



Further consultation on issues relating to determining a price for Chorus's UCLL and UBA services under the final pricing principle

Date: 14 March 2014

Purpose of this paper

1. This paper invites submissions on a number of matters relating to the UCLL and UBA final pricing principle (FPP) pricing review determinations. Background information on the pricing review determinations can be found in the UBA and UCLL process and issues papers.¹
2. This paper also responds to Chorus's request to clarify our previous statements regarding setting an expiry date for our FPP pricing review determinations, and sets out our proposed process for managing claims of confidentiality of information provided to us during the UCLL and UBA FPP pricing review determinations.

We are interested in your views on a number of matters relating to the FPP processes

Modern equivalent assets and services

3. Attached to this paper is preliminary legal advice we have received concerning two key issues in the pricing review determination process – the choice of modern equivalent assets (MEAs) and the services we will determine a price for. This advice does not represent a preliminary view on the part of the Commission. However, we are interested in your views about how we might approach the following, taking into account all relevant considerations and having regard to the attached advice:
 - 3.1 the selection of MEAs for the modelling of UCLL and UBA;
 - 3.2 the question of which services we are required to determine a price for, when modelling UCLL and UBA.²

Relativity

4. We are also interested in your views on the role of relativity throughout the UBA and UCLL FPP pricing review determination processes. In the 2013 UBA benchmarking decision, our starting presumption was that the relativity consideration would likely be maintained given that both UCLL and UBA prices were to be set in accordance with similar TSLRIC-based forward-looking cost-based price methodologies.³ We noted that this is likely to provide incentives to unbundle where efficient to do so. We did not identify any reasons to believe an adjustment above and beyond forward-looking cost differences between UCLL and UBA would promote competition for the long-term benefit of end-users. We are interested in your views on whether there are additional matters or evidence we should take into account regarding relativity in the FPP pricing review determinations.

¹ Commerce Commission "Process and issues paper for determining a TSLRIC price for Chorus' unbundled copper local loop service in accordance with the Final Pricing Principle", 6 December 2013, and "Process and issues paper for determining a TSLRIC price for Chorus' unbundled bitstream access service under the final pricing principle", 7 February 2014.

² Opinion of James Every-Palmer, 12 March 2014 (**Attachment A**).

³ Commerce Commission, Unbundled Bitstream Access Service Price Review, 5 November 2013 at [274]-[278].

Expiry date clarification

5. Chorus's submission on the UCLL process and issues paper at paragraph 152 sets out its understanding of our proposed approach to the expiry date of pricing review determinations.
6. We confirm that Chorus's submission broadly corresponds with our proposed process on expiry of the pricing review determinations.⁴ One additional step not set out in Chorus's summary is that it is possible that the UCLL model itself might need to be updated as part of amending the STD to update the UCLL price before the expiry of the pricing review determination.

Confidentiality process

Information provided to the Commission

7. Given the timeframes in which we are undertaking this exercise, it is particularly important to emphasise our expectation that confidentiality is only invoked where there is a sound case for it. Inappropriate invoking of confidentiality will undermine our ability to complete the pricing review determinations on time.
8. If parties provide us with information that they consider is confidential they must:
 - identify *with particularity* the information they consider is confidential; and
 - provide *specific reasons* explaining why the information should be treated as confidential information.
9. We expect that the reasons given in a request for confidentiality will describe how and why publication of the information would be likely to unreasonably prejudice the commercial position of the party that supplied or is the subject of the information.
10. We will not accept blanket claims of confidentiality. We will notify parties if we consider that a request for confidentiality requires further explanation. However, we reserve the right to review or reconsider the classification of any information for which confidentiality is sought on our own initiative, or at the request of an interested party.

Access to confidential information

11. Our draft pricing review determinations and supporting models may include or refer to confidential information. In order to ensure a robust consultation process, interested parties may need to review and submit on that information.
12. We therefore propose to put in place a confidentiality order, issued under section 100 of the Commerce Act 1986, to govern access to confidential information. We will advise the details of the order in due course.

