JOINT SUBMISSION ON UNBUNDLED BITSTREAM ACCESS SERVICE PRICE REVIEW DRAFT DETERMINATION DATED 3 DECEMBER 2012

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Table of Contents

Introduction	2
Summary of Submission	3
Statutory Framework	5
The IPP	8
Additional costs incurred	8
Countries that use a forward-looking cost-based pricing method	9
Section 18 – Purpose Considerations for Price Point Selection	12
Section 18(1) – long-term benefit of end-users	12
Section 18(2) – efficiency	15
Section 18(2A) – new telecommunications services that involve significant capital investment	15
Conclusion	21
Annex [Confidential]	

Introduction

1. This is a joint submission by the three Local Fibre Companies (**LFCs**), Enable Networks Limited, Whangarei Local Fibre Company Limited (**Northpower Fibre**) and Ultrafast Fibre Limited, in response to the Commerce Commission's (the **Commission**) draft determination (**Draft Determination**) on the unbundled bitstream access service price review (**UBA**).

2. The LFCs combined are responsible for approximately 30% of 75% of the country which will be provided fibre under the government's ultrafast broadband (**UFB**) project. Enable Networks Limited will cover Christchurch, Rangiora, Kaiapoi, Rolleston and Lincoln. Ultrafast Fibre Limited will cover Tauranga, Hamilton, Cambridge, Te Awamutu, Tokoroa, Hawera, Wanganui and New Plymouth. Northpower Fibre will cover Whangarei. These LFCs all have government and community based stakeholders. They are required to operate open access wholesale networks. The LFCs are not allowed to retail, and prices have been capped for 10 years; therefore their businesses are totally reliant on the retail market investing in and developing new products and services for fibre.

3. The LFCs are making major capital investments in fibre networks of approximately $900 million in aggregate – all for the long-term benefit of end-users of telecommunications services and for the economic growth and social development of New Zealand.

4. The three LFCs are united in their concerns regarding the Commission's Draft Determination.

Summary of Submission

5. The LFCs consider that the Commission has erred in its Draft Determination, primarily for the following reasons.

(a) ***Additional costs incurred:*** The Commission failed to consider all of the additional costs incurred in providing the unbundled bitstream access service and should have included the costs of fibre backhaul for cabinet-based services which make up a material part of broadband services.

(b) ***Incorrect benchmark set:*** The Commission incorrectly excluded from its benchmark set countries which it was required by the Act to include, namely France, Spain, Bahrain and the United Kingdom. These should have been included as they use a forward-looking cost-based methodology as mandated by the Act.

(c) ***Section 18(1) – Long-term benefit of end-users:*** The Commission failed to give any or proper consideration to the long-term benefit of end-users of fibre as required by s18(1) of the Act. Fibre has the capability to deliver a wider range of services than copper, and will ultimately provide far more benefit to end-users than copper. The Commission's decision places at risk existing and future investment in fibre.

(d) ***Section 18(2) – Efficiency:*** In making its price point selection the Commission failed to have regard to the efficiencies (or inefficiencies) likely to result from the Draft Determination, as required by s18(2). It is likely that uptake of fibre will be deterred and investment in fibre will be put at risk, with the result that the investment by LFCs will become a "white elephant".

(e) ***Section 18(2A) – New telecommunications services:*** In considering s18(2A) the Commission incorrectly regarded copper unbundling as a new telecommunications service to which s18(2A) applied. Section 18(2A) applies to fibre but not UCLL. Further the price point selected by the Commission poses a far greater risk for investment in fibre than it does for investment in future copper-based services.

6. Accordingly, the LFCs submit that to remedy these problems and to make a final determination in accordance with the legislation, the Commission must:

(a) consider all relevant additional costs incurred;

(b) benchmark with *all* countries that fit the Act's requirements; and

(c) correctly apply s18(1), (2) and (2A).

When all these steps are taken correctly, the LFCs submit that the result is that the Commission is compelled to adopt the *highest* available price from the proper benchmark set.

Statutory Framework

7. In determining the IPP, the Commission must read the Act as a whole and take into account that the IPP is a proxy for the FPP. As described below the TSLRIC model used for the FPP will yield a range of possible outcomes. It follows then that the IPP will also yield a range of possible outcomes. The Commission must then choose the price point which best reflects the purpose of the Act.

