In the Court of Appeal of New Zealand

CA229/2014-404

Under	**the Telecommunications Act 2001**
In the Matter of	**an appeal from Decision [2013] NZCC 20 of the Commerce Commission**
And	**Chorus Limited** **Appellant**
And	**Commerce Commission and Others** **Respondent**

Synopsis of Submissions of Orcon Ltd, InternetNZ, TUANZ and Consumer NZ

Dated 16 July 2014

Next hearing date: Hearing of Appeal on 31 July 2014

Wigley + Company, Solicitors
(Solicitor: M.B. Wigley)
PO Box 10-842, Wellington
Ph: 04 4723023
Michael.wigley@wigleylaw.com

Table of contents

Introduction

1 Counsel acts for the RSP, Orcon Ltd, and for the Interveners, InternetNZ, Consumer NZ, and the Telecommunications Users Association of New Zealand, (TUANZ) (together called "the Consumer NGOs" in this synopsis). Pursuant to s 18 the focus of the relevant part of the Act is the long term benefit of end users of telecommunication services in New Zealand. Hence the interest of the interveners.

2 The parties support the Commerce Commission's submissions and for that reason will not separately deal with a number of points. The main focus is upon the application of s 18 which has wide ramifications beyond this IPP process for future Commission telecommunications decisions, such as the FPP process. In that FPP process, there is also a tension between (a) setting a price based solely or primarily on cost evidence and (b) applying s 18 with its focus on efficiencies (which is different from cost evidence).

3 Before dealing with s 18, we will outline the underlying theme of this submission, and then deal with Chorus' approach to the relevance of the benchmark evidence.

The underlying theme of this submission

4 The underlying theme is that the Act contains a formula (or a process or a methodology) which the Commission must apply when deciding the IPP. That formula is that the Commission benchmarks "additional costs incurred in providing the unbundled bitstream access service against prices in comparable countries that use a forward-looking cost-based pricing method". That is a sparsely stated formula but it is a formula nonetheless, a formula that is augmented by integral conclusions (for, example, that the IPP is a proxy for the FPP).

5 Clarity on that point is significant as it highlights:

a. the error in Chorus's submission that benchmarks on their own are of limited probative relevance (we turn to that next); and

b. the primary role that the formula based on cost has relative to the secondary role of s 18 (this will be the main focus of this submission).

6 As to the first point, it is submitted that there is probative evidence relied upon by the Commission and that any criticism can only be levelled at the quality of that evidence and therefore the conclusions drawn from it. That is not a question of law. The Commission's role can be framed as deciding the best estimate of NZ cost (and therefore price) based on the evidence, which includes benchmark evidence. To get around the all-or-nothing aspect of there being no probative evidence, Chorus incorrectly frames the issues as all or nothing issues. That is not asking and dealing with the right question. Fewer and weaker benchmarks, and fewer and weaker evidence

from other sources erode the quality of the best estimate. But that is far from there being no probative evidence. And the choice from the available, and plausible, evidence is for the Commission alone.

7 In any event, we are in the world of statistics and econometrics. Lawyers should not dabble in the experts' field with the dangers that entails.

8 As to the second point, the primary submission is that the gaps and judgment calls in relation to that formula, and its implementation, are not necessarily to be resolved via s 18. Mostly they are not to be so resolved as to do so would produce incorrect outcomes under the Act, in context.

9 There is a key distinction between the IPP formula and the s 18 process:

a. The formula is specifically directed, and only directed, at deriving a price based on **cost**. The evidence will be cost evidence (such as the benchmark price in another country, derived from cost). We'll call that evidence "cost attributes". The same applies to the FPP: TSLRIC is all about cost.

b. Section 18 is a different process. It is solely about **efficiencies**[1] (not cost) and the LTBEU. We'll call that "efficiency attributes". That is a different thing. It may well lead to a different conclusion on price and other matters than a pure cost attribute assessment.

10 How the Commission made its decision is a textbook example of what is required. It made most of the judgment calls based on cost attributes and only brought in s 18 and efficiency attributes to choose from the plausible range. At a high level, the correct approach can, we submit, be summarised as follows.

> *The Commission must initially make it decisions, including on difficult judgment calls, only based on cost attributes. Only if and when it reaches a point where there is a range of viable choices to estimate price – a plausible range – should the Commission use s 18 and efficiency attributes to help make the choice from the plausible range.*

11 That is at the heart of this submission on s 18. This has a number of implications for this appeal. For example, it shows that Chorus is not correct to submit that s 18 should have been considered and applied throughout the process instead of just at the end.

12 Below we will outline the statutory and international treaty context supporting that submission. Some detail on the former (Part 2 of the Act) is in Appendix A and the detail on the latter (New Zealand's GAT obligations) is in Appendix B. (It is considered that this issue can be decided in the way proposed without reference to the treaty obligations,

[1] With a modest variation to the efficiency theme in s 18(2A) but that still has an efficiencies focus

but if necessary, the treaty points to cost based pricing to the exclusion of pricing based on other factors.

