In the High Court of New Zealand
Wellington Registry

CIV-2013-485-0023

Under	**Telecommunications Act 2001**
In the matter of	**an appeal from a Decision of the Commerce Commission**
Between	**Chorus Limited** **Appellant**
And	**2talk Limited and others** **Respondents**

Submissions of Counsel for InternetNZ, Consumer NZ and TUANZ in opposition to appeal

Dated 24 February 2014

Next Event:Appeal Hearing
Judicial Officer: Kos J
Case Officer: Micaela Stack
Date: 17 March 2013 at 10am

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Introduction and summary

1. InternetNZ, Consumer New Zealand and Telecommunications Users Association of New Zealand Inc ("TUANZ") (together, "Consumer NGOs") participated in the Commission's process, providing submissions and attending and submitting at the conference.

2. Chorus appears to submit that a failure to have probative material that tends logically to support findings is, alone, sufficient for the appeal to be granted. However, the threshold is substantially higher, and rarely achieved. The appellate courts counsel taking care in ensuring that appeals on the facts do not become appeals on errors of law.

3. In any event, there is sufficient evidence available to support the Commission's decision to cap the price at the Swedish price.

4. There is a fundamental flaw in the Chorus approach: Chorus says that a small benchmark set – and its median - has no little or no probative value, and it appears also to say that medians for larger datasets have little value too. Chorus incorrectly analyses the statistical and probability implications of the median and of datasets, as we outline by reference to the examples it uses. Chorus dismisses the statistical and evidential relevance of the median, describing the median as an arbitrary figure. That is contrary to the ubiquitous use by economists and statisticians of data sets and medians. It is also contrary to common sense as to what two or more data points have to say about the probability of where a third data point will land (All things being equal, the best estimate will be the median, and not, as Chorus contend either the lower or the higher of the two known price points.

5. The small benchmark set and its median do have evidential relevance.

6. Alternatively, Chorus, relying as it does for the first time on its criticism of medians, can only succeed if it had affidavit evidence before the court as to the statistical and probability implications of the data set. It has not.

7. Contrary to the Chorus submission that the Commission has been unduly mechanical and arithmetical in its approach and has not used what it has

called “broad judgment”, the Commission, recognising the potential for inadequacies of the two point dataset on its own, has exercised broad judgment, both quantitatively (eg the cross-check) and qualitatively (eg the analysis and application of s 18 efficiency factors for which no quantitative analysis has been undertaken).

8. The statistical approach taken by the Commission is a matter for the expertise of the Commission, and its experts in statistics, economics and econometrics. The erroneous probability analysis by Chorus demonstrates that these are murky waters for lawyers and courts, which should defer to the expert tribunal.

9. While the use of s 18 for the choice out of the plausible range is supported, Chorus’s endeavour to spread the application of s18 more widely among the Commission’s decision points is opposed, and is not available on a proper interpretation of the Act in overall context. The IPP for UBA is a formula based solely on cost, and that limits the application of s 18 to situations where analysis solely based on cost evidence can do no better than produce a plausible range of cost-based approaches. Section 18 is only relevant when a plausible range has been derived solely from cost attributes.

10. This issue has particular significance for future IPPs and FPPs (for example, the Commission faces multiple decision points in its current FPP processes)

11. The Consumer NGOs support and adopt and the Commission’s submissions save as to separate submissions below in relation to s18.

12. These submissions follow this order:

a. Framework for the appeal;
b. A fundamental flaw in Chorus’s argument;
c. The Commission has not taken the arithmetical and mechanical approach alleged by Chorus; it exercised broad judgment instead;
d. There is evidence to support the finding not to go over the Swedish price;
e. An overview of the Commission, Chorus and Consumer NGOs approach to s18;
f. Reconciling s 18 and 19 with the cost formula in the UBA IPP;

g. The statutory context and its relevance to that reconciliation;

13. Appendix A provides a tabular list of relevant Telecommunications Act provisions. Appendix B explains why the interpretation contended in these submissions is appropriate to give effect to New Zealand's international treaty obligations.

Framework for the appeal

14. Throughout its submission, Chorus frames the error of law as a failure to ensure that there *"…must be probative material that supports a finding ie there must be some material that tends logically to support the finding".* [1]

15. However, to show an error of law arising out of factual findings, the hurdle for Chorus is substantially higher. In this regard, the Consumer NGOs rely upon the summary in the Commission's submissions at [28] – [38] and add the following.

