

# Cross-submission on the Commerce Commission's Explanatory Paper on Section 30R review

5 November 2019



## Overview

- 1 This is Chorus' cross-submission on the Commerce Commission's (**Commission**) Section 30R review of five deregulated telecommunications services' standard terms determinations (**STDs**) Explanatory Paper (**Paper**), released on 3 October 2019.
- 2 We are committed to ensuring that changes to the remaining copper STDs reflect the legislative policy of copper deregulation and that the STDs continue to work as intended for the remaining regulated services – the unbundled bitstream access (**UBA**) and unbundled copper low frequency (**UCLF**) and related regulated services.
- 3 We align with the only other submission, from Spark, on the following:
  - 3.1 The regulatory framework is transitioning from regulated copper to fibre-based services;
  - 3.2 The unbundled copper local loop (**UCLL**) and UCLL Backhaul (i.e. sub-loop UCLL (**SLU**) Backhaul) services are deregulated as they are removed from the Telecommunications Act (**Act**) and are no longer subject to price regulation;
  - 3.3 Deregulation of UCLL leads to consequential amendments to the residual STDs, including removing references to UCLL to create standalone UCLF Backhaul and Co-location STDs; and
  - 3.4 Its agreement with the Commission to apply CPI to all prices in the relevant STDs.
- 4 However we disagree with the following proposed positions:
  - 4.1 The impact of the declaration of specified fibre areas on the UBA and UCLF services, as the Commission is aware. However, we don't repeat our position in detail here;
  - 4.2 Non-recurring charges, that have no Year 5 prices, should be frozen – if this is indeed what Spark is suggesting;
  - 4.3 That the Commission should confirm it will use its clarification powers if Chorus seeks to introduce new charges to relevant services during the transition period.
- 5 In addition, the Commission has asked for a specific response on two issues:
  - 5.1 Spark's suggestion to broaden the process for requesting Operations Manual and Service Level Agreement (**SLA**) changes to support potential retail service quality (**RSQ**) standards in the future; and
  - 5.2 Chorus' suggestion to amend the UCLF Backhaul STD Schedule 3, clause 9.2 reporting obligation from monthly to quarterly.

- 6 We do not support a broadening of the process for initiating changes to the Operations Manuals and SLAs. The introduction of an RSQ code by the Commission would not provide either a need or a justification for this.
- 7 More importantly, however, any substantive changes to the Operations Manuals and SLAs could affect the costs of providing these services. In particular, service levels and the prices set for services – whether in a commercial or regulated context – are tightly linked. Our key concern is not who instigates a change, but that the potential cost impact of any changes to the Operations Manuals and SLAs would therefore need to take that factor into account. The amendment mechanism should be limited to ensure that changes that increase costs cannot be imposed without a cost-recovery mechanism. We address this point further below.

### Changes to Operations Manuals and SLAs

- 8 The suggestion that the Commission should expand the change mechanism in the STDs for the Operations Manuals and SLAs fails to recognise an essential gap in the change mechanism as a result of the freezing of the section 30R and section 59 review mechanisms.
- 9 We accept that the SLA and Operations Manual change mechanism will continue, but it is inappropriate to amend the STDs to allow the Commission to initiate changes, including to support future RSQ obligations, on its own initiative. By removing the Commission's power to review and reconsider the STDs under sections 30R and 59, Parliament has indicated its intention for the Commission not to initiate substantive changes to the STDs after 1 January 2020. Amending the STDs to broaden the internal change mechanism to permit Commission-initiated changes within the STD would undermine this legislative policy.
- 10 The introduction of an RSQ code does not affect this conclusion. There is nothing in the Act that indicates that the development of an RSQ code will require changes to wholesale STDs. Parliament passed the provisions introducing the process for Commission-issued RSQ codes and the provisions locking down the STD terms until the copper review at the same time. If it considered that changes to the STD would be required as a result of the RSQ work, this would have been specifically provided for.
- 11 In any event, the suggestion to amend the change mechanism in this way raises the broader issue that any change to the service levels (including the introduction of new service levels), or indeed changes to the Operations Manuals, may result in significant changes to the service costs, in circumstances in which the Commission will no longer have the power to adjust service pricing to reflect this.
- 12 By removing the Commission's power to adjust service pricing and indexing service prices to CPI, Parliament intended to ensure that the position of all participants is held unchanged (in real terms) for the duration of the copper review period. Allowing changes to the SLAs, or Operations Manuals, which carry a substantial service cost

impact would undermine that legislative intent. Accordingly, we think that the change mechanism clause for each STD should be amended to state that the change mechanism should not be used to introduce any changes to the SLAs or Operations Manuals that have a cost impact which is more than minimal.