⁴ As articulated in Commerce Commission, "Process and issues for determining a TSLRIC price for Chorus' unbundled copper local loop service – supplementary paper on expiry date", 13 January 2014.

We are interested in your views

13. We are interested in your views on the matters raised in this paper.
14. Submissions on this paper are due by **5.00pm on Friday 11 April 2014**.
15. Cross-submissions on this paper are due by **5.00pm on Thursday 24 April 2014**.

Please address responses to: Keston Ruxton (Chief Adviser, Regulation Branch), c/o telco@comcom.govt.nz.

16. We intend to hold a workshop to assist with the submission process on **Friday 28 March 2014** (time and venue to be confirmed). As with the UCLL TSLRIC cost modelling workshop on 19 December 2013, we intend to limit the number of attendees from each organisation to two. Please notify Keston Ruxton with the names of attendees, as well as any questions you would like Commission staff to consider, by **5.00pm, Wednesday 19 March 2014**.

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12 March 2014

Dear Katie / Ruth

FPP determination: Issues re service description and the modern equivalent asset

Introduction and summary

1. The Commerce Commission is currently undertaking a pricing review in relation to Chorus' UCLL and UBA services pursuant to ss 42-52 of the Telecommunications Act 2001 (**Act**).
2. You have asked me to provide preliminary views in relation to the following inter-linked issues:
 - The service(s) that the Commission is required to determine a price for. In making a price review determination for 'UCLL', does the legal framework provide options for what service is priced? Is the Commission constrained by the STD definition of UCLL, which is non-cabinetised UCLL? If not, can it determine the price for access to the copper local loop irrespective of where an access seeker 'enters' the copper local loop network? Or does the Commission have to set separate prices for SLU and NCUCLL? Are there any relevant s 18 considerations?
 - The choice of the MEA. What are the legal constraints on how the Commission approaches the MEA? What are the relevant and irrelevant considerations in determining the MEA? For instance, are the following relevant considerations: TSO, the fibre roll-out contracts, UCLL MEA (eg if the Commission adopts a copper MEA for UBA, any legal issues for UCLL; if not, why not)?
3. I understand that the purpose of this draft advice is to provide a basis for industry comment.

4. In this advice, I first consider the Chorus argument that the Commission is required as a matter of law to mechanically adopt a modern equivalent asset (**MEA**) which replicates all of the specific features of Chorus' present copper network and that this MEA is necessarily Chorus' current network. My conclusion is that, in conducting the TSLRIC exercise, it is appropriate to engage in a process of abstraction from the *in situ* service in order to distil its "core functionality". That is, in accordance with conventional TSLRIC principles, the inquiry ought to be directed at determining the efficient cost today of an equivalent service unconstrained by the historic technology choices of Chorus (or of end-users). Accordingly, I do not consider that the Commission's discretion is limited in the manner suggested by Chorus.
5. In the second part of this advice, I attempt to describe relevant legal considerations and constraints which will bear on the service descriptions and MEA(s). Given that the identification and application of these factors involves economic and technical expertise, I have not attempted to provide an exhaustive list or to suggest in the abstract whether the factors individually or cumulatively require (or prevent) particular outcomes.
6. The relevant considerations and constraints include:
 - (a) the s 18 purpose statement;
 - (b) the staggered nature of the designated access services which was intended to allow access seekers to make build/buy decisions in relation to particular network elements;
 - (c) the need to provide for recovery of common costs and avoiding double recovery of costs;
 - (d) compatibility between the FPP price and the underlying STD;
 - (e) time invariance of FPP determinations (that is, ensuring that the FPP price that applies for a particular service is not affected by the time at which the application was made or what other FPP applications were live at the same time);
 - (f) the TSO, although its relevance is likely to be limited to helping derive a high level (technology neutral) understanding of the service being modelled;
 - (g) the fibre roll-out contracts which may provide helpful information in relation to the sort of network that would be built and the costs that might be incurred by an operator using the most efficient contemporary technology; and
 - (h) end user preferences which may assist in defining the core functionality of the service being modelled.