13 We turn now to the first issue and then deal with s 18.

Benchmarks and evidence

14 Chorus has the problem in its appeal that the absence of probative evidence to underpin its appeal involves a binary decision: is there or isn't there probative evidence? Thus, Chorus incorrectly poses questions and issues of a binary nature, to overcome its problem that in fact probative evidence does exist: Chorus's only possible complaint can be as to the quality and extent of the evidence used by the Commission, and how it was used, but that is not an appealable question of law.

15 We illustrate this by dealing with Chorus's example that is at the end of the spectrum which involves weaker evidence: having only the single benchmark of Sweden. The approach is the same throughout the Chorus submission and the Chorus point becomes weaker as more evidence such as additional benchmarks are added. At [4.20] of its submission, Chorus notes:

> Consider what the position would have been if Denmark had adopted a different regulatory approach, so the Commission only had the Sweden benchmark of $10.92. If the Commission had said "it costs $10.92 to provide the service in Sweden, so we conclude that it costs $10.92 to provide the service in New Zealand", that would be a plain error of law. The simple fact that the service costs $10.92 to provide in Sweden provides no logical basis at all for a conclusion that the cost of providing the service is the same in New Zealand. More information would be needed about any differences in the service provided in each country, and about relative costs in the two countries, before any such conclusion could be reached.

16 There are a number of errors in this simple example, which are repeated in the rest of the Chorus analysis.

17 First, the wrong question is being addressed. The issue is not whether the single Swedish benchmark is the **same** as the New Zealand cost, as the example posits. It is whether and how the benchmark is probative evidence as to the estimated NZ cost and price. It may be strong evidence or weak evidence. That can sensibly framed in terms of deriving the **best estimate** of the New Zealand cost from the available evidence (with which Chorus can have no difficulty as Chorus used the best estimate concept in the High Court). Benchmarks form a central part in this: after all, benchmarks are the only evidence specifically identified to be used in the Act. They must be used, which of itself implies the strong evidential relevance of the benchmarks, in this legislative context.

18 Probative evidence, and, thus the best estimate, can be assessed as follows:

a. TSLRIC is only an **estimate** of true cost;

b. The IPP is a blunter estimate (proxy) of TSLRIC which in turn is an

estimate;

c. The objective is to get the **best estimate** of cost (with such best estimate being less robust and less accurate for the IPP). It is not to get the **actual cost** as the quote above implies;

d. Best estimate is a statistical concept but it is also a simple and self-evident concept. It is one that reflects the outcome of correct application of probative evidence. We could equally use the words of probative evidence. Based on the probative evidence, what is the price to be derived under the IPP formula? Sometimes the Commission will have only limited evidence available to it but it can – indeed must – decide what the price is. It is a best estimate regardless; there might be a question around the quality of the decision relative to a decision based on more evidence, and how good that estimate is. But the Commission has derived the best estimate either way and that is not a question of law.

19 Applying this to the example:

a. In the extract above, Chorus states: *"The simple fact that the service costs $10.92 to provide in Sweden provides no logical basis at all for a conclusion that the cost of providing the service is the same in New Zealand".*

b. The Commission's role is to ascertain the best estimate and not that the price is the same in New Zealand. A sliding-scale question not a binary question and thus not an error of law question as there is some probative evidence anyway. For example, the Swedish price is probative evidence. Alone, it may be weaker, but it is probative evidence, strengthened also by its selection from a list of countries as being most relevant to New Zealand.

c. Next Chorus says*: "More information would be needed about any differences in the service provided in each country, and about relative costs in the two countries, before any such conclusion could be reached [that the NZ cost is the same as the Swedish cost]."*

d. That does not at all follow:

i. The first point is that one benchmark can in fact be sufficient. Indeed it must be if that is the only benchmark available, as the Commission has a statutory obligation to make the IPP decision and so it must use the single benchmark. The quality of the decision may be lower – that is, the best estimate is not so robust – but the decision can be made (and, given there is probative evidence, albeit not so robust, that is not an error of law).

ii. It does not follow that adjusting the benchmark as to

differences in services etc between the countries will improve the quality of the decision – the best estimate. The Commission said such adjustments couldn't be made in this case as to the two benchmarks, of which one is the country in this example. Thus, the Commission might justifiably conclude that the best estimate of the price is based on the Swedish price, without adjustment.

iii. The Commission can (and did in its decision) analyse the evidence such as Swedish conditions compared to New Zealand. It can (and did in its decision) reject any adjustment. That does not raise an appealable error of law. Contrary to what Chorus submits, the benchmark does not necessarily require adjustment.

iv. Sweden had already been down selected from a list of countries, making it more relevant to the best estimate assessment. The cost based price on other comparable networks overseas does tell us something about the NZ cost, sometimes less and sometimes more, but it is still probative evidence.

20 Keep adding benchmarks and the best estimate could improve, or not as the case may be. For example two benchmarks may be better than more as the others are less comparable. Here for example the Commission has cut out many potential benchmarks to get to two. The quality doesn't necessarily improve by adding back in some of those benchmarks. But, again, these are questions of degree (no question of law) and not the binary issue of absence of probative evidence.

