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Commerce Commission  
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6 May 2014

Dear Simon

### **Comments on the revised draft TDL liability allocation determination for FY13**

Thank you for the opportunity to comment on the Commission's revised draft liability allocation determination for the Telecommunications Development Levy for 1 July 2012 to 30 June 2013 (**revised draft determination**).

Our position set out in previous submissions on liability allocation for the 2012/2013 year has not changed and we continue to support the Commission's compliance review.<sup>1</sup> We are encouraged that the need for modifications to the Commission's original draft liability allocation determination was identified before the determination was finalised. This process has highlighted the importance of the Commission's ongoing monitoring to ensure that the anti-avoidance intention of section 79 of the Telecommunications Act 2001 (**the Act**) is upheld.

We agree with the Commission's proposed revised approach to revenue earned by related bodies corporate under section 79 of the Act, as set out at paragraphs 25-28 of its revised draft determination. We endorse the Commission's continuing assessment of whether liable parties' final allocations should be adjusted to take account of their connection with entities that earned qualifying revenue in the 2012/2013 financial year, as is currently occurring with Compass Communications.<sup>2</sup>

While the Commission has broadened its approach to section 79 to deal with corporate structures that may have avoided TDL liability for the 2012/13 financial year, we think that the Commission should consider revisiting its previous TDL liability allocation determinations in light of that approach. As we have previously noted, qualifying liable parties are dependent upon the Commission to maintain the credibility of the TDL process, given their lack of visibility of each other's qualifying liable revenue calculations.<sup>3</sup>

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<sup>1</sup> Chorus, *Telecommunications Development Levy 2012/2013 – Chorus' Qualified Revenue Information*, 20 September 2013; Chorus, *Comments on the Commission's draft TDL liability allocation determination for FY13*, 19 November 2013; Chorus email Anna Moodie to Neville Lord, 21 March 2014.

<sup>2</sup> As set out at <http://www.comcom.govt.nz/regulated-industries/telecommunications/industry-levy-and-service-obligations/telecommunications-development-levy-tdl/201213-tdl-liability-allocation-determination/>

<sup>3</sup> See our 19 November 2013 submission, at note 1 above.

Accordingly we think that the Commission should:

- Consider whether, if its proposed modified interpretation of section 79 of the Act (as set out at paragraphs 25-28 of its revised draft determination) was applied to previous years' TDL liability allocations, it would result in different liability allocations between qualifying liable persons for those respective years; and
- If so, redress over/underpayments by qualifying liable persons which arose from the Commission's former interpretation of section 79 of the Act for those TDL years. We note that the error correction power contained in section 13 of the Interpretation Act would provide a mechanism by which the Commission could require adjusted payments in relation to previous years' liability allocations.

Finally, we note that the Commission has not addressed the issue of pass through of the TDL levy in its draft determination. Previously, the Commission had indicated that this issue would be addressed in the initial pricing principle review process for Chorus' regulated copper services. As it was not addressed in those processes, we seek the Commission's confirmation that Chorus can proceed to implement its proposed approach to passing on the cost of the TDL levy in prices for its regulated copper services, as previously requested.<sup>4</sup> Currently, RSPs are free to pass through the cost of the TDL to their customers, while the regulatory framework may constrain Chorus from acting in the same way.

Yours sincerely



Anna Moodie  
Assistant General Counsel, Regulatory & Competition Policy

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<sup>4</sup> See Chorus' 20 September 2013 and 19 November 2013 submissions, at note 1 above.