Chorus’ argument that “the service” and the MEA must be based on its current copper network

Introduction

7. Chorus has argued that:¹
 - (a) the service to be priced is the existing service as described in the STD;
 - (b) the MEA must have the same technical/physical characteristics as the current copper network (for example, in relation to electricity conductivity and compatibility with existing end-user equipment) and be capable of delivering the TSO obligations; and
 - (c) the only MEA capable of meeting these requirements is Chorus’ current copper network.
8. In the context of UBA, Chorus has also argued that the FPP requires Chorus’ existing copper local loop to define the inputs to the UBA MEA in order to calculate the TSLRIC of additional costs incurred in providing the unbundled bitstream access service. This argument is considered at paragraphs 23 to 29 below.

Assessment of Chorus’ argument

9. The Commission’s task is to determine the price payable for UCLL and UBA as designated access services in accordance with the applicable final pricing principle (s 52(a)(i)).
10. The applicable final pricing principles are (Schedule 1):
 - (a) for UCLL, “TSLRIC”; and
 - (b) for UBA, “[t]he price for Chorus’s unbundled copper local loop network plus TSLRIC of additional costs incurred in providing the unbundled bitstream access service”.
11. TSLRIC is defined as follows:

TSLRIC, in relation to a telecommunications service,—

 - (a) means the forward-looking costs over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, the service, taking into account the service provider’s provision of other telecommunications services; and
 - (b) includes a reasonable allocation of forward-looking common costs.

¹ See 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*, at [36]-[64], [71]-[74], [92]-[108], [207]-[212], [227]-[244], [259]-[260], and [271]-[274].

12. Forward-looking common costs is also a defined term:

forward-looking common costs—

- (a) means those costs efficiently incurred by the service provider in providing the service that are not directly attributable to providing an additional unit to that service; but
 - (b) does not include any costs incurred by the service provider in relation to a TSO instrument
13. In my view, there are four candidate interpretations for the phrase “the service” in terms of the application of the TSLRIC concept:
- (a) the actual service provided by Chorus;
 - (b) the service described in the relevant STD;
 - (c) the designated access service as described in Schedule 1; or
 - (d) a more abstract description of the regulated service that is technology neutral and captures its core functionality.
14. The first three approaches are focussed on determining a price for the current service based on current technologies, whereas the fourth approach asks “what sort of comparable service would be provided today?”
15. In my view, the definitions of TSLRIC and forward-looking common costs provide some support for (a) and (b) as the references to “those costs efficiently incurred by the service provider in providing the service” and “the service provider’s provision of other telecommunications services” tend to point to the actual service being provided by the actual access provider rather than a more hypothetical exercise. Furthermore, since the price determined by the FPP process will become the price applicable for the relevant STD, there may be a mismatch unless approach (b) is taken. Approaches (b) and (c) would be most consistent with use of “the service” in the Act generally. A court would also be concerned not to optimise the service (and reduce recoverable costs) beyond the bounds intended by Parliament.
16. However, in my view, there a mix of contextual and purposive indicators of meaning which support interpretation (d).² To explain:
- (a) My understanding is that TSLRIC models attempt to determine “the costs that would be incurred by an operator using the most efficient means at any point in time to provide the service” and that this is captured in the expression “forward-looking costs”.³ The reference to costs over the “long run” also points to the ability for all factors of production to be changed.

² See s 5 of the Interpretation Act 1999 and *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767 (SC) as to the overall approach to statutory interpretation.

³ Ministerial Inquiry, Final Report, pp 65-66.