21 Chorus characterise the approach as one of arithmetic and mathematics – despite the heavy analysis by the Commission beyond that - when even at this simpler end we are in the world of statistics and econometrics.[2] The lawyers fall into danger by dabbling in this area when the Commission and its staff have the expertise. It is submitted that Chorus should not be permitted to enter this statistical debate, absent expert evidence submitted on appeal (which ought not be permitted anyway). The issues, framed in terms of logic by Chorus, in fact raise complex statistical and probability issues.

22 We turn now to the section 18 issues.

Application of s 18

23 The proposition put forward by Orcon and interveners is as follows:

[2] For example, Chorus incorrectly submit at [4.31] that the New Zealand costs, relative to two benchmarks are no less likely to be the highest value than it is to be the middle value of the three country set. That ignores elementary probabilities around medians, as identified by Kos J at [112] and the relevance of statistics and probabilities. The example also unrealistically assumes absent and any reliable information about differences in services etc, when in fact the two benchmarks have already been downselected.

> *The Commission must initially make it decisions, including on difficult judgment calls, only based on cost attributes. Only if and when it reaches a point where there is a range of viable choices to estimate price – a plausible range – should the Commission use s 18 and efficiency attributes to help make the choice from the plausible range.*

24 This has a number of implications for this appeal. For example, it shows that Chorus is not correct to submit that s 18 should have been considered and applied throughout the process instead of just at the end.

25 As outlined at the start of this submission, the formula for setting the IPP is based on cost attributes, and section 18 considerations are based on efficiency attributes. They are different and involve different processes. There are overlaps between the formula and cost attributes on the one hand and s 18 and efficiencies on the other but that does not make the two steps part of the same. For example, as the Commission confirmed in its decision, a cost based price is often the most efficient price. The two may well be the same. But that doesn't mean that the cost price is calculated having regard to efficiency attributes. A cost based price, calculated using cost attributes will often also be the most efficient price as a result, and not as part of using efficiency attributes to get to the cost price. This highlights that they are different processes, which may lead to different outcomes. Using the Decision as an example, the Commission has increased the price to reflect efficiencies, on grounds (as to investment and dynamic efficiencies) that have nothing to do with underlying cost. There is a risk that use of s18 will take the price away from cost, when cost is what is mandated by the IPP formula. Hence, s 18 ought be carefully applied as it was by the Commission.

26 While Interveners and Orcon broadly agree with the way the Commission has handled this split between the IPP formula and s 18, they have concerns with , [60] in the Commission's Decision:

> "Section 18 establishes that our purpose in making this determination is first and foremost to "promote competition in telecommunications markets for the long-term benefit of end-users.""

27 But the Commission's purpose in making the IPP determination is not, first and foremost, promotion of that s 18 purpose. It is, first and foremost, to decide the IPP price, applying the formula above, which is all about cost based pricing, and not about the separate issue of s 18 purposes. The formula governs and the purpose statement, with the s 19 obligation to implement that statement, is subordinate to the express words of the formula. We will develop further reasons for this below.

28 The Commission will often face challenging judgments at various steps of pricing processes, even more so in relation to FPPs. But many if not most of those judgment calls can be made solely by reference to cost attributes, disregarding efficiency attributes. The job of the Commission is to get the optimal proxy for the FPP, that is to get the optimal proxy

based on cost attributes only. Using efficiency attributes deviates the price from the cost proxy.

29 Where s 18 does come into play is when the Commission is faced with a range of choices, all of which are viable in endeavouring to identify the best cost proxy for IPP (or the best TSLRIC cost for FPP). That is the point at which the Commission can and should use s 18 and efficiency attributes to choose where to land from the choices.

30 The Commission's decision is a textbook example of this occurring successfully.[3] Over the course of the process and its decision the Commission made a number of difficult judgment calls based on cost attributes. It was able to do so without resorting to s 18 to resolve any impasse. It was on track under the formula. Then it reached the point where it had a range of possible candidates for the prices, near the end of the process. All could viably be consistent with a cost based price. It usefully coined the "plausible range" concept to encapsulate this. Only then did it turn to s 18 and efficiency attributes to help make the choice from the plausible range. It used a mixture of cost attributes and efficiency attributes to get to the final price.

31 This also highlights the point made by the Commission that the ultimate price must lie within the framework of the cost formula. In other words, the price cannot go above or below the plausible range of possible cost based prices. The following is not available: "We have a cost based price of $X, solely from cost attributes, but we are going to add $Z to that figure to reflect dynamic efficiencies."

32 The Commission was therefore able to resolve difficult judgment calls earlier in the process relying only on cost attributes. It would be wrong, contrary to what Chorus contend, to add s 18 and efficiency attributes to those earlier decisions. That would distort the approach, and also risk double counting etc. (There is of course the issue anyway that the Commission validly chose, out of options, to adjust under s 18 at the end of the process and not throughout. It cannot be criticised for this as the legislation enables that choice: that point is covered in the Commission's submissions).

33 At first blush, looking at s 18 and the formula in isolation may lead to the conclusion that s 18 and 19, with their strong purpose obligations, must be given meaning and that the approach under the formula should be altered to accommodate s 18 efficiencies throughout the analysis. On that limited review, why else have s 18 and 19 if their role is so confined?

