FPP Review of UCLL

Comments on applications for an FPP

25 February 2013

Public Version

Overview

1. This is the first time that a final pricing principle (**FPP**) review has been undertaken. Accordingly there is some uncertainty about the process and the rights of parties within that process. Telecom has therefore filed an application for an FPP review of the UCLL decision to protect its procedural rights after Chorus had signalled its intention to make its own application.

2. After receiving our application, the Commerce Commission (**Commission**) has formed a preliminary view that we are not a valid applicant. This is on the basis that Telecom is not a "party" to the determination.

3. We believe that not recognising our standing as a party takes an unduly narrow interpretation of the definition of "party" in the Act and ignores the purpose of the operative provisions: which is to let all purchasers and providers of regulated services, both past and future, seek a review of an IPP decision that affects them.

4. A narrow interpretation does not in our view give proper effect to the principle established in New Zealand case law, which allows a purposive approach to prevail over problematic statutory wording in instances where the outcome of applying a literal interpretation must not have been Parliament's intent.

5. In this case we would say that Telecom must surely have a sufficiently material interest in the UCLL decision as a future Access Seeker that it cannot have been the intention of Parliament to deny it the basic procedural review rights that every other Access Seeker has.

6. On any measure, it is clear that Telecom has as much, or more, interest in the final UCLL prices as any party. We purchase a portfolio of services costing in excess of $800 million per year that are pegged to UCLL prices.

7. The price for our principal Chorus input service – the UCLF service – is the UCLL price. The UCLF service description and pricing principles provide no mechanism for reviewing that price except by way of bringing an FPP of UCLL. Therefore, an interpretation of the Act that prevents Telecom applying for a UCLL FPP review, effectively also denies Telecom the opportunity to review the UCLF decision, when it is clearly an Access Seeker for UCLF. That simply makes no sense – why would the Act deny review rights to one party, when all other parties retain those rights, and the exercise of them leaves no other party disadvantaged?

8. That is not to say the Act is clear in terms of the wording in the statutory definition: we acknowledge that the drafting is loose and on the face of the words open to at least two differing interpretations. We believe though, that the reference to "all" access seekers in the definition of "party" combined with the fact that there is an attempt in the wording to capture past and future Access Seekers and Access Providers is the best indicator of Parliament's intent. The

purpose of the Act was to ensure all parties have rights in respect of decisions that affect them irrespective of the date on which they formally became or become an Access Seeker. Therefore, we should be accorded rights as a "party" for the purposes of making an FPP application, and we believe a purposive interpretation of the Act permits that.

9. In the remainder of this submission, we detail the reasons why Telecom should be considered an applicant and also make suggestions relating to initial stages of the FPP process.

Telecom is a valid applicant for an FPP

10. The definition of "party" in the Act signals that "all" Access Seekers are considered parties to a determination. The definition then anticipates that persons may become Access Seekers, and accordingly a party, either before or after an IPP determination has been made. In other words, the statutory definition is attempting to be broad reaching and not intended to exclude parties from having standing based on a mere matter of timing. We believe that it is possible and sensible in light of this to read the wording as allowing a person that will become an Access Seeker after the determination is made (as we are) to have standing to bring an FPP.

11. Further, when the words of the definition are considered "in light of their purpose" (as is required section 5 of the Interpretation Act), it seems difficult to believe that it was the statutory intention to deny one particular business that has a very material interest in the UCLL decision standing to bring a review. As noted above;

    - The Act contemplates Telecom being a future access seeker of UCLL. It makes no sense to bind us to the outcome of a decision in respect of that service in December 2014 but provide no right of review to ensure that the price we are subject to is appropriate; especially given that every other Access Seeker has a right of review;

    - We take a portfolio of other services costing in excess of $800 million per year that are pegged to the UCLL price. All those services are affected by the outcome of the FPP, so we have a very material interest;

    - We are uniquely impacted by any UCLL decision specifically because we are barred from taking the service until December 2014. Therefore we arguably have more need for a right to review than any other player;

    - When amendments were made to prevent Telecom from being an Access Seeker of UCLL until 2014, it was clear that the intention was simply to stop Telecom from immediately unbundling. There was no discussion of attempting to deny Telecom basic standing and review rights on decisions that had a material impact upon it; and

- In addition to our standing with respect to UCLL, we are clearly an Access Seeker for the UCLF service. Our ability to bring any FPP review of the UCLF service is effectively also defeated unless we are capable of bringing a review of the UCLL service. It cannot have also been the statutory intention to deny us the right to seek a review of a service that we are currently the largest Access Seeker for. This would be the implication of the Commission's preliminary approach.

