New regulatory framework for fibre

Cross-submission to Commerce Commission

PUBLIC VERSION

1st February 2019

SUMMARY

1. Vocus welcomes the opportunity to cross-submit on the new regulatory framework for fibre consultation.

2. **There is plenty of common ground amongst RSPs and consumer-interest groups:** It is clear there is a large amount of common ground amongst RSPs and consumer-interest groups which should help with the development of the fibre Input Methodologies. There is a clear emphasis on the importance of promoting competition and the need for prescriptive Input Methodologies, which minimise discretion, particularly in relation to cost allocation. There is also a shared concern about service quality and specification of an out-of-date 100/20mb/ps Anchor Service.

3. **Prescription should be preferred (where practicable) to help promote regulatory certainty:** Part 4 and Court precedent makes it clear that greater regulatory certainty is achieved by more prescriptive (where possible) Input Methodologies. Chorus cannot credibly claim to both advocate regulatory certainty and flexible, principle-based Input Methodologies.

4. **The section 162 purpose refers to all end-user services where FFLAS is an input:** The reference to *“markets for fibre fixed line access services”*, in the section 162 purpose, refers to any telecommunications market services provided to end-users where FFLAS is used as an input. We agree with Chorus that *“The end-users of FFLAS will include consumers of retail fibre fixed line broadband services and, in some cases, consumers of Fixed Wireless Access (FWA) services where a FFLAS, such as Direct Fibre Access Services (DFAS), is an input into the FWA voice or broadband service”*.

5. **The purpose of *“promotion of workable competition”* is a key element of the new regime:** We do not support Chorus’ view that promotion of competition in telecommunications should focus on retail competition only, or that replicating competitive market outcomes should be given priority over promotion of actual competition.

6. We instead agree with the Commerce Commission that: *“As incentive regulation is an imperfect substitute for workable competition, where feasible, we consider that workable competition is more likely to be the preferred mechanism to promote the relevant outcomes under ss162 and 166(2)(b)”*.

7. There is clear support amongst RSPs and consumer-interest groups for cost allocation rules (or a Pricing Input Methodology) to be applied for determining the (relative) price of different access products, and to avoid risk of market foreclosure.

8. **Vocus does not support Chorus’ request for early determinations of the RAB and WACC Input Methodologies:** Vocus rejects Chorus’ rational to prioritise the RAB and WACC Input Methodologies on the basis of regulatory certainty. The High Court and the Commerce Commission have been clear certainty is something that will develop over-time.

9. In relation to Chorus’ specific request that the initial RAB be prioritised we note the Commerce Commission’s observation that initial RAB values have far less significance for

incentives for investment and efficiency than RAB roll-forward provisions, but that initial RAB values did have a notable bearing on a supplier’s ability to earn excess returns.[1]

10. Vocus considers that the Commerce Commission should prioritise development of Input Methodologies on the basis of complexity, how much work will be required and the extent to which they will be contentious. Some Input Methodologies will take longer than others to develop so they should be prioritised, particularly given the short amount of time the Commerce Commission has to develop the IMs.

11. **There is nothing new in Chorus’ WACC percentile and 10-year risk-free rate arguments:** Chorus is running the same arguments that it used in relation to the copper price determination and, in relation to the duration of the term for the risk-free rate, and that were (unsuccessfully) used by regulated suppliers during the establishment of the Part 4 Input Methodologies, and subsequent Merit Appeal case.

12. **Commercial arrangements Chorus has in place with the Crown are not a substitute for price-quality setting under the new Part 6:** Chorus appears to be attempting to argue the Commerce Commission can take a relatively laissez-faire, or hands-off, approach to price-quality setting on the basis that *“… the Network Infrastructure Project Agreement (NIPA) with Crown Infrastructure Partners (CIP) … was competitively tendered and heavily negotiated …”*. The limitations of the 100:20 product is a good illustration of why the Commerce Commission should NOT rely on Chorus’ commercial arrangements.

13. **Vocus does not support the transitional short-cuts Chorus is seeking:** While we fully recognise the new fibre regulatory regime will develop and evolve over-time, as is reflected in Part 4 precedent, and this may have implications for things like introduction of an IRIS mechanism, we oppose the types of short-cuts Chorus is advocating such as *“Using reporting requirements in the first regulatory period (RP1) rather than strict quality compliance thresholds”* and adoption of *“an approach to setting expenditure for RP1 that differs from the approach that the Commission will adopt in the IMs”*.