- (b) The TSLRIC approach would normally involve constructing a hypothetical about what would be the efficient cost today for an equivalent service that would not be constrained by the historic technology choices of Chorus (or of end-users) or the details of contingent and technologically dependent obligations like the TSO. In other words, the TSLRIC approach conventionally involves abstracting from the nuts and bolts of the *in situ* service.
- (c) The application of the TSLRIC approach would also normally entail a significant degree of choice and judgment including in determining whether to take a top-down or bottom-up approach and the extent of optimisation.
- (d) If one of interpretations (a), (b) or (c) was adopted, the range of options for the Commission's TSLRIC model would be dramatically constrained. That is, rather than exercising its discretion based on s 18 and other relevant considerations to determine an appropriate degree of optimisation, the Commission would be required to adopt an extreme position on the continuum of TSLRIC approaches where there is very little or no optimisation of the current facilities. Accordingly, I see these three interpretations as being at odds with taking a TSLRIC approach to pricing and, in my view, if Parliament had intended such a constrained application of conventional TSLRIC principles it would have used much clearer language.
- (e) In terms of the legislative history, I have reviewed the key documents in the legislative history around the 2001 Act and the 2006 and 2011 amendments, and have not found any suggestion that the abstracting process and discretion that would be part of a typical TSLRIC exercise was intended to be restricted in this way.⁴
- (f) I also note that the definitions of TSLRIC and forward-looking common costs refer to the "service provider" rather than the "access provider". The Act uses "service provider" generically, whereas it would have been natural to refer to the "access provider" if it was intended to model Chorus' actual network.
- (g) The IPP approach of benchmarking against "comparable countries that use a forward-looking cost-based pricing method" also tells against Chorus' approach. That is, an IPP approach based on prices in other jurisdictions,

⁴ I note that in the Select Committee report on the Telecommunications Amendment Bill 2006, a proposal that "pricing of unbundling should take into account pricing relativities between Telecom's local-loop service and a comparable service provided by a competing access network infrastructure" was rejected on the basis that such an approach would inappropriately "link the pricing of unbundling to the cost of deploying alternative infrastructure" (Select Committee report, p14). While this could be read as a rejection of the conventional approach to TSLRIC as described in this advice, it appears that the comment was in response to Telecom's submission that the Commission should be required to consider "the cost of competing network access services" (i.e. the costs of existing actual competing access services) in setting prices for UCLL and UBA Telecom Submissions on the Telecommunications Amendment Bill, 15 August 2006, p 7), and the Select Committee's remarks should be confined accordingly.

which do not generally depend entirely on historic build choices, would be an odd proxy for the modern cost of Chorus' actual copper network.

- (h) To the extent that this approach results in any mismatch between the underlying STD and the TSLRIC price, it may be possible to make price adjustments where the hypothetical service is superior (or inferior) to the actual STD service.

17. I note that in *Application by Telstra Corporation Limited* [2010] ACompT 1 (10 May 2010) the Australian Competition Tribunal considered a challenge to a TSLRIC model developed by Telstra on the basis that it used copper (rather than an alternative technology) as the MEA. Although the Tribunal rejected the challenge, this was not on the basis that the service description referred to copper or that detailed copper-based characteristics of the current network could only be met by a copper MEA, but rather because insufficient evidence had been presented as to the cost and viability of alternative technologies or their ability to replicate an “unconditioned” service.⁵ That is, the Tribunal proceeded on the basis that in principle the MEA could be an alternative modern technology. Furthermore, the Tribunal rejected Telstra's application of the model on the basis of an alternative argument that by replicating Telstra's actual exchange locations, distribution area boundaries and pillar locations, the optimisation was so severely constrained that it was not capable of estimating the efficient costs of supplying local loops.⁶
18. While the matter is clearly not black-and-white, in my view the Courts would be likely to find that Parliament intended to leave decisions about the extent of abstraction in the service description and the degree of optimisation of the MEA to the Commission.⁷ In particular, the Commission is not required to mechanically adopt a service description or MEA which replicates all of the specific features of Chorus' present copper network.

