, set by the Gas Industry Company, which also require a minimum of 40 working days' notice.

³⁷ <http://www.ea.govt.nz/dmsdocument/13646>

³⁸ <http://www.ea.govt.nz/dmsdocument/17876>