12. We note that the Commission has, rightly, previously taken a broad interpretation of statutory provisions in other contexts and has moved away from an overly literal application of the statutory wording where it has felt justified by the purpose of the statutory scheme to do so. An instance we recall is the decision to recognise Chorus as a liable person to contribute to the TDL levy from the outset. The approach we propose here is similar to the approach rightly taken by the Commission then.

13. This approach is also consistent with the approach taken by the Court of Appeal in *Frucor Beverages v Rio Beverages* [2001]. In that case the issue was "whether s 34 of the Evidence Amendment Act (No 2) 1980 should be given its literal meaning or whether it is capable of a purposive construction which would depart from that meaning". The Court effectively overrode a literal application of the words in favour of what it considered Parliament's intention to be:

> [at para 28] *Once satisfied that Parliament intended to confer privilege on both patent attorneys and their clients in respect of the defined protected communications, the Court should strive to arrive at a meaning which gives effect to that intention...*
>
> [At Para 30] *Allied to this tenet is the principle that the Courts will endeavour to avoid an interpretation of a section where that interpretation would lead to unworkable or inconvenient consequences. This case illustrates the undesirable consequences which would follow from a literal interpretation...*
>
> [At Para 38]... *Thirdly, there is no necessary reason when considering the legitimacy of an implication to regard the "text" as meaning particular words or phrases within the statutory provision rather than the text of the section read as a whole...*

14. A similar approach is required here. It is very difficult to see what harm could be caused to any other party from this purposive approach, yet on the flipside it seems to strongly align with what Parliament's intent must have been: to provide equal and non-discriminatory review rights to all affected purchasers of Chorus services that are linked to the UCLL price.

15. Overall it is not consistent with a piece of legislation whose goal is to promote competition and non discrimination in markets to then arbitrarily discriminate against one specific business with respect to basic review rights.

16. It is worth considering that all that stands between Telecom unambiguously having rights as a party and the literal interpretation, which denies that standing, is that the definition of party uses the word "became" instead of the word "become" it terms of it contemplating parties who become Access seekers after the IPP determination. Not only is this a perfect example of where the reasoning in *Fucor* would require a greater degree of flexibility to be read into the wording, but arguably if you apply section 6 of the Interpretation Act to the situation of Telecom you would naturally read the word as "become" in any event.

17. Section 6 directs the Commission in this case to apply the enactment to the circumstances in which it arises. In this case the relevant circumstances include the following:

    - The Commission is setting a price under a process now that will apply when the statutory limitation on Telecom's consumption of UCLL ends. Specifically, the nationally averaged UCLL price applies to all instances of UCLL from December 2014 when the statutory restriction on Telecom falls away;

    - The fact that the UCLL price is the price of the UCLF service and the Baseband equivalent service, in respect of which Telecom is an access seeker with no statutory limitation on it;

    - The Commission considered the matter of the UCLF price as part of the UCLL pricing review and recognised the important linkages here, including the material impact on Telecom and Chorus if the UCLL price were to increase or decrease; and

    - Chorus itself recognised, in its statement to the NZX on 3 December 2012, that the UCLL pricing Decision impacted both 150 000 UCLL lines and 1.6 million UCLF lines (of which Telecom is the purchaser).

18. Overall, if the Commission does not recognise Telecom as a party we would be denied the basic review rights that natural justice requires must be read into the statutory scheme. This would be an error in law.

Request for preliminary issues workshop

19. We are aware that this is the first time the Commission has undertaken an FPP determination and that a large portion of the process for working through an FPP process is subject to the Commission's discretion. We therefore recommend the Commission undertake an initial scoping phase in order to indentify and preliminary issues to help decide how to approach the process.

20. Three issues that we think are worth discussing from the outset are:

    - The process of developing the cost model, for example

- Who is best placed to calculate /model the FPP price in the first instance;
- When and where in the process key modelling parameters should be decided;
- How to determine what type of network should be modelled;
- How this exercise might be designed to ensure it provides a network model that can be used in future processes; and

- The possible approach to backdating the pricing decision once the process is complete;
- The process by which Chorus (and potentially other parties) will make information about network costs available in order to allow parties to participate and whether this should be done publically or under confidentiality.

21. We believe that there will be a range of other practical preliminary issues that are worth considering before launching the process fully. This could be by way of a scoping workshop similar to that used for developing STDs.

[End]