16. In delivering the judgment of the Supreme Court in *Bryson v Three Foot Six Ltd*[2], Blanchard J observed:

a. The cases where an error of law arises out of factual findings are "*rare*";[3]

b. *"It must be emphasised that an intending appellant seeking to assert that there was no evidence to support a finding of the Employment Court or that, to use Lord Radcliffe's preferred phrase, "the true and only reasonable conclusion contradicts the determination", faces a very high hurdle. It is important that appellate Judges keep this firmly in mind."* [footnote removed][4]

c. *"It should also be understood that an error concerning a particular fact which is only one element in an overall factual finding, where there is support for that overall finding in other portions of the evidence, cannot be*

[1] See for example Chorus submission at [5.7]
[2] [2005] 3 NZLR 721
[3] At [26]
[4] At [27]

said to give rise to a finding on "no evidence." It could nonetheless lead or contribute to an outcome which is insupportable."[5]

d. *''Lord Donaldson MR has pointed out in Piggott Brothers & Co Ltd v Jackson [[1992] ICR 85,92] the danger that an appellate court can very easily persuade itself that, as it would certainly not have reached the same conclusion, the tribunal which did so was certainly wrong:*

> *It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option. To answer that question in the negative in the context of employment law, the appeal tribunal will almost always have to be able to identify a finding of fact which was unsupported by any evidence or a clear self-misdirection in law by the industrial tribunal. If it cannot do this, it should re-examine with the greatest care its preliminary conclusion that the decision under appeal was not a permissible option… ".* [footnote removed]

17. What constitutes an "error of law" is also dependent upon the statutory context. Generally a decision under appeal is final as to the rights between the parties, and therefore the formulation of what is an error of law in those circumstances encompasses sufficiently substantial breaches as to factual findings. Here, however, the statutory framework is different. If a party is dissatisfied with an IPP decision, it can apply for an FPP decision. Only then are the parties' rights finalised, subject to appeal. A party has a mechanism by which it can seek to remedy the alleged error, a mechanism that is designed to be more accurate than the proxy process. That mechanism is different as it involves the actual methodology for calculating the price, and not just a benchmarking methodology that calculates a proxy. An appeal decision on the approach to benchmarking (outside s18 considerations) does not affect the position at the FPP stage.

18. It is submitted that, where the alleged factual error would not be material on the FPP – such as the issues on this appeal beyond s18 - there is not a potential error of law. (Alternatively, the threshold for factual errors sufficient to

[5] At [28]

constitute error of law is higher than cases where the parties have no further rights). An interpretation of "error of law" extending to such factual findings would be inconsistent with the statutory framework, where the IPP is designed to be a relatively quick process, and the affected party has another – and better – path to deal with its concerns. Noted is that the Commission can backdate its FPP decisions. The Section 18 issues however are examples of issues that are applicable on both the IPP and the FPP stages and therefore are an appropriate basis for appeal.

19. Finally, for the reasons outlined by the Commission in its submissions (at [31] to [38]), and as stated in *Major Electricity Users' Group Inc v Electricity Commission*:[6]

> *"…this is a classic example of a matter which called for the exercise of judgement by an expert body, based on the material before it and on its own industry knowledge and expertise"*

A fundamental flaw in Chorus' argument

20. In summary, the Chorus submission makes a critical error in its treatment of probabilities arising out of data sets. This can be seen by analysing its example at [5.11] of its submissions.

21. The dataset in the example has 20 closely comparable countries, from which the probability as to the costs in New Zealand is to be deduced. Chorus say that the odds of the last country in the set (New Zealand) having the highest costs in the sample, other things being equal, are 1 in 21 or less than 5%. Chorus say that the odds of New Zealand having the lowest costs in the dataset are also less than 5%. Chorus concludes that it is therefore 90% likely that the unknown price falls between the highest and the lowest price.

[6] [2008] NZCA 536 at [101]

22. However, that assumes that the probability is on a linear straight line basis: that is, the odds of the price being at the median are the same as the odds of the New Zealand price being at the upper or lower price points: the odds are around 5% as to all the known 20 price points that the unknown price point will land on that price point, wherever it is placed in the dataset.

23. Common sense confirms that it is substantially more probable that the New Zealand price will be nearer the median. The highest and lowest price points are outliers and therefore the odds of the price being at or near the upper or lower data points are substantially lower than 5% in each case. Probability is likely to be reflected in a bell curve (with the median at the top of the bell) or something similar (as so often seen in economics and statistics) and not a straight line. The shape of that curve will be dependent on a number of factors typically accounted for by statisticians – and that raises complexities - but in any scenario it is highly unlikely there will be anything like a straight line distribution as contended by Chorus.