Other considerations in relation to specifying “the service” and the MEA

Introduction

19. In this section of my advice, I consider other legal considerations that may affect the Commission's approach to the service descriptions and the MEA or MEAs.

⁵ At [200]-[229].

⁶ At [230]-[237].

⁷ Please note that I have not considered as part of this advice whether a “hypothetical new entrant” is the appropriate starting point for developing the MEA. It may be, however, that there is little practical difference whether one starts from a hypothetical new entrant and then attributes certain Chorus-like characteristics (for example, in relation to demand and what other services are being offered by the access provider for the purposes of determining common costs) or from Chorus and then asks how it would provide the equivalent of the UCLL or UBA services using best available technology today.

20. I consider the following issues in turn:
- (a) the s 18 purpose statement;
 - (b) the staggered nature of the designated access services;
 - (c) common costs and double recovery;
 - (d) compatibility of the FPP price with the underlying STD (and the distinction between non-cabinetised UCLL and SLU);
 - (e) time invariance of prices;
 - (f) the TSO;
 - (g) fibre contracts roll-out; and
 - (h) end user preferences.

Section 18 purpose statement

21. As you are aware, the Commission must exercise its discretion in the way that best “promote[s] competition in telecommunications markets for the long-term benefit of end-users of telecommunications services” (ss 18 and 19).
22. In determining the appropriate service description and MEA there are likely to be a range of relevant factors (including utilisation of existing infrastructure, incentives to minimise costs, incentives to invest and replicating outcomes of workably competitive markets), some of which may be in conflict with each other in relation to particular modelling decisions.

Do staggered services require staggered prices?

23. Schedule 1 of the Act prescribes a staggered range of designated access services based on access being sought at different parts of Chorus’ actual network.
24. For example, in relation to unbundling, relevant designated services include:
- (a) the unbundled copper local loop network;
 - (b) co-location;
 - (c) backhaul (distribution cabinet to telephone exchange); and
 - (d) backhaul (telephone exchange to interconnection point).
25. Conversely, the UBA service and UBA backhaul allow an access seeker to provide a broadband service without using its own equipment.
26. This menu allows an access seeker to decide “whether to build or buy” and to pick and choose particular parts of the network to access. This is sometimes referred to as the “ladder of investment”.

27. In my view, it is arguable that the existence of this structure indicates a statutory intent that the Commission should set prices for the individual designated access services in a manner that preserves appropriate relativities for build/buy decisions. I also note that the Act specifically requires the Commission to consider the relativity between the two services (s 19(b) and Schedule 1) in setting UCLL and UBA prices.⁸
28. In relation to UBA, Chorus goes further than this and argues that the wording of the UBA FPP requires the MEA for UBA to include Chorus' existing copper local loop in order to calculate the TSLRIC of additional costs incurred in providing the unbundled bitstream access service.⁹ Another way of putting this argument is that the existing copper network must be taken as a given, and the TSLRIC and MEA principles only applied in relation to the facilities associated with the "additional costs".
29. The following table sets out four approaches that the Commission might take in relation to the UBA MEA and includes my preliminary comments in relation to each:

Approach to UBA MEA	Preliminary comments
1. Take Chorus' copper local loop network as a given and only apply TSLRIC and MEA principles to the facilities associated with the "additional costs" of providing UBA	<ul style="list-style-type: none"> There is some merit in the argument that this approach is required by the UBA FPP. For example, suppose that a fibre-to-the-home (FTTH) MEA is used in place of the current local loop for the purposes of determining the UBA FPP price. As I understand it, this may imply negligible additional costs for UBA. As well as tending to make unbundling uneconomic this may prevent Chorus from earning a reasonable return on its UBA assets even if it was providing a highly efficient service on the current network.