14. If Chorus is concerned about the time-frame available, it should not have argued for a short time-frame for implementation in the legislation, and should not have opposed the Commerce Commission seeking an extension to the Implementation Date.

15. **RSPs and consumers need opportunity to scruntise any supplier proposals:** We acknowledge Chorus’ position that it would not have time to consult on its supplier proposal for the first regulatory period (subject to the comments above). This is likely to mean the role of supplier proposals (if any) will need to be limited for the first reset and/or a pragmatic compromise could also be that information provided to the Independent Verifier is also made available to RSP advisors and experts on a confidential basis.

[1] Commerce Commission, EDBs-GPBs Reasons Paper at [2.8.38], 3/7/001032; Airports Reasons Paper at [2.8.22], 2/6/000643.

INTRODUCTION

16. Vocus welcomes the opportunity to make this cross-submission on the new regulatory framework for fibre.

17. Given the submission period jutted against the Christmas break, we appreciated the prompt publication of the submissions. We also welcome the Commerce Commission meeting with submitters prior to cross-submissions being due. We think this was a helpful addition to the process and encourage similar engagement as the Part 6 fibre regime is developed.

18. If you would like any further information about the topics in this submission or have any queries about the submission, please contact:

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OPENING COMMENTS

19. It is clear there is a large amount of common ground amongst RSPs and consumer-interest groups, with common themes around the importance of promoting competition and the need for prescriptive Input Methodologies, particularly in relation to cost allocation. There is a shared concern about service quality and specification of an out-of-date 100/20mb/ps Anchor Service.

20. Chorus claims to want regulatory certainty but is seeking to limit the Input Methodologies, even though their purpose is to provide certainty. Chorus position stands aside from that of regulated suppliers under Part 4 who sought prescriptive and broad Input Methodologies.

21. Despite the clear wording of section 166(2)(b), Chorus is attempting to downplay the importance of promoting competition, taking a narrow perspective of retail competition despite section 166(2)(b) applying to all forms of *"telecommunications competition"*, which includes both retail and infrastructure-level competition.

22. It is worth noting Chorus' pushed successfully for the legislation to prescribe an unreasonably short time-frame for the Implementation Date, but is now using this condenced timeframe to argue for a number of short-cuts in the development of the new fibre regulatory regime.

23. If there was one coherent thread to Chorus' submission it was that while Vocus and other submitters wants the Commerce Commission to *"promote as much competition as possible, and apply as much regulation as necessary"*, Chorus is seeking to promote as high fibre prices as possible, with application of as little regulation as they can get away with.

24. Chorus stance on most matters is contrary to the legislative purposes of promoting the long-term benefit of end-users, and regulatory certainty.

LARGE AREA OF COMMON GROUND AMONGST RETAIL SERVICE PROVIDERS AND CONSUMER-INTEREST GROUP

25. It is clear from submissions that there is a large amount of common agreement amongst RSPs and consumer-interest groups:

    (i) The inclusion of the section 166(2)(b) requirement to promote competition, where relevant, is supported and a highly important addition to the section 162 purpose statement.

    (ii) Promotion of competition, where possible, produces better outcomes than mimicking or replicating the outcomes of a workably competitive market.

    (iii) The Commerce Commission should err on the side of highly prescriptive (where practicable) Input Methodologies which minimise discretion; particularly Chorus' discretion.

    (iv) The Part 4 WACC Input Methodology, and copper pricing determinations, provide appropriate precedent, including in relation to WACC percentile, for the fibre WACC Input Methodology.

    (v) The Cost Allocation Input Methodology is highly important, and the cost allocation issues which will need to be addressed are more complex than under Part 4.

    (vi) The Cost Allocation Input Methodology should include cost allocation between different regulated access services; and/or these matters should be addressed in a separate Pricing Input Methodology.

    (vii) The risk of double-recovery of costs from both copper and fibre services is a very real risk which the Commerce Commission needs to address. The Cost Allocation Input Methodology needs to ensure there is no double-recovery of costs and/or allocation of the same costs to different regulated services.

    There are substantial service quality issues with the provision of Chorus' fibre services which will need to be addressed in the Quality Dimensions Input Methodology and service-quality setting.

WHERE CHORUS RELIES ON SUPPOSITION OR ASSERTION, THE COMMERCE COMMISSION SHOULD GIVE IT LITTLE OR NO WEIGHT

26. Chorus' submission relies heavily on use of supposition in place of fact.

27. One example, is Chorus' statement that *"We expect the Commission to recognise the higher levels of risk associated with Chorus' fibre investment than that associated with existing firms regulated under Part 4 of the Commerce Act and our copper network".*

28. Chorus provided no evidence of substance to support the supposition that the level of risk associated with fibre investmnent is less than that faced by regulated suppliers operating under Part 4 or its copper network.