34 The answer becomes apparent when s 18 and 19 and the formula are looked at in context, both of the Act, particularly Part 2, and also New Zealand's international treaty commitments- which are legally

[3] That is, text book as to material aspects. For example, Orcon and the interveners consider the s 18 analysis was incorrectly undertaken but that is not a matter for this appeal.

enforceable. To the extent that pricing moves from cost due to use of efficiency attributes, there is a departure from the treaty.

35 We will first summarise the conclusions as to the interplay of the IPP formula and sections 18 and 19, and then we will outline the detail.

Summary: How are s18 and 19, and the IPP cost formula, to be reconciled?

36 Context shows that the formulaic cost price requirement can be reconciled with the separate issue of efficiencies in s18 and the obligation to give effect to s18, such that the initial requirement is to find the best cost-based proxy based only on cost attributes, and only then, if there is a plausible range, the Commission can turn to s18.

37 In particular:

a. The plain meaning of the UBA cost formula is that the cost-based price is to be derived.

b. The Minister and the Commission must, under s 19, consider and give effect to s18 in relation to multiple decisions under Part 2. Those decisions are on a spectrum from:

    i. Those where s 18 governs the decision (e.g. Commission and Ministerial recommendations under Sch 3 that a service is added to the list of service descriptions in Sch 1); to

    ii. Those where there is a statutory formula or framework for making the decision (the UBA IPP is an example).

c. Viewed in the context of a spectrum of multiple decisions ranging from narrow s18 involvement to governing s 18 involvement, it can be seen that a narrow application of s18 and 19 to the UBA IPP is consistent with the dominance of the UBA IPP cost formula, giving little room to adjust the price away from a cost price. It is neither necessary nor appropriate to give a strained interpretation to the legislation to move the Commission's approach away from a cost-based methodology. The wide array of decisions enable some to be dominated by s 18 and some not. Sections 18 and 19 must be subservient to the express words of the Act. Section 19 covers a wide variety of decisions on a spectrum.

38 If necessary – it is submitted it is not – New Zealand's international GATS treaty obligations are based on commitments that services such as UBA are regulated at cost price. Domestic statutes are interpreted so as to give effect to international treaty obligations. That supports the interpretation outlined above. This is dealt with in Appendix B to these submissions.

39 It is necessary to go into more detail on the framework in the Act to

outline the context in which the IPP cost formula and s 18 and 19 are to be interpreted.

Telecommunications Act: overall framework

40 The Act is divided between Part 4 and the rest of the Act. Part 4 broadly carries forward the telecommunications legislation from before the 2001 reforms. It deals with practical network issues such as access to land, misuse of the network, etc. Part 4 is largely standalone. The rest of the Act deals with economic regulatory issues.

41 Part 3 deals with the way in which telecommunications providers share the cost of supplying commercially non-viable customers, particularly rural customers. These are the telecommunications service obligations (TSO).

42 The rest of the Act reflects the 2001 regulatory reforms to deal with network dominance, as those reforms have developed since then, particularly via:

a. The major steps of operational separation and the introduction of UCLL (2006); and then

b. structural separation and UFB (2011)

43 Part 2A catered for operational separation, and now caters for structural separation. Part4AA provides the legislative framework for UFB. Part 2B contains information disclosure requirements.

Part 2: the focus of this appeal

44 Part 2, for which s18 is the purpose statement and to which s 19 applies s 18 as to all Part 2 and Sch 1 to 3 decisions, governs regulated services, to be provided by access providers (Chorus and Telecom, in particular) to access seekers. Broadly, there is a menu of services (in Schedule 1) which must be provided by an access provider, such as Chorus, if the Commission so determines, on terms decided by the Commission. Until then, the services listed in that menu do not need to be provided.

45 Part 2 contains the regime for managing:

a. what is in that menu (i.e. what is in Schedule 1); and

b. the processes for determining the price and non-price terms for regulated services based on the services in that menu.

46 The context of the range of decisions to be made under Part 2 by the Commission and by the Minister is relevant to how s 18 and 19 apply to determining the UBA IPP. Appendix A to this submission summarises in table form the range of decisions to which s18 and 19 apply. Below, this submission summarises the key points in the table.

47 If a particular service is listed in Schedule 1, an access seeker can apply to the Commission for a determination requiring the access provider to supply that service, either on:

a. Price and non-price terms ("designated service"); or

b. Non-price terms only ("specified service").

48 In practice the great majority of services determined by the Commission are designated services so the Commission decides both price and non-price terms.

49 The non-price terms determined by the Commission are extensive and are similar to complex commercial agreements for the supply of services. See for example the non-price terms for the UBA standard terms determination (STD) decided in 2007, and amended since, which are the non-price terms upon which the Commission has made its UBA IPP decision.

50 Each service description in Schedule 1 briefly outlines the basis on which the Commission can decide whether to regulate the service, and the terms on which it can do so (non-price terms as to both designated and specified services, and price terms as to designated services).

51 Generally, determination of non-price terms is not constrained to particular formulae or frameworks, beyond the brief descriptions of the services in Schedule 1. As the service descriptions are short, the Commission has considerable latitude as to what non-price terms it will decide. Therefore, s18 and 19 considerations dominate those decisions, for there are few other parameters in the legislation.