24. Correctly approached in this way the median and similar central points such as the mean are highly significant. This is what understood by economists and statisticians, given for example the ubiquitous use of the median in data sets by the Commission going back to the first benchmarking decisions in 2002, soon after the Act was enacted in 2001.[7] Why otherwise would the experts use medians so often?

25. If the court does not consider it appropriate to have regard to the above submission (it is submitted that there can be judicial notice on the point if necessary), then, also, Chorus should have provided evidence by affidavit to support its contention as the correct assessment of probabilities and statistics. It has not done so and the point for Chorus must fail.

26. The median has probative value in relation to arriving at the optimal proxy of the FPP TSLRIC. The Chorus submissions are premised on the basis that the

[7] See for example Commission Determination 477

median does not have probative value. For example, when addressing the "cross check" data set of a further three countries, Chorus observe:[8]

> *"There is no magic in the median figure, as discussed above".*

27. Yet the Commission, economists and statisticians widely use medians and means. Also, the data set Chorus is commenting on has 5 data points not just 2. The general thrust of the Chorus submission is that medians in all data sets are artificial.

28. This flaw is further illustrated in the example used by Chorus at [7.11] of its submissions. From two known estimates for building a house (for $800,000 and $900,000 respectively), all things being equal, what can you infer as to the price in an estimate yet to be opened, asks Chorus? Answers Chorus, at [7.13]:

> *"…as a matter of basic logic,,, it is more likely that it [the third and unknown price] will be either the lowest or the highest of the three estimates than it will be the middle estimate" which presumably is the median (also the mean in a dataset of two).*

29. It is not at all logical that the price is more likely to be the highest or lowest. To the contrary, and again as a matter of common sense, the best estimate of the third price, all things being equal, will be the median, in terms of probabilities given the two known data points. It will not be, as contended, more likely that the unknown price will be the high or the low price points.

30. Alternatively, if Chorus are to advance these novel points, involving complexity, it had to lodge affidavit evidence and it has not.

31. Chorus say that a dataset of two is not, of itself, logically probative. That is not correct. A dataset of two (or even a dataset of one) says something about the likely value of the third (or second) price. Even if the last example covered by Chorus is correctly treated by it, contrary to our submission, the dataset says something about where the third price point lies, as the Chorus submission

[8] At [6.49]

says. However, as the Commission points out, a dataset of two is less reliable than a larger dataset.

32. All that is a question of degree, and that is a matter of factual judgment for the Commission. A dataset of two provides less evidence than say a data set of six. But it does provide evidence. Evidence that is relevant and that is probative. Thus, Chorus is submitting as to levels of degree, rather than a binary relevant/not relevant, probative/not probative outcome.

33. In summary, when Chorus states in its submissions, *"For example, that the median from a sample is an arbitrary starting point"*,[9] that does not reflect standard methodologies used ubiquitously by statisticians, economists, and by the Commission. The median is a statistically relevant starting point and it provides probative evidence.

34. Chorus also do not address the point that the two point dataset is more robust as it has been selected so that the most comparable services are included in the data set. Ultimately this is not just about two data points. Multiple other potential data points have been eliminated. That strengthens the evidence available from the data set.

Arithmetical and mechanical approach?

35. Chorus say that the Commission has taken an arithmetic and mechanical approach to the assessment, with regard to the ultimate objective of deriving the proxy price. Chorus say that the Commission is required to exercise a broad judgment that is informed, but not constrained, by the observed benchmarks.[10]

36. But in fact the Commission has done the very thing that Chorus has expressed concern about: it has exercised broad judgment rather than simply mechanically accepting the raw data from the two point data set:

[9] Chorus submission at [37]
[10] Chorus submission at [1.6(e)]

a. It has recognised that the two country dataset is too small on its own from which to derive the price, based on the median;

b. It has therefore assessed that Sweden is more comparable than Denmark;

c. It has decided to err on the high side to take account of s18 considerations. Importantly, that is a qualitative and not a quantitative assessment, getting away from the arithmetic (and getting away from cost based benchmarking too as this assessment is based on s18 efficiencies);

d. It has used the wider data set as a cross check, again applying s18 (again, based on a qualitative s18 assessment) to increase the price.

37. To the extent that what is used is "arithmetic" as described by Chorus, but what is more correctly called statistics and econometrics (even as to a two price point dataset), this is a matter more within the expertise of the Commission, rather than lawyers and the court. Likewise as to the overall approach by the Commission. The rejection above of the Chorus analysis as to medians and probabilities further indicates this to be so: there are dangers in lawyers and courts dabbling in statistics without expert input. Use of a two price point data set is one of numerous statistical and econometric options available to the Commission, and they are experts in this area. The level of robustness of the "evidence" (noting that the Commission has a wide discretion as to what it takes into account (s 53 Telecommunications Act)) is a matter for the Commission. The court should defer to the expertise of the Commission.