29. We note the High Court statement that *"Where a proposition is simply asserted … we give it little or no weight"*.[2]

CHORUS CONTINUES TO MISUSE REGULATORY CERTAINTY ARGUMENTS

30. It appears from Chorus' submission that what they are seeking is not actually regulatory certainty.

31. Chorus' uses regulatory certainty as a euphemism for wanting to increase the likelihood of the best-outcome (long-term benefit) for its shareholders. This includes limiting the role of the Commerce Commission through legislative over-rides, and trying to manoeuvre to have as much flexibility and discretion over the inputs used to set price and service quality as they can get away with.

32. Any party genuinely wanting regulatory certainty would be nervous about the precedent value of Parliament over-riding the regulator, and would not lobby for Parliament to make decisions on matters which would normally be determined by the regulator. We agree with Vector that *"… it is … intervention to overrule the Commerce Commission … that would create regulatory uncertainty …"*[3]

33. It is clear from the Commerce Commission's development of the Part 4 Input Methodologies that there is a spectrum between a completely flexible set of Input Methodologies, which provide little regulatory certainty, and highly prescriptive Input Methodologies which would provide a high degree of regulatory certainty.

34. This was reflected in regulated suppliers advocacy for highly prescriptive Part 4 Input Methodologies to best ensure the purpose of promoting regulatory certainty was achieved.

35. The Supreme Court in Vector v Commerce Commission recognised the contents of the Input Methodologies contribute to certainty by increasing the predictability of outcomes and constraining the Commission's evaluative judgements.[4] The Court of Appeal similarly observed *"… there is a continuum between complete certainty at one end and complete flexibility at the other"*.[5]

36. Consistent with these observations, we agree with Axiom Economics *"… if the IMs do not specify clearly in advance – or in sufficient detail – how Chorus is to value its assets, allocate costs and so on, there would be clear scope for parties to engage in undesirable conduct and for potentially paralysing uncertainty. Specifically, if the IMs are inherently vague, or the Commission is seen to be constantly altering its approach as circumstances change (which would be inevitable with only 'high-level' principles), then the investment incentives of both Chorus and access seekers alike may be compromised"*.

37. If Chorus was genuine about seeking regulatory certainty it would be advocating for highly prescriptive and detailed (where possible) approach to the Input Methodologies. Chorus has

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[2] WELLINGTON INTERNATIONAL AIRPORT LTD & ORS v COMMERCE COMMISSION [2013] NZHC [11 December 2013] at [1745].
[3] Vector, Submission to the Ministry of Business, Innovation & Employment on Review of the Telecommunications Act, 13 September 2013, paragraph 15.
[4] Vector v Commerce Commission [2012] NZSC 99, [2013] 2 NZLR 445 at [56]-[61].
[5] Commerce Commission v Vector Ltd [2012] NZCA 220, [2012] 2 NZLR 525 at [60].

clearly contradicted itself by claiming to be seeking regulatory certainty while at the same time advocating for a *"flexible"*, *"high-level"* and *"principle based"* approach to the Input Methodologies.

VOCUS DOES NOT SUPPORT THE TRANSITIONAL SHORT-CUTS CHORUS IS SEEKING

38. The issues Chorus is now raising about the practical issues with the Commerce Commission's proposed timetable, and whether there will be sufficient time for Chorus to develop an Input Methodologies-compliant price-quality path proposal, should have been raised in its submission on the Telecommunications (New Regulatory Framework) Amendment Act Bill.

39. We note our lack of sympathy for Chorus as the challenges they will face are entirely a consequence of the transition provisions they advocated. Other submitters advocated adopting the Part 4 transition provisions which would have avoided these difficulties.

40. Chorus appears to be seeking operation of bilateral regulatory arrangements between the Commerce Commission and itself to deal with transitional arrangements e.g. Chorus argue *"the Commission and Chorus [should agree] practical solutions for RP1 to ensure that the price-quality path can be implemented in good time"*. Chorus' submission repeatedly makes reference to agreement between the Commission and itself on various of elements of the regulatory regime without consideration of its customers, end-users or any other stakeholders.