8. The Commission is required by s 77 of the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011 (**Amendment Act**), to implement the new UBA initial and final pricing principles, which will take effect 3 years from separation day.

9. The relevant Initial Pricing Principle (**IPP**) is set out in Subpart 1 of Part 2 of Schedule 1 to the Telecommunications Act 2001 (**Act**) as follows:

> *Initial pricing principle applicable after the expiry of 3 years from separation day:*
>
> The price for the designated access service entitled Chorus's unbundled copper local loop network plus benchmarking additional costs incurred in providing the unbundled bitstream access service against prices in comparable countries that use a forward-looking cost-based pricing method.

10. Accordingly, in determining the IPP, the Commission is required to calculate the additional costs (in addition to UCLL) incurred in providing the UBA service, and then benchmark these additional costs "against prices in comparable countries using a forward-looking cost-based pricing method".

TSLRIC

11. The relevant Final Pricing Principle (**FPP**) is set out in Subpart 1 of Part 2 of Schedule 1 to Act as follows:

> *Final pricing principle applicable after the expiry of 3 years from separation day:*
>
> The price for Chorus's unbundled copper local loop network plus TSLRIC of additional costs incurred in providing the unbundled bitstream access service.

12. TSLRIC (Total Service Long-Run Incremental Cost) is defined in Clause 1 of Schedule 1 of the Act 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.

13. The Commission recognised in the Draft Determination that the IPP is intended to be a proxy for the TSLRIC final price.[1] Accordingly, to determine the degree of flexibility open to the Commission in the IPP process, it is important to understand the decisions and judgments the Commission will need to make if it is required to set a TSLRIC final price.

14. Setting a TSLIRIC final price involves complex modelling and many assumptions are made in developing the costing model. This is clearly described in the Charles

1 Draft Determination, at paragraph 29.

River Associates Paper (**CRA Paper**),[2] which is referred to in the Draft Determination.[3]

15. The range of possible outcomes in applying a TSLRIC model is discussed in an ITU report dated April 2012 on “Regulating Broadband Prices” which concludes that “it can be very difficult to undertake detailed cost analyses or cost modelling of active services” (such as bitstream). The reason stated is that:[4]

> “…there will be few network elements that are used by specific services in ways that are not directly proportionate to bandwidth. The directly allocated costs of service provision will thus be small and the mark-up for shared and common costs will be a much greater proportion of the total service cost than currently. The result will be greater scope for error in the results from standard bottom-up cost models. Further, there is rarely an easy way to allocate shared and common costs between different active services. It is entirely reasonable for different people to have different opinions on the principles to use to determine which costs are capacity-dependent, which are distance-dependent, and which are service-dependent."

16. It follows from the above that, in setting the final price, the Commission must exercise its judgment as granted by the Act to make a large number of decisions. Each decision in the process and the ultimate decision must best give effect to the purpose of the Act as set out in s18(1), (2) and (2A).[5] As a result, there will be a range of possible prices available to the Commission. Correctly applying s18 mandates that Commission choose the price that *best meets the purposes of the Act.*

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2 Charles River Associates "Costing Methodologies and Incentives to Invest in Fibre" (July 2012).

3 Draft Determination, at footnote 60.

4 ITU "Regulating Broadband Prices" (Geneva, Switzerland, April 2012), at pp 22-23.

5 Section 19(c) compels the Commission to "make the recommendation, determination, or decision that the Commission or Minister considers best gives, or is likely to best give, effect to the purpose set out in section 18."

17. Accordingly, since the IPP is a proxy for the FPP, in setting the IPP the Commission is entitled to use the same degree of judgment and decision as applies at the final price stage. As the final price is likely to fall within a wide range, in the IPP process the Commission is entitled to consider a complete benchmark set and select the price point which best meets the purpose of the Act.

The IPP

"Additional costs incurred"

18. The IPP requires that the "additional costs of providing the unbundled bitstream access service" (in addition to UCLL costs) be benchmarked. UBA costs differ as between exchange-based bitstream services and cabinet-based bitstream services because cabinet-based services use fibre backhaul from the cabinet to the parent exchange. Cabinet-based bitstream services represent roughly 50% of all UBA services in urban areas and therefore the inclusion of this would have a material positive impact on the overall price.