Evidence available anyway

38. But as it happens, the Commission modelled price on far more than the median of the two price dataset, and exercised judgment (or "broad judgment" in the words of Chorus) in doing so.

39. The Commission in its submissions explains why there was evidence available to support its conclusions. Applying *Three Foot Six*, there is support for the

conclusions in other evidence, even if the Commission's approach was flawed: it is not enough that the Commission made an error.

40. Chorus rely upon [53] of the Commission decision:

> *"52. We note that in our update paper we set out an approach that would potentially extend the plausible range beyond the observed benchmarks. A number of parties were critical of this approach.*
>
> *53. The Commission remains of the view that inferring a larger plausible range is a conceptually valid exercise of the IPP, particularly where there are a small number of benchmarks. However, as we have not ultimately applied that approach in this determination, we have not responded to these aspects of submissions".*

41. What is clear from this passage is that, contrary to the Chorus submission, the Commission recognised that a larger plausible range was possible. It specifically said so. Implicit also is that the Commission considered and rejected the price points beyond the Swedish price. (See also [153]-[159] of the Commission's submissions).

42. For the reasons identified by the Commission in its submission, there is sufficient support for that overall finding – to limit the upper bound to the Swedish price - in other portions of the evidence.

43. Moreover, this is not one of the "*rare*" cases where *"the true and only reasonable conclusion contradicts the determination";* that is *"a very high hurdle",* adopting the quotes above from *Three Foot Six.*

The application of Section 18

44. We turn now to the treatment of s 18.

45. **The Commission's approach:** The Consumer NGOs accept that the Commission was correct when it used s18 to select a price point from within what the

Commission calls a plausible range.[11] That is accepted because the Commission used only cost attributes – as described below – to derive the plausible range; Section 18 efficiencies are not cost attributes, as outlined below. A plausible range is a range from which the Commission can reasonably choose a price point or a particular approach. It was only when selecting from the plausible range that the Commission applied s 18.

46. **The Chorus approach**: Chorus submits that the Commission ought apply s 18 more widely than this, including decision points prior to selection from a plausible range. For example, Chorus says, in its submission at [5.9]:

> *"In deciding how much fact-finding and analysis to carry out at each stage of the exercise, and in exercising the judgement required at each stage of the analysis, the Commission must take into account the s 18 purpose provision."*

47. Then, when addressing the approaches and methodologies that the Commission might use[12], Chorus says:

> *"In deciding which approach to adopt, and in applying the selected approach, the Commission would need to take into account and seek to give effect to the s 18 purpose provision"*

48. **The Consumer NGO approach**: it is submitted that there must be a clear and careful delineation of (a) decision-making based on cost attributes and (b) decision-making based on s 18 attributes. The Chorus approach would incorrectly integrate those two separate steps and that is contrary to the primary objective, which is to determine the most reliable proxy of TSLRIC cost.

49. This is an issue of considerable importance to all IPPs and FPPs undertaken by the Commission. For example, the Commission, in its discussion paper on the approach to the UCLL FPP – Processes and Issues Paper for UCLL TSLIRC dated 6

[11] The Consumer NGOs do not accept that the way in which s18 was applied is correct, but that issue is beyond an appeal based on error of law. It is also submitted that the Commission's statement as to its s18 obligations is incorrect, when it states, at [60] of the Decision, "Section 18 establishes that our purpose in making this determination is first and foremost to "promote competition in the [LTBEU} ". It's primary obligation in this determination is to establish a cost based price, and for the reasons given in this submission, the s18 purpose is secondary to that primary purpose.

[12] At [5.18] to [5.22] of its submissions, as to one benchmark, applied in turn to two benchmarks at

December 2013 - has said that it will need to make judgment calls around choices in relation to multiple matters, not just once as it has done in the decision under appeal. It would be valuable for the court to provide a decision on this ground of the Chorus appeal, for the guidance of the Commission and of parties.

Discussion

50. **Act requires a cost-based price:** The Act provides a formula for calculating the UBA IPP price:

> *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*

51. This is unequivocally a formula, albeit briefly stated, that requires a cost-based price using a particular methodology and source information. Absent s 18 considerations, the Commission must derive an IPP based solely on cost. Further, it is common ground between the parties that the UBA IPP is a proxy for the TSLRIC FPP which of course is a solely cost-based methodology.