41. While we fully recognise the new fibre regulatory regime will develop and evolve over-time, as is reflected in Part 4 precedent, we oppose the types of short-cuts Chorus is advocating. We do not support any suggestion of bilateral arrangements agreed between Chorus and the Commission or other short-cuts such as *"Using reporting requirements in the first regulatory period (RP1) rather than strict quality compliance thresholds"* and adoption of *"an approach to setting expenditure for RP1 that differs from the approach that the Commission will adopt in the IMs"*.

42. If Chorus is correct that time constraints will limit the extent it can undertake consultation on any supplier proposal, it will likely mean the role of supplier proposals (if any) should be limited for the first reset, consistent with the approach taken to Transpower's RCP proposals. A pragmatic compromise could also be that information provided to the Independent Verifier is also made available to RSP advisors and experts on a confidential basis at the same time.

COMMERCIAL ARRANGEMENTS CHORUS HAS IN PLACE WITH THE CROWN ARE NOT A SUBSTITUTE FOR PRICE-QUALITY SETTING UNDER THE NEW PART 6

43. Chorus appears to be attempting to argue the Commerce Commission can take a relatively laissez-faire, or hands-off, approach to price-quality setting because *"… the Network Infrastructure Project Agreement (NIPA) with Crown Infrastructure Partners (CIP) … was competitively tendered and heavily negotiated, and as a result reflects competitive market*

outcomes" including in relation to *"Key elements of service quality"* and *"Specified quality standards"*.

44. Vocus does not accept Chorus' contention. The commercial arrangements Chorus has agreed with the Crown are not a subsititute for the Commerce Commission's price-quality setting responsibilities.

PROMOTION OF COMPETITION IS REQUIRED IN ALL TELECOMMUNICATIONS MARKETS, WITH NO LEGISLATIVE DISTINCTION OR PRIORITY GIVEN TO ANY PARTICULAR FORM OF COMPETITION

45. Chorus' attempts to downplay the importance of the promotion of competition purpose in its submission, including substituting the wording of promotion of competition to the narrower role of promoting retail competition.

46. For example, Chorus states *"When making decisions on how to apply the Part 6 purpose statement we encourage the Commission to consider the rationale of the UFB model, which is to promote competition in retail markets …"* [emphasis added].

47. The Part 6 purpose is clear that the purpose is *"promotion of workable competition in telecommunications markets"* [emphasis added], which can include both retail competition, based on access to Chorus' fibre network, and infrastructure-based competition.

48. We question what basis Chorus has for suggesting *"the Commission should not take any decisions that would prioritise competition in other markets over [competition in retail markets for fixed-line broadband services]"*.

ANY TRADE-OFF THAT HAS TO BE MADE BETWEEN THE SECTION 162 AND SECTION 166(2)(B) PURPOSES MUST MAXIMISE THE LONG-TERM BENEFIT OF END-USERS

49. Vocus does not agree with Chorus' claim that *"if a balance between the objectives is required, the section 162 purpose statement should be given primacy [over section 166]"*. We would welcome Chorus being upfront about what kind of trade-offs it is concerned the Commerce Commission might make.

50. The common purpose of section 162 and 166 is that the Commerce Commission should aim to maximise *"the long-term benefit of end-users"*.

51. In simple terms, if the long-term benefits to end-users from *"promoting outcomes that are consistent with outcomes produced in workably competitive market"* exceed [are less than] the benefits from *"promotion of workable competition in telecommunications markets"* then section 162 [166(2)(b)] should be given precedence.

52. Our submission noted, in general terms, that the benefits of promoting actual competition can be expected to be greater than the benefits from replicating workably competitive market outcomes.

53. The reference to *"end-users in markets for fibre fixed line access services"* under section 162 and the broader reference to *"end-users of telecommunications services"* under section

166(2)(b) does not change this. The Commerce Commission is required to maximise the long-term benefit of end-users in markets for fibre fixed line access services PLUS the long-term benefit of end-users of telecommunications services.

54. We also note that both the section 162 and 166(2)(b) purposes have wide coverage. Section 162 does not specify a specific fibre service. Rather, section 162 refers to *"markets for fibre fixed line access services".*

55. There is nothing in the section 162 purpose that limits its scope from any end-user telecommunications services or market that uses FFLAS as an input. Section 166(2)(b) is broader still referring to all relevant *"telecommunications services"* i.e. all telecommunications services where regulation of FFLAS can impact on the level of competition. We agree with Chorus that *"The end-users of FFLAS will include consumers of retail fibre fixed line broadband services and, in some cases, consumers of Fixed Wireless Access (FWA) services where a FFLAS, such as Direct Fibre Access Services (DFAS), is an input into the FWA voice or broadband service"*.