19. A cost-based price for this component of the cabinet-based services has already been set by the Commission for this component of the service in the Sub-Loop Standard Terms Determination (**STD**).[6] This was set following a benchmarking exercise consistent with the exercise the Commission is now carrying out. The cost of this component of the service, calculated in accordance with the STD must be added to the costs derived by the current bench-marking exercise. This addition alone would require a material increase to the price in the Draft Determination.

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6 Commerce Commission " Standard Terms Determination for Chorus' Sub-Loop Unbundled Copper Local Loop Services – Sub-Loop General Terms – Public Version" (18 June 2009, updated to incorporate Commerce Commission decisions, amendments, and clarifications through 30 November 2011). See Appendix 3, Schedule 2, pp9-11.

Countries that use a forward-looking cost-based pricing method

20. The Act requires that the Commission benchmark prices in countries that use a "forward-looking cost-based pricing method."[7] In the Draft Determination, the Commission identified eight counties that use a forward-looking cost-based pricing method. France, Spain, Bahrain and the United Kingdom were eliminated from the benchmark set because the forward-looking cost-based pricing methodology that they use is a fully distributed cost methodology (**FDC**, also known as FAC).[8]

21. In the Draft Determination, the Commission explained that it "considers that models based on a FDC methodology are not a good proxy for a TSLRIC model", and as a consequence "we have excluded countries using FDC models to set regulated prices from its benchmarking sets".[9]

22. The Commission states in its Draft Determination[10] that its decision that FDC is not a good proxy for TSLRIC is based on the CRA Paper, and a paper by Plum Consulting (**Plum Paper**).[11] Neither paper comes to this conclusion; indeed the only conclusion that can be drawn from the two papers is that there is no material difference between the two methodologies.

23. The CRA Paper describes LRIC+ (which the Commission accepts as being equivalent to TSLRIC)[12] as "the LRIC method, but includes a mark-up (eg some percentage) to account for a contribution to the conglomerate's common costs by

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7 Telecommunications Act 2001, Schedule 2, Part 1, Subpart 1, Chorus's unbundled bitstream access, Initial pricing principle.

8 For the interchangeability of the terms FDC and FAC see for example ITU "Telecommunications Handbook" (Washinton DC, USA, November 2000), at Appendix B-13.

9 Draft Determination, at paragraph 169.

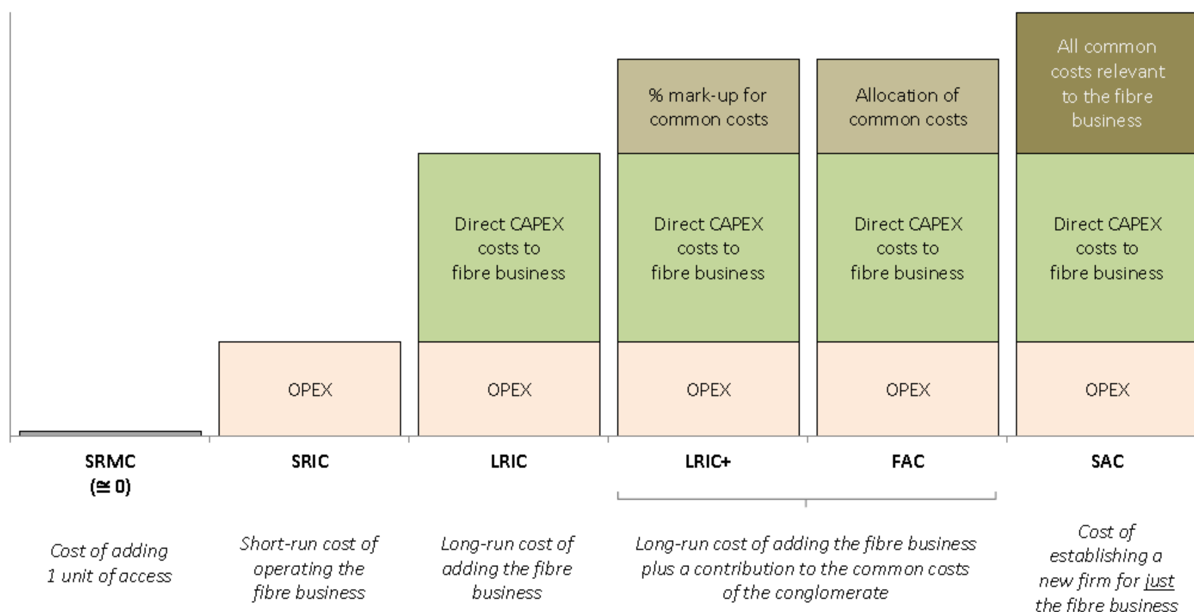
10 Draft Determination, at footnote 60.