52. Absent s 18 considerations, the evidence used by the Commission must solely be evidence as to cost (we are describing such evidence as cost attributes). That is what the Commission has correctly done here prior to the final price point selection: it has solely used cost attributes.

53. **Section 18 attributes:** Section 19 requires the Commission to make the decision that it *"considers best gives, or is likely to give, effect to the purpose set out in section 18"*. How is that to be integrated with the formula based solely on deriving a cost price?

54. Section 18, in summary, provides:

    a. The purpose of Part 2 and Schedules 1 to 3 is to promote competition for the long-term benefit of end-users ("LTBEU");

b. In giving effect to that purpose, resulting efficiencies must be considered (it being well recognised that efficiencies include static and dynamic efficiencies); and

c. Also, in giving effect to the purpose at (a) above, consideration must be given to the s18(2A) factors. Significantly, s18(2A) is constrained to being applied only under s18 (1), that is considering competition in the LTBEU.

55. For convenience, we will call the factors to be considered under s 18 the s 18 attributes.

56. The key point in this context is that a s 18 assessment, based on s18 attributes, is quite different from an assessment based on cost attributes. The latter simply derives cost: what is the cost (or what is a proxy of cost in the IPP?). The former involves different considerations, around efficiencies and s18(2A). As the Commission points out in its decision, cost based pricing is often regarded as efficient. But that does not make each of the s18 analysis, and the cost based IPP analysis, the same: deriving the cost based price and assessing s 18 attributes are two entirely different processes. The Consumer NGOs submit that it is particularly important to be clear about the difference, and treat each separately, and sequentially.

57. The Commission faces challenging judgment calls on IPPs and FPPs. It is submitted that the cost analysis and the s 18 analysis should be clearly delineated by the following sequential steps:

a. First, when the Commission faces a challenging judgment call at any step in the process, it first uses only cost attributes in making its decision at that point. Many of the Commission's decisions at these points are capable of being resolved in this way, without resort to s 18. By these means, the primary objective – deriving a solely cost based price – is achieved. Using other factors, such as s 18 attributes, takes the Commission away from that primary objective because that is a different exercise.

b. Only if the Commission cannot make its decision on the first step above can it move to the second step. If the first step produces only a plausible range – that is, a range by which a cost based price can plausibly be derived – the Commission can turn to s18 to help make a choice out of the plausible range. The plausible range should include only options that can equally meet the objective to set the optimal proxy price (that is, the Commission cannot make a choice between options based solely on cost attributes). It has equally valid choices from which to choose. Then s 18 applies to make the choice from that plausible range.

c. This is what the Commission correctly did in the decision under appeal.

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

58. **Summary:** if s 18 and 19 plus the UBA cost formula are looked at in isolation, there is an impression that the Act should be interpreted such that s18 has a major role at each decision point in the methodology. Otherwise it seems that s 18 and 19 would be ineffectual. However, context and purpose show 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.

59. 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 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 s 19 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.

60. 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.

61. 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

62. 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.

63. 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).

64. 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)

65. 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

66. 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.

67. 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.

68. 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.

69. 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").

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

71. 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.

72. 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).

73. 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.

74. 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 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.

75. 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).

76. 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.

77. 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).

78. 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.

79. 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.

80. 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).

81. *"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).

82. 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.

Dated 24 February 2014

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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	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

	application provisions					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:[13]

> 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):[14]

a. The General Agreement on Trade in Services (GATS);[15]
b. the Annex on Telecommunications (annexed to GATS) commonly called the Basic Telecommunications Agreement or BTA (called the Annex in this report);[16]
c. the Reference Paper;[17] and
d. Schedule of Telecommunications Commitments and Exceptions by each nation. (New Zealand has committed to all relevant obligations in the

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[13] NZ Airline Pilots Assn v Attorney-General [1997] 3 NZLR 269, 289 (NZCA) per Keith J

[14] 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.

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

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

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

above documents).[18]

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.[19] 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 provided;….

3.3 Chorus is a major supplier as defined in the Reference Paper. It also provides public telecommunications networks and services. Additionally, relevant

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

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:[20]

> 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."[21]

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 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

[20] Mexico –Telecoms at footnote 830
[21] Para 7.102

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).[22] 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[23] 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 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:

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

[23] 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.

(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.[24]

(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:[25]

> 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:[26]

> 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 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.

[24] Nor do other parts of the Commerce Act including Part 4
[25] At Para 7.237
[26] At Para 242

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.