52 That point is significant: as developed below, selection of price for designated services is mostly formulaic (usually either retail-minus or cost), whereas selection of non-price terms is not. Price is also dependent upon the non-price terms such as quality of service, the service delivery points (hence, the rejection of three of the potential benchmarks), etc. Read in overall context, s 18 and 19, and the formula for the UBA IPP, do not need to be, nor should be, given a strained interpretation so that somehow the s 18 analysis is relevant to determining the cost of the service; there is a cost formula for that, and the Commission has wide discretion, mainly governed by s 18, as to non-price terms. Limiting application of s 18 to the UBA IPP formula does not deprive s 19 of meaning, for s 18 and 19 applies to multiple other Part 2 decisions, often in a manner that dominates the approach.

53 There are 19 services currently in Schedule 1, of which:

a. 12 are designated and have formulae for the calculation of the IPP and the FPP prices

b. 4 require the Commission to decide the formulae for the price; and

c. 3 are specified services (that is, there are no regulated price terms).

54 Service descriptions in Schedule 1 can be added, removed or changed by:

a. Legislation (for example, the 2006 statutory reforms added UCLL to Schedule 1 and the 2011 reforms added the UBA pricing change from retail minus to cost price and the obligation on the Commission to issue the determination under appeal); or

b. By way of change following a Commission recommendation accepted by the Minister: that is the Schedule 3 process.

55 In deciding whether Schedule 1 should be amended to add, change or delete service descriptions, the Act contains few requirements upon the Commission and the Minister. Therefore, s18 efficiency objectives govern the decisions by the Minister and the Commission. There is a requirement for the services to comply with the standard access principles (cl 5 and 6 Part 1 Schedule 1).

56 In relation to the services briefly described in Schedule 1, access seekers can ask the Commission to issue a determination requiring the access provider to provide the service on determined terms. Other than standard access principles, the service description requirements as to non-price terms are relatively limited, whereas there is a formula for all of the 12 designated services, either retail-minus or cost pricing, with IPP and FPP formulae in all cases.

57 To allow s19 to move the price from a pure cost-basis would be contrary to the obligations in the Act not to do so, by way of the IPP formula. The Act should be interpreted to avoid that outcome. The submitted interpretation does avoid that outcome in a manner, considered in overall context, consistent with both s19 and the IPP.

58 To take a different approach would be for the Courts effectively to legislate to fill "*gaps*" in the legislation. ""*Gaps" do not exist if the legislation can be interpreted sensibly as it stands*" (Burrows, Statute Law in NZ 4th Edition page 213: see also *Central Plains v Ngai Tahu* [2008] NZCA 71).

59 "*Whatever the purpose of an Act may be, there is only so far one can "stretch" the meaning of the words of the provision under consideration…. There are often cases where the words are so clear in a particular sense that it is simply not possible to give them a different sense to satisfy the requirements of a wider purpose that the Act may seem to bear*" (Burrows at Page 225 - 226). The courts (and the Commission) cannot "*usurp the policy-making function, which rightly belongs to Parliament*" (*Northland Milk Vendors v Northern Milk* [1988] 1 NZLR 530, 542 per Cooke P).

60 In summary:

a. The issues arising under each of s18, 18(2) and 18(2A) arise in relation to all decisions by the Minister and the Commission under Part 2, and Sch 1 and 3;

b. On a spectrum, some decisions have minimal s18 input (eg IPPs and FPPs with retail-minus and cost methodologies) and some have dominating s 18 input (such as Schedule 3 applications and decisions on non-price terms);

c. The Act should be interpreted such that s 18 applies only when the Commission faces a plausible range of choices consistent with cost pricing. Only then should s 18 be available to make a choice from the range. That comprises two sequential steps similar to that adopted by the Commission in the decision under appeal.

d. If necessary, compliance with international treaty obligations points to the contended approach.

Costs

61 Costs are sought for Band A on a complex appeal.

M.B. Wigley
Counsel for the Interveners and for Orcon Limited

Appendix A – Provisions in Part 2 and Schedules 1, 3, 3A Telecommunications Act

No.	Subject	Subpart in Part 2	Sections	Schedules	Decision maker	Overview
1.	Determinations as to designated and specified services	2	s 20-30	Sch 1	Commission	This is the original sub-part under which the Commission issues determinations, by which access seekers get services from access providers. The STD process dealt with next was added in 2006 and in practice has become the main method of determining whether the service should be available and on which terms. There are 12 "designated services" (that is services for which price and non-price terms can be determined) and 3 "specified services" (for which there can only be non-price terms determined). Although there are common themes for each of the 16 service descriptions, the descriptions as to threshold requirements and as to the basis for determining terms vary. All designated services follow the IPP and FPP model. Most now provide for cost pricing, but some are still based on retail-minus (UBA is transitioning away from retail-minus to cost). All pricing decisions are based on a formula: either retail minus or TSLRIC (with IPP proxies for each). Decisions as to non-price terms have few constraints and are therefore dominated by s 18 and 19 considerations.
2.	Standard Terms Determinations (STD)	2A	s 30A-30T	Sch 1	Commission	As noted above, this is an alternative path for the final determination. The application of s18 is materially the same so the Commission has the same range of decisions to make, with the addition that it is for the Commission, on its own initiative, to decide whether to commence the STD process (s30C).

