



Further consultation on issues relating to determining a price for Chorus's UCLL and UBA services under the final pricing principle – supplementary paper

Date: 25 March 2014

Purpose of this paper

1. This paper sets out our views to date, and invites submissions, on the issue of backdating the final pricing principle (FPP) UCLL and/or UBA price. It is issued as a supplementary paper to the consultation paper issued on 14 March 2014.¹
2. Background information on the pricing review determinations can be found in the UBA and UCLL process and issues papers.² We have considered submissions and cross-submissions on these papers, and had regard to the attached preliminary legal advice, in forming the views expressed in this paper.
3. Backdating is on the agenda for discussion at the workshop to be held on Friday 28 March 2014. This paper will inform that discussion.

We are interested in your views on a number of matters relating to backdating the FPP price

Whether backdating is mandatory

4. Our view at this point in time is that we have discretion whether to backdate the FPP price. This issue is discussed in the attached preliminary legal advice. We seek your views.

Relevant considerations in deciding whether to backdate

5. Whether you agree or not with our view that backdating is not mandatory, we seek your views on the relevant considerations and evidence we should have regard to in deciding whether to backdate. We also seek your further views on how to implement backdating if a decision to backdate is taken.³

Backdate to what date and why

6. We are interested in your views on the date to which the UBA and/or UCLL price should be backdated to, and why. We have not formed an initial view at this stage. This issue is also discussed in the attached preliminary legal advice.

Timing of the backdating decision

7. In our view we cannot make a final decision on backdating until the relevant final price review determinations are made.
8. Submissions on this paper are due by **5.00pm on Friday 11 April 2014**.

¹ Commerce Commission "Further consultation on issues relating to determining a price for Chorus's UCLL and UBA services under the final pricing principle", 14 March 2014.

² Commerce Commission "Process and issues paper for determining a TSLRIC price for Chorus' unbundled copper local loop service in accordance with the Final Pricing Principle", 6 December 2013, and "Process and issues paper for determining a TSLRIC price for Chorus' unbundled bitstream access service under the final pricing principle", 7 February 2014.

³ See UCLL process and issues paper dated 6 December 2013 paragraphs 44 to 46 for further details on potential implementation issues.

9. Cross-submissions on this paper are due by **5.00pm on Thursday 24 April 2014**.

Please address responses to: Keston Ruxton (Chief Adviser, Regulation Branch), c/o telco@comcom.govt.nz.

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24 March 2014

Dear Katie/Ruth

UCLL pricing review determination and backdating the FPP price

Introduction

1. By way of background, I understand that:
 - (a) The initial UCLL standard terms determination (**STD**) was released in November 2007. The price was determined in accordance with the applicable initial pricing principle (**IPP**).
 - (b) In 2012, the Commission conducted a s 30R review in order to update the UCLL IPP price.
 - (c) The new price was determined on 3 December 2012: prices are currently geographically de-averaged (urban: \$19.08; non-urban: \$35.20), but a national price of \$23.52 will apply from 1 December 2014 (all prices per line per month).¹
 - (d) These prices are currently subject to a pricing review pursuant to ss 42–52 of the Telecommunications Act 2001 (**Act**). The applicable final pricing principle (**FPP**) is TSLRIC.
2. You have requested my preliminary views in relation to the following matters relating to the date on which the FPP price will take effect:
 - (a) Question 1: Is backdating mandatory and, if so, from when?
 - (b) Question 2: If the Commission has discretion in relation to backdating, can it make a binding decision about backdating in advance of the rest of the pricing review determination (**PRD**)?

¹ As to the timing of the introduction of the averaged price, see s 73(3) of the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011.

3. I understand that the purpose of this advice is to provide a basis for industry comment.
4. I set out my preliminary views below.

Is backdating mandatory and, if so, from when?

5. The date on which an FPP price takes effect was considered in *Telecom v Commerce Commission*.²
6. In that case, Telecom sought a declaration that the FPP price in a PRD could not commence earlier than the date the review determination was made. The High Court declined to grant the declaration and the Court of Appeal dismissed Telecom's appeal.
7. Since neither of the other two parties (the Commission and TelstraClear) counterclaimed for its own declaration, I regard both Courts' comments about the correct interpretation to be *obiter*. That is, the Courts disagreed with Telecom, but made no formal ruling as to the correct interpretation.
8. In the High Court, Harrison J expressed the view that the Commission could, but was not required to, backdate the FPP determination: "the term of a pricing review determination would have to take effect from the inception date of the s 27 determination, unless the Commission within its powers decided that another date was appropriate."³
9. Various parts of the Court of Appeal judgment can be read as regarding the backdating of the FPP price as automatic:⁴