⁸ It could be argued that the express requirement to consider the relativities between UCLL and UBA could be interpreted as implying that the other relativities are irrelevant. Indeed, I note that in the Select Committee report on the Telecommunications Amendment Bill 2006, a submission by Telecom that the relativity principle be extended to require consideration of the relativity between "resale services, Telecom's unbundled bitstream access, (and related back haul), Telecom's unbundled copper local loop network services (including related co-location and back haul services), and the cost of competing network access services" (Telecom Submissions on the Telecommunications Amendment Bill, 15 August 2006, p 7) was rejected on the basis that such an approach "would lead to unnecessary complexities in the calculation of price" (Select Committed report, p11). However, I do not read this as a rejection of the staggered approach generally.

⁹ See Chorus, *Submission in response to the Commerce Commission's Process and Issues Paper for determining a TSLRIC price for Chorus' unbundled bitstream access service in accordance with the Final Pricing Principle*, at [17]-[27].

	<ul style="list-style-type: none"> • While I do not think that adopting this approach would require the Commission to also use the copper network as the MEA for UCLL purposes, I note that using different MEAs in respect of different services may create problems in terms of the allocation of common costs since the different services will be based on different network assumptions (see below). Conversely, however, using the current copper network as part of the MEA for both UCLL and UBA may not allow sufficient optimisation to generate an efficient forward-looking price for UCLL in terms of s 18.
<p>2. Take Chorus' copper local loop network as the starting point, but allow for utilisation of rural broadband initiative (RBI) fixed wireless in place of copper in some rural areas</p>	<ul style="list-style-type: none"> • As I understand it, the basis for this approach is that a new entrant seeking to compete with Chorus' UBA service would utilise either copper or RBI fixed wireless as it considered appropriate. • In my view, if the current access network is to be used as an input, then it seems more appropriate to limit this to Chorus' actual network as this is the network pre-supposed by the service description (as per Chorus' argument above). The RBI may, however, still be relevant for other purposes (for example, the RBI subsidy may need to be netted out from the TSLRIC cost calculations). • If this approach was taken, the same issues apply in relation to the choice of MEA for UCLL as noted for option #1 above.
<p>3. Use the same optimised MEA for UBA and UCLL (eg FTTH), but use a s 18 price adjustment to create appropriate relativities</p>	<ul style="list-style-type: none"> • This approach would carry legal risk (as per Chorus' argument above). Also, especially if applied in relation to a number of services and depending on the information available to the Commission, it may result in a series of <i>ad hoc</i> adjustments for the prices of the various services with little factual foundation for the relativities.
<p>4. Use the same optimised MEA for UBA and UCLL (eg FTTH) without making any pricing adjustments (on the basis that the s 18 purpose statement is best served by not preserving economic breathing space in relation to some services and some forms of competition)</p>	<ul style="list-style-type: none"> • This approach would carry legal risk in terms of Chorus' argument above and whether s 18 can be used to "trump" the staggered structure of Schedule 1. Further consideration would be required if this was the Commission's preferred approach.

Common costs and double recovery

30. I note that the TSLRIC price for a designated access service must include "a reasonable allocation of forward-looking common costs" and must not allow the

access provider to recover costs that it is recovering in relation to another designated service (clause 4B, Schedule 1).

31. While I do not consider that this by itself requires the Commission to adopt a single MEA across all services, meeting these criteria is likely to be more complex if different MEAs are used for different services.