						On request, the access provider puts forward a standard terms proposal. Via a draft STD and consultation steps, a final STD is issued. The current UBA pricing review is a review of the 2007 UBA STD, pursuant to s 30R, in order to change the price from retail minus to cost as from December 2014.
3.	Residual Terms Determinations	2A	s 30U-30ZD	Sch 1	Commission	This allows the Commission, following application by an access seeker, to vary the terms in an STD, or to address matters not addressed in the STD. There have been no such determinations so far.
4.	Determinations for designated multi-network services	3	31AA-41		Commission	This is a process, similar to that for determinations for specified and designated services, applicable to multiple access providers for services such as number portability. There are currently 4 such services in Sch 1. The Commission may, on its own initiative, decide to initiate the process (s31AA), or an access seeker can apply (in which event, the Commission must decide whether to investigate (s 35)). Other than s 18 and 19, there is no stated basis on which either of those two decisions is made. Unlike the other designated services, the Commission decides the formula for how the cost is allocated between access seekers and access providers. Other than s 18 and 19, there is no stated basis for that decision. Therefore, decisions by the Commission include: a. Whether it initiates the process; b. Whether it investigates following application by the access seeker; c. The formula for allocating cost; d. Cost and non-cost terms (cost being based on that formula). Therefore, s 18 and 19 dominate the Commission's approach.
5.	Pricing review	4	s 42-52	Sch 1	Commission	This is the Subpart dealing with the FPP phase: the final pricing for which the IPP is

						a proxy. All designated services currently provide for TSLRIC or retail-minus methodologies. It is submitted that the Commission's approach is largely fettered by the price methodologies in a way similar to the IPP methodologies.
6.	Clarification of determination	5	s 58	Sch 1	Commission	On its own initiative, or application by a party, the Commission can amend a determination to clarify it.
7.	Reconsideration of determination	5	s 59	Sch 1	Commission	On application of a party, the Commission can revoke or amend a determination, and substitute another determination, if there has been a material change of circumstances or the determination was made on material false or misleading information. The Commission follows the same process as for the initial determination
8.	Alteration of Sch 1 services	6	s 66 and 68	Sch 1 and Sch 3	Commission and Minister	The Governor-General may by Order in Council, made on recommendation of the Minister, amend the list of services in Sch 1 by adding or removing services or amending service descriptions. The Minister must not make the recommendation unless the Minister accepts the Commission's recommendation that the proposed alteration be made. Sch 3 sets out the procedure to be followed by the Commission and the Minister. The Commission can of its own initiative commence an investigation (as to whether to amend the list of services in Sch 1) or upon request of the Minister. Additionally, the Commission must consider every 5 years whether to omit existing services in Sch 1. The Act does not state the grounds on which the Commission and the Minister decide what to do. Therefore, the Schedule 3 decisions as to instigation of an investigation by the Commission, the Commission's recommendation, and then the Minister's handling of that recommendation (e.g. refer the recommendation back to the Commission for further consideration or to recommend amendment of Sch 1) is governed by s18 and 19. The Commission and the Minister must make the recommendation that "the Commission or Minister considers best gives, or is likely to best give, effect to the purpose set out in section 18." (s19)

9.	Alteration of Sch 1 interpretation and application provisions	6	s 67	Sch 1 and 3	Commission and Minister	Amendment of Part 1 of Schedule 1, which contains interpretation and application provisions such standard access principles, follows the same process as for amendment of the list of services in Schedule 1 pursuant to s 66. Therefore this also is governed by s 18.
10.	Sch 3A undertakings	6	s 68A	Sch 1, 3 and 3A	Commission and Minister	After a Sch 3 investigation has commenced, an access provider enter a voluntary undertaking to provide the service, avoiding the need for regulation, on terms agreed between the Commission and the access provider.(cl 2 Sch 3A). If the Commission accepts the undertaking, its final report recommends that the Minister accepts the undertaking and, were necessary, changes are made to the list of services in Sch 1. (cl 3 Sch 3A). When accepted by the Minister, the undertaking is binding. Other than compliance with low level standard access principles, there is no framework on which the Commission and the Minister make their decisions (cl 4 Sch 3A). Therefore s 18 governs the decisions via s 19.
11.	Regulations	6	69	Schedule 1	Commission and Minister	In addition to more general powers to make regulations in s 157, the Governor-General, by Order in Council, may on the recommendation of the Minister, make regulations related specifically to Part 2, such as application of applicable access principles, IPP, FPP, etc. The Minister cannot make a recommendation unless the Commission has so recommended.

APPENDIX B: GATS and Telecommunications

1 Summary

1.1 New Zealand has entered the General Agreement on Trade in Services (GATS). This is an international treaty under the auspices of WTO that requires, in its Telecommunications Annex and Reference Paper, New Zealand to have pricing for services such as UCLL and UBA based on cost, and without cross-subsidisation, such as between copper services and fibre services, which is the effect if the UBA price goes above cost.