11 Plum Consulting "Costing Methodology and Transition to Next Generation Access" (a report for ETNO, March 2011).

12 Draft Determination, at paragraph 168.

the new business increment." It describes FDC as LRIC "plus also some proportion of all common costs." In Figure 2 (set out below) it compares a number of pricing methodologies; LRIC+ and FDC/FAC are represented as being identical.[13]

Figure 2: Comparison of commonly proposed cost measures and their treatment of common costs



Source: CRA

24. The Plum Paper reaches a similar conclusion. It states that "LRIC costing is potentially more transparent than the fully allocated costing methodology as it is possible to see how common costs are allocated. Overall, comparing FAC with LRIC defined with broad increments we do not believe that either approach is superior to the other."[14]

25. For this reason the LFCs submit that the Commission has incorrectly interpreted the relevant literature to support the exclusion of the countries which use FDC. However, even if FDC was not a good proxy for TSLRIC, the LFCs submit that it

13 CRA Paper, at p15.

14 Plum Paper, at p28.

was not open to the Commission to exclude countries using a FDC methodology from the benchmark set. This is because FDC is a forward-looking cost–based pricing method. The Act requires that the IPP be determined by benchmarking against prices in countries that use a "forward-looking cost-based pricing method". Had Parliament intended that benchmarking be limited to countries that use "TSLRIC" (or equivalent) pricing methodology (which the Commission states is the approach it has adopted)[15] it could have used that term in the IPP (as it did in the FPP.)

26. As a consequence, France, Spain, Bahrain and the United Kingdom must be reinstated in the benchmark set. If these countries are included, the Commission will find that the benchmarked range is wider. This will give the Commission more room to select a price from the range that best gives effect to the purpose of the Act. Such an approach is consistent with the statutory framework as described in the first section of these submissions.

Section 18 – Purpose Considerations For Price Point Selection

Section 18(1) – long-term benefit of end-users

27. The Commission's consideration of s18 of the Act in the Draft Determination does not explicitly consider the extent to which the rapid and successful roll out and uptake of UFB will be to the long-term benefit of end-users. The whole rationale of the UFB project is to enhance productivity, economic growth and social development.[16]

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15 Draft Determination, at paragraph 168.

16 For example, John Key released a press statement stating that: "Fibre will deliver big economic benefits for New Zealand – enhanced productivity, improved global connectivity, and enhanced capacity for innovation." See http://johnkey.co.nz/archives/467-NEWS-Broadband-plan-to-get-NZ-up-to-speed.html.

28. The Commission seems to take the view that further investment in UCLL is of equal long-term benefit to end-users as investment in fibre, as it applies an “even handed" approach to the two technologies.[17] The LFCs submit that the long-term benefit of end-users will not be achieved if retail service providers (**RSPs**) focus their investment on copper instead of innovation over fibre. Fibre has the capability to deliver a wider range of services than copper, and will ultimately provide far more benefit to end-users than copper. A lower UBA price will see RSPs focus on copper and, while this may appear to be to the benefit of the end-user in the short term, it will have no long-term benefit.

29. The LFCs have observed that getting new products to work over fibre (even if they are only replicating current services eg voice and broadband) requires significant investment by the RSP to get things to work smoothly – product development, network changes, operational systems and processes. This will not be incentivised under the draft price.

30. Section 18(1) also requires consideration of the implications for investment (as does s18(2A) more explicitly). The LFCs submit that the Draft Determination has negative implications for both existing and future investment in telecommunications infrastructure.