VOCUS AGREES WITH CHORUS THAT PRICE "SHOCKS SHOULD BE MINIMISED" BUT THOSE PROVISIONS ARE TO PROTECT END-USERS FROM LARGE PRICE INCREASES AND NOT TO PROTECT CHORUS OR ITS SHAREHOLDERS

56. Chorus appears to misunderstand the new legislative provisions relating to price shocks.

57. Chorus state price *"shocks should be minimised"*, which we agree with, but goes on to claim *"A key reason for moving to the new regulatory model and to avoid shocks in this transition is to ensure that LFCs retain both the incentive and capacity to continue to undertake the investments that customers want. To this end, our ability to maintain an investment grade credit rating is critical for the on-going success of the UFB programme. We require an investment grade credit rating to service nearly $2 billion of debt"*.

58. The provisions in both the Commerce and Telecommunications Acts relating to *"price shocks"* are included for the sole purpose of protecting end-users from large, sudden, price increases.

59. It appears Chorus has confused *"price shocks"* with the provisions relating to *"undue financial hardship to the regulated fibre service provider"*.

60. Part 4 precedent is clear that, if the regulated price is reduced the provision to *"require that the lowering of prices must be spread over time"* only applies if the regulated supplier can demonstrate it would otherwise be subject to *"undue financial hardship"*:

> *s 53P(8)(a) of the Act only allows an alternative rates of change to be applied if, in our opinion, this is necessary or desirable to minimise any undue financial hardship to the supplier or to minimise price shock to consumers. … evidence would … have to be included to satisfy us that the relevant criteria have been met.*[6]
>
> *Any supplier that believes the proposed price adjustments will cause undue financial hardship must provide evidence in response to this paper that:*

[6] Commerce Commission, Revised Draft Reset of the 2010-15 Default Price-Quality Paths, 21 August 2012, footnote 78.

> *… The proposed revenue adjustment will, or is likely to, limit the supplier's ability to finance its reasonable investment needs and meet its debt repayments as they fall due.*
>
> *… It is not reasonable (and/or possible) for the supplier to address its limited ability to finance its reasonable investment needs and meet its debt repayments as they fall due by altering its behaviour.*[7]

61. No regulated supplier has meet this hurdle despite, by way of example, Vector and First Gas' gas distribution network businesses' allowed revenues being reduced by 21 and 20%, respectively, in the 2017 gas DPP reset, and FirstGas' gas transmission prices reducing by 10%.[8] This was on top of the 2013 gas DPP reset which resulted in Vector's gas distribution prices being reduced by 18% and its gas transmission prices by 29%.[9]

VOCUS DOES NOT SUPPORT CHORUS' DESIRE FOR THE WACC AND RAB INPUT METHODOLOGIES TO BE PRIORITISED OR DETERMINED AHEAD OF OTHER INPUT METHODOLOGIES

62. Our submission detailed that the work on individual Input Methodologies should be phased and prioritised on the basis of: *"… how complex the Input Methodologies will need to be, the extent to which existing precedent can be utilised versus green or brown-field development, and the extent to which the Input Methodologies or elements of the Input Methodologies may be contentious"*.

63. We suggested this may warrant prioritisation of the Cost Allocation, Capital Expenditure and Quality Dimensions Input Methodologies. It is clear from RSP and consumer-interest group submissions that cost allocation and service quality are considered to be priority areas.

64. We disagree with Chorus' view that the WACC and RAB Input Methodologies can be set discretely and independently of other Input Methodologies. The Cost Allocation Input Methodology, for example, may have implications for which assets (or what proportion of those assets) can be included in the RAB.

65. In relation to Chorus' specific request that the initial RAB be prioritised we note the Commerce Commission's observation that initial RAB values have far less significance for incentives for investment and efficiency than RAB roll-forward provisions, but that initial RAB values did have a notable bearing on a supplier's ability to earn excess returns.[10]

66. The High Court also recognised that incentives to invest depend on the value of those assets being added into the RAB at cost, and downplayed the importance of the initial RAB value.[11] The High Court *"agree[d] with the Commission that initial RAB values have:*

    (a) little or no impact on incentives for suppliers to invest in new or replacement assets;