1.2 Where possible, a treaty is to be interpreted such as to give effect to New Zealand's international treaty obligations:[1]

> *We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in such a way which is consistent with New Zealand's international obligations.. That presumption may apply whether or not the legislation was enacted for the purpose of implementing the relevant text… In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates.*

1.3 The Consumer NGOs submit that the correct interpretation of the Act, independent of treaty obligations, is as outlined in the body of the submission (namely, decisions at each step are based solely on cost attributes, but if and only if the Commission decides a plausible range, can the price be adjusted upwards to meet s 18 attributes). However, if that is not so, the treaty confirms that the Act ought to be interpreted in this way, so that it is consistent with the treaty obligations as to cost based pricing and as to cross-subsidisation.

2 The Treaty: overview

2.1 While sometimes described as one document (the GATS Basic Telecommunications Agreement) there are four key documents comprising nations' telecommunications commitments under the General Agreement on Trade in Services (GATS):[2]

a. The General Agreement on Trade in Services (GATS);[3]
b. the Annex on Telecommunications (annexed to GATS) commonly called the Basic Telecommunications Agreement or BTA (called the Annex in this report);[4]
c. the Reference Paper;[5] and

---

[1] *NZ Airline Pilots Assn v Attorney-General* [1997] 3 NZLR 269, 289 (NZCA) per Keith J; see also Burrows, Statute Law in New Zealand (4th edition) at page 495-499

[2] There is a useful overview on the WTO website at: http://www.wto.org/english/tratop_e/serv_e/telecom_e.htm.
See also Para 15.4.1 et seq in Walden (ed), Telecommunications' Law and Regulation (2009, 3rd Edition, OUP) which also describes how each document agreed.

[3] http://www.wto.org/english/tratop_e/serv_e/gatsintr_e.htm

[4] http://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm

[5] http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm

d. Schedule of Telecommunications Commitments and Exceptions by each nation. (New Zealand has committed to all relevant obligations in the above documents).[6]

2.2 108 countries have made commitments under the Annex of which 99 have committed to the Reference Paper. All documents are legally binding on the countries signing them (except where they have entered reservations: New Zealand has not entered material reservations). Obligations can be enforced least under the WTO dispute process, via the WTO Disputes Resolution Body.

2.3 The two most relevant documents are the Annex and the Reference Paper.

2.4 Among other source material in relation to the Annex and the Reference Paper, we will refer in particular to the the only decision of the WTO's Dispute Settlement Body in relation to and the Reference Paper, namely the "Mexico-Telecoms" decision. This is the WTO's Dispute Settlement Body's 2004 decision under the Annex and the Reference paper in the claim brought by the United States against Mexico.[7] In relation to a number of issues that overlap with the New Zealand situation, the Dispute Settlement Body (DSB) found that Mexico was acting illegally and required, among other things, that legislation was changed and new legislation introduced to meet the GATS requirements. Mexico- Telecoms is an important decision as it clarifies the application of the Annex and the Reference Paper.

3 Cost-oriented rates: cl 2 Reference Paper

3.1 We now turn to the two relevant grounds in the Annex and the Reference Paper, starting with cost-oriented rates.

3.2 Clause 2 materially states:

> ***2. Interconnection***
>
> *2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.*
>
> ***2.2 Interconnection to be ensured***
>
> *Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided:*
>
> *..(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be*

[6] http://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_commit_exempt_list_e.htm
[7] ST/DS/204/R

provided;….

3.3 Chorus is a major supplier as defined in the Reference Paper. It also provides public telecommunications networks and services. Additionally, relevant specific commitments encompassing UBA have been made by New Zealand under the treaty.

3.4 Therefore, the following question arises: Does UBA fall within Interconnection as envisaged by cl 2?

4 Are UCLL and UBA "interconnection" services as envisaged by cl 2?

4.1 Interconnection means different things in telecommunications, depending on context. It is not clearly defined in the treaty documents or elsewhere. For example it is not limited to the traditional PSTN voice point of interconnection where Telcos exchange voice calls at a point of interconnection.

4.2 Such interconnection is often associated with what is called termination, where the calling party's network provider ends up paying a termination charge to the called party's network provider. Additionally, depending on context, the called party's provider ends up carrying the traffic to the called party, within the same charge (eg. that happens with mobile termination).

4.3 The WTO Panel in Mexico-Telecoms makes it clear that interconnection under Cl2.1 is not limited to such interconnection involving termination of traffic for handing over to the other provider:[8]

> *The word "termination" is used in our findings to refer to one of the forms of "linking" that falls within the scope of the "interconnection". This is supported by the language of Section 2 which states that the section applies to linking "in order to allow the users of one supplier to communicate with users of another supplier".*

4.4 "Interconnection" here gets the wider definition at the start of Cl 2.1. Against that background, the WTO Panel starts by noting that "the dictionary definition of the term link [the key word in the definition is "linking"] thus suggests that linking can involve any kind of connection between networks."[9]

4.5 That definition at the start of cl 1.2 is, splitting it into two components but otherwise quoting cl 2.1 (where "users" is defined in the reference paper to include service suppliers as well as service customers):

> *Interconnection involves linking with suppliers providing public telecommunications transport networks or services in order:*
>
> *(a) to allow the users of one supplier to communicate with users of another supplier and*
> *(b) to allow the users of one supplier to access services*

[8] Mexico –Telecoms at footnote 830
[9] Para 7.102

provided by another supplier.