- 13 This can be achieved by adding a final clause to the independent recommendation maker and Commission review provisions of the General Terms that “[*The independent recommendation maker / The Commission*] must not make a decision to [*recommend / approve*] a change that will increase the cost to Chorus of providing the Service more than a *de minimis* amount.”
- 14 If the Commission decides not to add such a clause, the Commission should give careful thought to how to deal with changes to the SLAs or Operations Manuals carrying cost implications in the future, given that there is no price adjustment mechanism in the STDs allowing parties to recover resulting additional costs associated with providing services.

## Quarterly reporting of additional local exchanges

- 15 We proposed amending the reporting obligation for notification of new unbundled local exchanges under the UCLF Backhaul STD. The reference in our submission to clause 9.2 of Schedule 3, should have referred to clause 9.2 of Schedule 1.
- 16 The reasoning for the proposed change to the reporting obligation from monthly to quarterly is to reflect the current practice agreed informally with the Commission due to low volumes. The proposed change is *only* in respect of the obligation to report new unbundled local exchanges at which Chorus supplies the UCLF service. For clarification, we are not proposing to change any other reporting (such as performance reporting) to quarterly.

## Other issues arising from submissions

### Updated price adjustment mechanism

- 17 There is general support for the Commission’s approach to apply CPI to all prices in the relevant STD.
- 18 Spark says it supports the Commission’s pragmatic approach to applying CPI to all prices in the relevant STD. However it seems to suggest that “non-core” (or non-recurring) charges that are not specified as having Year 5 prices should be frozen at the current price, with no indexed price adjustment (CPI or otherwise). There is no basis for this in the Act.
- 19 If the legislative provisions in section 69AG around CPI pricing do not apply to some prices, then the existing mechanisms for those prices simply remain unchanged (Option 2 in the Paper). This interpretation has some validity, but there is no basis for applying CPI to some prices and arguing that in the absence of CPI indexing, no

indexing at all applies to other pricing. The price-freeze is implemented by removing the Commission's statutory power to review the STD under section 30R and section 59. However, this doesn't mean that the existing price adjustment mechanisms set out in the STDs are removed. On the Commission's analysis (which we support), it is the requirement that the prices be adjusted by CPI that has that effect.

- 20 Option 3 in the Paper would also give rise to a result for which there is no support in the legislative history. As expressed in sections 69AG(2)(a) and (5)(a), Parliament intended for the STD to continue to apply to the relevant service. Parliament would not have intended the continued operation of the STDs to be frustrated by the removal of all adjustment mechanisms for non-recurring charges.
- 21 As noted in our submission, our general position is to support indexation that most closely mirrors actual pricing inputs, but we reiterate that the Commission is constrained by the Act in this instance. Option 1 (CPI adjustment for all prices) is consistent with the Act while recognising (to some extent) that prices should reflect changes in inputs.

### **Commission's use of clarification powers**

- 22 We disagree with the proposal that the Commission confirm that it will use its clarification powers (we assume this relates to the Commission's powers under section 58 of the Act for "clarification of determination[s]") if Chorus seeks to introduce new charges to relevant services during the transition period on the basis there is "*a risk of new charges being proposed and unnecessary disputes*".<sup>1</sup>
- 23 While we agree this clarification power remains, despite section 69AG, there is no basis for the Commission confirming in advance of any circumstance that potentially calls for clarification what it would (or would not) use its powers of clarification for. This would be an unnecessary and problematic pre-judgment of any situation.
- 24 For completeness, we note the reference to the introduction of new charges as the basis for saying that there is a risk of new copper charges being introduced.<sup>2</sup> These are:
- 24.1 A fibre install cancellation charge;
- 24.2 Early termination; and

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<sup>1</sup> Spark (23 October 2019), *Submission on Commerce Commission's section 30R reviews of the copper standard terms determinations*, page 2, para 11.

<sup>2</sup> See footnote 1, above.

### 24.3 Copper intercept charges.

- 25 Of these, the only charges on Chorus' initiative are cancellation charges — other charges, early termination and copper intercept charges, we understand relate to another fibre service provider.
- 26 While charges relating to fibre have little relevance to the issue at hand, we note that we have always been entitled to charge for cancellation services under the fibre Reference Offer. We are currently consulting with industry on whether to exercise that right. The possibility of doing so is driven by sensible considerations, including the goal of reducing cancellation rates across the industry. These considerations and when we will apply those charges will be announced shortly in Chorus' cancellation charging policy.

### Further proposed draft amendments

- 27 Finally, given that a number of issues not signalled at the beginning of this review have arisen in the course of submissions, we ask that the Commission circulate any further amendments it proposes to implement to interested parties, for comment on the drafting of those amendments.