Compatibility with underlying STDs

32. The FPP price will become the price for the service defined in the relevant STD. Although the FPP price may be subject to “terms and conditions” (s 52(d)), I do not consider that a substantive change to the underlying service description is permissible.
33. As noted above, to the extent that the service being modelled for TSRLIC purposes is materially inferior or superior to the service described in the underlying STD, it may be possible to accommodate this via a price adjustment.
34. In terms of the historic distinction between non-cabinetised UCLL and SLU,¹⁰ in my view:
- (a) the Commission cannot merge the two separate STDs as part of the price review process and each must have its own price; and
 - (b) if the Commission’s approach to service description and MEA imply that the present distinction is not meaningful for modelling purposes, then the same price could apply in relation to both STDs.
35. In considering this issue, it is also appropriate to consider the difficulties (cherry-picking) created by having different unbundling prices depending on whether a line is cabinetised where other prices such as the unbundled copper low frequency service (UCLFS) are averaged. While the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011 refers to the distinct STDs for un-cabinetised and sub-loop UCLL, in my view this does not amount to a Parliamentary intention for the price differential to necessarily continue. Indeed, averaged prices could be said to be more consistent with the statutory intention as evidenced by clause 4A in Schedule 1 which requires geographically averaged prices for UCLL and UBA.
36. If the Commission was minded to remove this pricing distinction, one issue to consider would be whether it is the SLU price that is comparable to the non-cabinetised UCLL or rather that SLU plus SLU-backhaul price which is comparable? Assuming it is the latter, there would still need to be a separate SLU-backhaul price since this is a separate service.

¹⁰ Please note that I have not considered the issue of exactly which prices are “live” and to be determined as part of this FPP process as part of this advice. If the Commission decides to remove the current pricing distinction between un-cabinetised and sub-loop UCLL but only some of the relevant prices can be dealt with as part of the current process, the Commission will need to consider the process for transitioning to a set of prices which is consistent overall.

37. Finally, if the current price distinction is maintained for non-cabinetised UCLL and SLU, the Commission may need to consider:
- (a) whether the “additional costs” component for UBA should also vary on this basis; and
 - (b) whether the UCLF and UBA STDs need to be reconsidered (or the Schedule 1 service descriptions amended) so that different UCLL prices are payable depending on whether the line is cabinetised.

Time invariance of prices

38. The Act envisages that some of the designated access services may be subject to FPP prices while others will remain subject to IPP prices. This suggests that:
- (a) the overall approach taken by the Commission should be able to work regardless of whether a particular service is subject to FPP or IPP pricing (for example, there should be a consistent demarcation of services between the IPP and FPP processes); and
 - (b) the MEA and FPP price that apply for a particular service should not be affected by the time at which the application was made or what other FPP applications were live at the same time.

Relevance of the TSO

39. In my view, the TSO is of limited relevance to the exercise of determining the service descriptions and MEA(s) of the relevant services. This follows from my view above that developing a TSLRIC model involves a hypothetical question about what would be the efficient cost today for an equivalent service unconstrained by historic technology choices by Chorus. In my view, the specific details of the TSO (which are historic and contingent in nature) cannot have been intended to constrain the service description or MEA. The TSO may have some relevance in determining a high-level (technology neutral) description of the functions provided by the local loop.

Relevance of fibre contracts

40. In my view the recent fibre roll-out contracts may provide helpful information in relation to the sort of network that would be built and the costs that might be incurred by an operator using the most efficient contemporary means to provide a functional equivalent of the local loop.


Relevance of end user preferences

41. In determining the core functionality of the relevant services, the Commission may find it useful to have regard to the current services offered and the features that are most desired by customers.

Conclusion and overall comments

42. While the Act provides the Commission with a broad discretion in conducting the pricing review determination, the express and implied considerations and constraints set out above makes this process a more challenging exercise than it may first appear.
43. Further, a number of the factors discussed above will require the Commission to consider the fit between a new FPP price and the price which applies under other STDs (for example, the staggered nature of the services, common costs and double recovery, and time invariance). This does not mean that the same MEA is required for all services, but rather that the Commission must reach an approach which is coherent overall having regard to the factors discussed above.
44. The discussion in this section is not intended to be exhaustive or to provide definitive guidance. Rather, it is intended as a road map of the major considerations. Further attention can be given to specific issues as the Commission's thinking develops.

Yours faithfully



James Every-Palmer