4.6 UBA entails linking of the access seeker's network and services with Chorus's network and services and then with customers. This allows users of one supplier to communicate with users of another supplier. It also allows users of one supplier to access services provided by another supplier.

5 Is the proposed pricing compliant?

5.1 As Mexico-Telecoms confirms, "cost-oriented pricing" means pricing based only on cost attributes, and not such pricing plus some form of uplift for other reasons (such as cross-subsidisation).[10] As described below, the Reference Paper, and associated history, has a strong focus on cost pricing and removal of cross- subsidisation. Cost based pricing is generally recognised as the most efficient model, including for dynamic efficiencies.

5.2 The Act should be interpreted so that decisions are made by the Commission solely on cost attributes (unless there is a plausible range) in order to preserve the cost-based requirement under New Zealand's international treaty obligations.

6 The second ground: Anti-competitive practices: cl 1 Reference Paper

6.1 Clause 1 of the Reference Paper materially provides:

> ***1. Competitive safeguards***
>
> *1.1 Prevention of anti-competitive practices in telecommunications*
>
> *Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.*
>
> *1.2 Safeguards*
>
> *The anti-competitive practices referred to above shall include in particular:*
>
> *(a) engaging in anti-competitive cross-subsidization; …*

6.2 Chorus is a "major supplier" as defined in the Reference Paper. New Zealand therefore must maintain appropriate measures for the purpose of preventing Chorus from engaging in anti-competitive practices, including[11] anti-competitive cross-subsidisation.

6.3 As Mexico-Telecoms makes clear, existing domestic law, including law that would enable such anti-competitive practices, is not permissible, and not a

[10] See Para 7.160-7.188 of Mexico-Telecoms

[11] As the Panel explains in Mexico-Telecoms, the list in cl 1.2 is not exhaustive. This report does not consider further grounds at this point: see for example the last footnote.

reason why there must be appropriate measures.

6.4 The Commerce Act as it stands does not fulfil the requirements of Para 1 of the Reference Paper:

(a) That Act, in provisions such as s36, and jurisprudence under that Act, do not match or meet the straightforward requirements of Para 1 of the Reference Paper.[12]

(b) For example, s36, including the extensive authorities interpreting it, provide a far more complex and more limited restraint on anti-competitive practices. The need to establish both purpose and effect is just the start of the differences.

(c) Cross-subsidisation, and the other two examples given in Para 1, do not per se involve breach of s36. For cross-subsidisation to be unlawful under s36, the tests for predatory pricing are likely to have to be met. As the Privy Council's decision in *Carter Holt Harvey* shows, the test is significantly narrower than the concept of anti-competitive cross-subsidisation.

6.5 The Panel in Mexico-Telecoms explained why and how Clause 1 operates:[13]

> *An analysis of the Reference Paper commitments shows that Members recognized that the telecommunications sector, in many cases, was characterized by monopolies or market dominance. Removing market access and national treatment barriers was not deemed sufficient to ensure the effective realization of market access commitments in basic telecommunications services. Accordingly many Members agreed to additional commitments to implement a pro-competitive regulatory framework designed to prevent continued monopoly behaviour, particularly by former monopoly operators, and abuse of dominance by these or any other Major suppliers. Members wished to ensure that market access and national treatment commitments would not be undermined by anti- competitive behaviour by monopolies or dominant suppliers, which are particularly prevalent in the telecommunications sector.*

6.6 The effect of increasing the copper prices is to cross- subsidise the UFB services.

6.7 Cross-subsidisation is singled out for special attention in Mexico- Telecoms:[14]

> *The first illustrative example in Section 1.2 of anti-competitive practices is anti-competitive cross- subsidization. Cross-subsidization was and is a common practice in monopoly regimes, whereby the monopoly operator is required by a government to cross subsidize, either explicitly or in effect, usually through government determination or approval of rates or rate structures. Once monopoly rights are terminated in particular services sectors, however, such cross-subsidization assumes an anti- competitive character. This* provision, therefore, provides an example of a practice, sanctioned by measures

[12] Nor do other parts of the Commerce Act including Part 4
[13] At Para 7.237
[14] At Para 242

> of a government that a WTO Member should no longer allow an operator to "continue". Accordingly, to fulfil its commitments with respect to "competitive safeguards" in Section 1 of the Reference Paper, a Member would be obliged to revise or terminate the measures leading to The cross- subsidization. This example clearly suggests that not all acts required by a Member's law are excluded from the scope of anti- competitive practices.

6.8 Therefore, the Act should be interpreted such that Chorus does not obtain anti-competitive cross subsidies or above cost pricing. That supports initial decisions being made by the Commission based only on cost attributes, with s18 considerations justifying an uplift only where there is a plausible range, and of course if s18 efficiencies justify the uplift.