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[7] Commerce Commission, Revised Draft Reset of the 2010-15 Default Price-Quality Paths, 21 August 2012, paragraph 134.
[8] Commerce Commission, Stephen Gale, Acting Deputy Chairperson, Default price-quality paths for gas pipeline businesses from 1 October 2017 to 30 September 2022, 31 May 2017.
[9] https://comcom.govt.nz/__data/assets/powerpoint_doc/0029/88058/Analyst-briefing-slides-on-the-default-price-quality-paths-for-suppliers-of-gas-pipeline-services-28-February-2013.ppt
[10] Commerce Commission, EDBs-GPBs Reasons Paper at [2.8.38], 3/7/001032; Airports Reasons Paper at [2.8.22], 2/6/000643.
[11] WELLINGTON INTERNATIONAL AIRPORT LTD & ORS v COMMERCE COMMISSION [2013] NZHC, [11 December 2013], paragraphs [598] and [599].

(b) little or no impact on incentives for suppliers to improve efficiency and provide services at a quality that reflects consumer demands; and

(c) little or no impact on suppliers sharing with consumers the benefits of efficiency gains." [footnotes removed][12]

67. The High Court also recognised that importance of the initial RAB value is in terms of limiting the ability of suppliers to extract excessive rents:[13]

> What initial RAB values do have a direct impact on is the extent to which suppliers are limited in their ability to extract excessive profits. … An initial RAB value would, in our view therefore, be fundamentally flawed if it generated prices that were inconsistent with the achievement of the s 52A(1) purpose and outcomes, in particular if it failed to limit suppliers' ability to extract excessive profits over time.

THE COMMERCE COMMISSION NEEDS TO ENSURE IT PREVENTS DOUBLE RECOVERY

68. We note that a number of submitters raised concern about the potential for double recovery of costs from both Chorus' fibre and copper services.

69. This is directly analogous to the issue the Commerce Commission had to manage under Part 4 Commerce Act, where regulated suppliers provided both electricity and gas network services and/or gas distribution and gas transmission services.

70. A number of submitters, including Chorus, made comments in their submissions which suggest the level of common or shared costs (and potential for double recovery) could be significant or material. It is notable Chorus' was clear that the level of sharing (and therefore the potential for double recovery) will actually increase in the near future, contradicting suggestions the double recovery issue will dissipate over-time e.g.:

    (i) Chorus' noted how tightly its copper and fibre networks are operated together: e.g. *"We operate one network that includes two technologies, copper and fibre, across the different areas in New Zealand. As a result of this, extensive sharing of network and non-network assets occurs between regulated and non-regulated services. We expect the extent of sharing with copper services will substantively increase in the near future"*.

    (ii) Frontier Economics noted *"the size of common fibre-copper capex … may … form a non-trivial portion of assets; common capex has been approximately 10% of directly attributable fibre capex through the rollout, consisting primarily of information technology and building and engineering services"*.

    (iii) Spark noted by way of example that *"Fibre Network assets are more likely to straddle regulated FFLAS and non-FFLAS services than seen in other sectors"*.

71. Our preliminary observation is that the Commerce Commission will need to look back at its copper pricing determinations to determine what expenditure items that are needed for fibre, were assumed to be needed for provision of copper services and reflected in the TSLRIC prices. The lower the level of asset sharing the Commerce Commission assumed in the

[12] WELLINGTON INTERNATIONAL AIRPORT LTD & ORS v COMMERCE COMMISSION [2013] NZHC, [11 December 2013], paragraph [758].
[13] WELLINGTON INTERNATIONAL AIRPORT LTD & ORS v COMMERCE COMMISSION [2013] NZHC, [11 December 2013], paragraphs [759] and [760].

copper price determinations the larger the adjustment that will be needed to the fibre service cost calculations to avoid double-recovery.

72. Similarly, another preliminary observation is that the Commerce Commission will need to consider the extent to which the ‘pure’ incremental cost calculation in the TSLRIC prices for the copper services was adjusted upward to contribute to common costs (noting TSLRIC *“includes a reasonable allocation of forward-looking common costs”*).

THE COPPER PRICE DETERMINATIONS PROVIDE SUFFICIENT RELEVANT PRECEDENT TO SUPPORT RETENTION OF MID-POINT WACC UNDER THE TELECOMMUNICATIONS ACT

73. Chorus has made it clear it wants to relitigate elements of the copper pricing WACC determination, including length of the period used for setting the risk-free rate (10-years rather than 5), and WACC percentile.

74. While we acknowledge there are differences between fibre and copper, there are more than sufficient arguments for setting the copper WACC at midpoint that hold in relation to fibre, to confirm a higher WACC percentile for fibre would not be justified or to the long-term benefit of end-users.