31. The investment by the LFCs, and the price for the provision of fibre services negotiated by them with the Crown (which is capped for 10 years) was based on certain assumptions as to fibre uptake. The LFC base product price (30 Mbps down, 10 Mbps up) of $37.50 was carefully set at a level lower than the wholesale copper bitstream price (which as figure 5 of the Draft Determination shows was in a range between $40.54 and $56.66)[18], in order to encourage RSPs to shift to fibre, rather than continuing to invest in copper. This was particularly important in

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17 Draft Determination, at paragraph 120.

18 Draft Determination, at p30.

order to provide RSPs with an incentive to invest in products and services over fibre in the early years.

32. The basis on which the LFCs' investments have been made will be materially adversely impacted if the equivalent copper UBA price is lower than, or at parity with, the LFC base product price which is capped for 10 years. This will remove an important incentive to move from copper to fibre.

33. In normal competitive markets, low consumer uptake would lead to a decision to cease further investment until warranted by demand. However the legislatively mandated separation of the network from the retail services supplied over fibre means that the investment in the fibre network must continue irrespective of the uptake.

34. The proposed price impacts on competition between fibre, copper and wireless technologies to such an extent that the financial viability of the LFCs is placed at risk given their present contractual obligations to invest. Unlike Chorus, the LFCs do not have other substitutable revenue to fall back on. If there is no fibre uptake, there is no business, and network competition is lessened.[19]

35. As a result the fibre network that has already been rolled out will be underutilised for years to come and will be unable to generate an economic return to its investors. There is a real risk that the fibre network will become a “white elephant”.[20]

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19 **[CONFIDENTIAL]**

20 A 'white elephant' is an idiom for a valuable but burdensome possession of which its owner cannot dispose and whose cost (particularly cost of upkeep) is out of proportion to its usefulness or worth. The term derives from the story that the kings of Siam (now Thailand) were accustomed to make a present of one of these animals to courtiers who had rendered themselves obnoxious, in order to ruin the recipient by the cost of its maintenance. In modern usage, it is an object, scheme, business venture, facility, etc., considered to be without use or value. Source: Wikipedia

36. The Commission cannot ignore the financial implications for the LFCs of the UBA decision. The Commission is required to interpret the Act so as to promote competition in telecommunications markets for the long-term benefit of end-users, and accordingly must consider whether its decision will put existing investment at risk.

37. The implications for future investment in fibre should also be considered. The UFB project only covers 75% of the country and the Rural Broadband Initiative covers a further 5%. However, investment in broadband technology for the remaining 20% will now be seen as less attractive. The Commission should also be concerned with dynamic efficiency (under s18(2)) and it should be making decisions which create a positive investment climate, otherwise investment in broadband technology like fibre will stagnate. More generally, it does little to investor confidence in telecommunication wholesale and retail infrastructure (including wireless) in New Zealand to see that the economic viability of a government sponsored initiative like UFB may be put at risk. This issue is discussed in more detail below, in relation to s18(2) and (2A).

38. Finally, the LFCs submit that the Commission cannot abdicate its responsibility to determine whether s18(2A) refers to the "UFB rollout or to UCLL unbundling", as it purports to do in paragraph 121. The LFCs submit that UCLL does not meet the s18(2A) requirements. At a more fundamental level however, the long-term benefits to end-users from investment in fibre are so overwhelming, that it is difficult to understand why future investment in copper should be given equal weight by the Commission in s18 considerations.

Section 18(2) – efficiency

39. The Draft Determination does not disclose any consideration of the efficiencies that are likely to result from the decision, as required by s18(2). The draft UBA price will encourage the promotion of copper-based services, and significantly

deter the investment by RSPs in fibre-based services and future investment in fibre. The combination of these factors will lead to low uptake of fibre-based services by end-users. At the same time LFCs are obliged to continue to roll out a very expensive fibre network, in accordance with contractual commitments given to the Crown.

40. LFCs submit that this outcome cannot be the most efficient outcome available, and hence cannot best satisfy the requirements of s18(2) of the Act.

