



31 January 2014

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By Email: Matthew.Clark@comcom.govt.nz

Dear Matthew

UBA FPP applications

Thank you for the opportunity to comment on the UBA (Decision NZCC 20/2013) Final Pricing Principle Review (**FPP**) applications. We comment briefly below on two matters – timing of the UBA FPP process, and its interplay with the UCLL FPP process.

In terms of timing, the Commission's priority must be to achieve a high-quality and robust FPP price for the UBA service that will be enduring. Speed of answer should not detract from this objective in any way. While the Commission is obliged to make reasonable efforts to complete the FPP within three years of separation, when read in the context of the obligation to complete an IPP review within one year of separation, this suggests two years is considered a reasonable period to complete the FPP process. If the Commission does want to provide a transparent estimate of the time this FPP review will likely take, it should aim to complete the UBA FPP within two years.

Chorus comments in its covering letter on the linkages between the UBA and UCLL FPP processes. We agree the processes should ideally be aligned, and modelling undertaken in an integrated and consistent fashion. That said, we note it is not essential that the processes follow the same timeline - it is possible for the Commission to confirm UBA costs ahead of a final UCLL FPP determination.

Reasonable efforts to review the UBA STD within one year of separation

Section 77(1)(a) of the Telecommunications (TSO, Broadband and Other Matters) Amendment Act 2011 provides that the Commission make reasonable efforts to review the UBA STD in order to make changes necessary to implement the initial and final pricing principles applicable after the expiry of 3 years from separation. At a minimum this would require the Commission to set an IPP price and amend the STD to permit the final pricing principle to be implemented. We do not

consider this obligation requires the Commission to actually strike an FPP price within that time though. Further, we consider that reasonable efforts are likely to have been exhausted when the Commission finalised its UBA pricing review. The STD had by then been reviewed and necessary changes made such that the initial and final pricing principles can be implemented.

For the FPP provisions to be implemented, that is, to come into effect, only a price determined in accordance with the IPP must have been set. It is the setting of the price in accordance with the IPP that then triggers the operative provisions of section 42 of the Act and section 78 of the Amendment Act, thereby implementing the FPP provisions.

When read within that context, section 78(3), which provides that the Commission must make reasonable efforts to complete the FPP review before the expiry of 3 years from separation day, should be interpreted as a two year process following the finalisation of the IPP price. That said, the reasonable efforts proviso makes it clear that neither the 3 year post separation date nor a 2-year period from the date from which the IPP price is set, is directive.

Reasonable efforts has typically been interpreted by the courts, albeit in contract interpretation cases, as meaning that a party should adopt and pursue one reasonable course of action in order to achieve the result, bearing in mind its own [commercial] interests and the likelihood of success of meeting the objective, and which need not be exhaustive of every course available to it. This is a lesser standard than “all reasonable efforts” and “best efforts”.

Furthermore, the duty must be performed by reference to the facts available at the time of performance. As Chorus has noted in its covering letter, final pricing reviews require detailed cost modelling and consultation and can take years to complete. This three year period must therefore be read and applied having regard to the relative complexities of undertaking IPP and FPP reviews for the UBA service, the time that has ultimately been taken to complete the UBA IPP process, and the importance of a thorough and robust process for determining the UBA under the FPP.

UCLL and UBA final pricing principle reviews

In parallel, the Commission is also considering final pricing principle applications to the designated UCLL service and is seeking comments on UCLL FPP processes and issues by 14 February 2014, including the relationship between the processes.

We agree with Chorus that a range of services are provided over the local access network and it's important that the cost models reconcile so that, for example, there is no under or over recovery of costs. Accordingly, the UBA and UCLL processes should run in parallel to the greatest degree possible, drawing on the same input data where relevant, and brought together at key decision points. For example, at the time the cost model principles and specifications are agreed.

Nonetheless, once the underlying principles are established and depending on the design principles adopted for the UCLL and UBA models, the Commission *may* be able to consider latter stages relating to UBA specific costs more independently of the UCLL process. In this regard, much will depend on whether the design principles adopted enable the UBA costs to be considered as simply incremental to the local access network. For example, the overseas benchmark cost models that underpin current regulated prices, recover full local loop network costs from UCLL services, with the

bitstream costs comprising electronics and transport to the hand over point. This has also been the approach consistently applied to setting New Zealand prices. While yet to be considered, if a similar approach is taken to the UCLL and UBA FPP modelling, UBA costs could be considered as largely discrete and incremental to the access network.

This approach is also consistent with forward looking MEA models implemented overseas. For example, we understand that, in applying a fibre MEA, the Danish regulatory authority identifies separate bitstream costs by reference to DSLAM electronic costs, i.e. it maintains common passive elements and replaces fibre with bitstream electronic components.¹

The position is less clear if the Commission seeks to separately model network costs for different sub-sets of end-points, i.e. separated cabinetised end-points and non-cabinetised end-points costs. In this scenario, it will be impossible to conclude anything about UBA prices ahead of the UCLL process.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'JWS', is centered below the text 'Yours sincerely'.

John Wesley-Smith
General Manager
Regulatory Affairs

¹ See page 7 onwards in the DBA consultation note regarding MEA assessment where the Authority considers this question.