Section 18(2A) – new telecommunications services that involve significant capital investment

41. Section 18(2A) was inserted by the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011. The policy intent of s18(2A) is clear on the section's wording that UFB must be taken into account. To dismiss s18(2A), or to give it insufficient weighting, would be a failure of the Commission to promote the purposes of the Act.

42. It is worth setting out s18(2A) again.

> (2A) To avoid doubt, in determining whether or not, or the extent to which, competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand is promoted, *consideration must be given to the incentives to innovate that exist for, and the risks faced by, investors in* ***new telecommunications services that involve significant capital investment*** *and that offer capabilities not available from established services*. (emphasis added)[21]

21 It is notable that s18(2A) makes no distinction between significant capital investments that have been committed to and those that may be committed to. It simply refers to significant capital investment in *new* telecommunications services.

Investment

43. In the Draft Determination the Commission considers s18(2A) but accords it little significance because it concludes that both UCLL and fibre may fall into the ambit of s18(2A).[22] The Draft Determination consequently concludes that it is not necessary to decide whether both UBA and UCLL fall within the ambit of s18 (2A), because “the implications for the UBA would be the same in either case”. For the reasons explained below, the LFC's submit that this analysis is incorrect on both counts – that *only* fibre is covered by the ambit of s18(2A) and that the implications for fibre are *not* the same as for UCLL.

44. Section 18(2A) is clearly directed at fibre investment, but cannot be applied to UCLL. UCLL is an established service”, not a “new” service as referred to in s18(2A). UCLL was launched commercially in New Zealand in 2008, and successive Commission Market Monitoring Reports have charted the growth of UCLL over the following years.

45. The Commission may have intended to refer to VDSL instead of UCLL, which in the New Zealand context could possibly meet the criteria of being a new service that offered capabilities not available from established services. However, even if VDSL satisfied that requirement, it does not involve “significant capital investment”, and therefore does not meet the requirements of s18(2A). The investment required to upgrade an ADSL2+ customer to VDSL is small and incremental, and insignificant when compared to the huge capital cost of rolling out a new fibre network. This point is recognised in the Plum Paper: “while VDSL requires risky investment, it is not of the same magnitude as FTTH."[23]

46. The LFCs accordingly submit that the Commission erred when it took investment and innovation in UCLL into account in its consideration of s18(2A).

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22 Draft Determination, at paragraphs 120 to 122.

23 Plum Paper, at p38.

47. The Commission further erred when, having wrongly considered incentives to invest and risk to investors for both fibre and UCLL, it concluded that the implications for incentives and risk "would be the same in either case".[24] Nothing could be further from the truth.

48. The draft UBA price amounts to a significant drop in the wholesale price of copper-based broadband, varying from $8.09 for an existing urban line, $24.21 for an existing non-urban line, or $12.53 for a new line. In all cases the price reduction is significant, between 20% for an existing line, 43% for an existing non-urban line and 28% for a new line. The proposed $32.45 price is now less than the entry level fibre price of $37.50.

49. The impact for copper investors of this price change is relatively low. The UBA price change was grandfathered for three years specifically to allow time for those who have invested in unbundling exchanges to recover their investment. In the case of Chorus, that investment has been recovered many times over.

50. By contrast, for UFB investors, the consequences for both risk and innovation are unambiguously negative, and significantly so, as is clear from the reaction of investors reported in the business media.[25]

51. The proposed fall in the price of copper-based services dramatically increases the risk faced by existing fibre investors, and reduces the incentives for further fibre investment. This point is well recognised in one of the papers referred to by the Commission; the CRA Paper concludes that where copper and fibre networks are

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24 Draft Determination, at paragraph 121.

25 See for example National Business Review "Chorus: earnings could fall up to $160m if ruling goes ahead" <http://www.nbr.co.nz/article/chorus-says-annual-earnings-could-fall-160m-if-uba-draft-price-ruling-goes-ahead-bd-133381> (3 December 2012) and ShareChat.co.nz "Chorus shares plunge on ComCom draft fibre pricing decisions" <http://www.sharechat.co.nz/article/84643dd1/chorus-shares-plunge-on-comcom-draft-fibre-pricing-decisions.html> (3 December 2012).

operated in parallel "it is no longer the case that low access prices for copper necessarily promote investment in fibre. Rather, for certain reasonable parameters we find the opposite result."[26]

Innovation

52. Section 18(2A) requires the Commission to consider incentives for innovation. The Commission says it is "unclear whether a UBA price higher than the mean is likely to lead to investment in new innovative services, whether over copper or fibre, since access seekers will have an incentive to upgrade to fibre in order to differentiate their services from copper-based services".[27] It is unclear how the Commission has arrived at this point – it seems to suggest the Commission is of the view there will always be an incentive for access seekers to upgrade to fibre irrespective of the wholesale price of copper services, ignoring the critical incentive that price represents.

53. The LFCs disagree with the Commission's analysis for the following reasons:

(a) Most RSPs are incentivised to maximise their margins and are EBITDA driven on an annual basis. With the new proposed pricing, the RSP will get an automatic increase in margin of between $8.09 and $24.21 per line (depending on the nature of the line) in December 2014. RSPs are not financially incentivised to invest now in fibre services when increased margins from copper are very likely to be available in 24 months' time. There is considerable investment required by the RSP to develop products to shift to fibre before any innovation of services even occurs. For this reason, to make the initial investment, RSPs need a short-term uplift in margin to make that investment. Once RSPs have the systems, processes and people in place to provide fibre-based products,

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26 CRA Paper, at p82.

27 Draft Determination, at paragraph 122.

innovation and the move to new products and services will start to occur. If RSPs do not make the initial investment and move to fibre, this will further delay innovation on fibre and thus negatively impact on the long-term benefit to the end-user.

Any investment by RSPs in fibre over the next 24 months is likely to be viable simply because RSPs see the monthly fibre price as providing them quick margin uplift over copper. However, such investment in the LFC's view is unlikely to be significant, as the lower copper prices from 2014 raise a real likelihood of low long-term uptake of fibre.

(b) The Commission also over-estimates the likelihood of RSPs innovating on fibre-based services in the absence of a price incentive. RSPs have limited resources in terms of time, people and money. To provide even current basic services on fibre requires significant amounts of all of these. Further innovation to deliver new, fibre-based products and services requires even more time, people and money. RSPs are running a business and will invest where they can make the most immediate impact on margin. Under the proposed UBA pricing RSPs are not going to be incentivised to make the investment required to develop fibre-based services – these initiatives will inevitably be delayed for many years. The incentive is for the RSPs to invest in copper-based services with VDSL, which is a far smaller and incremental investment, and which will directly adversely impact on the uptake of fibre services.

(c) The Commission requested submissions regarding the effects on end-users.[28] The RSPs could pass the decreased price for UBA onto end-users, to make copper services more attractive than fibre services. They could invest some of the increased margin in upgrading to VSDL, to make copper services more attractive than fibre services. Or, if market

[28] Draft Determination, at paragraph 111.3.

conditions allow, they could retain the increased margin, making copper services more profitable than fibre services. Whichever combination of events occurs, the result is that end-users (who are naturally price sensitive) would be encouraged to stick with copper-based services rather than migrate to fibre, which while attractive to end-users in the short term, is not, for all the reasons stated above, in the long-term interests of end-users of telecommunications services in New Zealand.

Conclusion

54. For the reasons outlined above, the benchmark set must be extended, and all additional costs of providing the UBA service must be taken into account. When that process has been completed in accordance with the Act, s18(1), (2) and (2A), individually and together, compel the Commission to set a price at the upper bound of the range – which in the IPP process is a price point at the 100th percentile of the benchmark range.

55. In the last sentence of the Draft Determination, the Commission states: "We welcome your views on whether s18(2A) warrants an increase in the UBA price above the legislated cost base". The LFCs recognise that the Commission must exercise its discretion within the bounds of the legislative framework. There is however, within those bounds, ample scope to set an increased UBA price that satisfies the requirements of s18.

56. The benchmark prices must include *all* additional costs incurred and there must be benchmark prices from *all* countries that the legislation requires it to include. When the Commission has a correct benchmark set, it must then choose a price that best reflects the purpose considerations of the Act; the LFCs submit that this requires the price to be the *highest* point in the benchmark range. In this way the Commission will best serve the purpose of the Act, but will do so within the bounds of its benchmarking obligations.