In our view Harrison J was right to uphold the contention by the Commission and TelstraClear that a price review determination relates back to the date of the initial determination. That is consistent with the substitutionary nature of reviewing or appellate decisions which vary an original decision. The alternative view implies a potential for negating the efficacy of the review process which the Act has established in order to serve the s 18 purpose. Moreover, the obvious function of the price determination regime is to fix the price for a period of time relevant to the application, not to fix the price for part of that time and another price for another part. We consider that the s 18 purpose is better served by substituting the revised price for the initial price *ab initio* rather than only after a period of relatively less efficient pricing. None of the arguments advanced on behalf of Telecom has persuaded us to the contrary.

10. However, I do not read this as a conscious rejection of Harrison J's view that the Commission has discretion as to whether to backdate. That is, the Court clearly rejected Telecom's position that the FPP price could not be backdated, but was not required to and did not make a considered choice between automatic and

² *Telecom New Zealand Ltd v Commerce Commission HC Auckland CIV-2004-404-5417*, 8 April 2005 and *Telecom New Zealand Ltd v Commerce Commission CA75/05*, 25 May 2006.

³ At [31]. See also [47].

⁴ At [44]. See also [21], [35] and [41].

discretionary backdating. If the Court was rejecting Harrison J's view I would have expected engagement with the part of his judgment quoted above.

11. In my view:

- (a) The Act does not expressly, or by necessary implication, require automatic backdating of the FPP price. Rather, as noted by Harrison J, it is a matter for the Commission's discretion. That is, the Commission may backdate the FPP price to the date of the IPP price, backdate to another date or not backdate at all.
- (b) The s 18 purpose statement will likely provide the most important guidance as to the Commission's determination of an appropriate starting date of the FPP price. In this regard, the Commission should take into account the Court of Appeal's view that backdating serves the s 18 purpose. However, I do not consider that the Commission is precluded from reaching a different view as to the application of s 18 in relation to a particular FPP determination.
- (c) Different considerations may apply for an FPP arising from a s 30M determination compared with a s 27 determination. In particular, the courts in the *Telecom* declaratory judgment proceedings were clearly concerned that an FPP determination would be a "formalised futility"⁵ if it was not backdated (since the underlying s 27 determination would likely have little or no time to run). The same concern may not apply in relation to STD determinations, as they do not have expiry dates.⁶
- (d) I also note that the industry structure has changed significantly over the last eight years in terms of the number of access seekers and increased competition (including between copper and fibre). So, for example, an argument that backdating would merely result in windfall gains/losses and that the prospect of such transfers would disrupt the market may have more purchase today than it did with the Court of Appeal in 2006.⁷
- (e) As an alternative to full backdating, the Commission could implement the FPP price in a way that partially backdates the price change under s 52(d) if such an outcome was justified, eg, by reference to s 18 considerations.
- (f) While both courts in the declaratory judgment proceedings expressed the view that under or over payments could be recovered through the law of restitution or the terms of the FPP,⁸ to the extent that the Commission's preferred approach involves backdating, there may be implementation complexities to work through (particularly where the FPP is higher than

⁵ CA at [19].

⁶ See s 30Q. For completeness, I note that although the STD does not expire, the FPP determination must still have an expiry date (s 52(f)). However, even if it is not backdated, the FPP price for an STD is not at risk of being "futile" since, at a minimum, it will take effect during the term of the FPP determination.

⁷ At [41]-[42].

⁸ HC at [35]-[38] and CA at [37]-[39].

the IPP as, for example, Chorus may not have charged the full FPP price over this period and some RSPs may have left the industry).

Can the Commission make a binding decision about backdating in advance of the rest of the PRD?

12. As part of regulating their own processes, decision-makers sometimes make staged decisions. For example, courts and tribunals may give separate decisions on quantum and, subsequently, liability. This is permissible in the absence of a contrary statutory regime.
13. Here, however, I think it is doubtful that a separate determination about backdating is permitted by the Act. In particular:
 - (a) The Act prescribes that the draft and final pricing determinations “must” include a number of matters including the price, the reasons for the determination, and the terms and conditions on which the determination is proposed to be made (which could include whether the FPP is backdated) (ss 49 and 52). The requirement to include, among other things, all those matters appears to indicate that Parliament contemplated a single draft determination rather than a staged decision-making process.
 - (b) The Act contemplates that there will be “a pricing review determination” and that the IPP will continue in force until that determination is made (s 42(2)). This suggests that a single determination was envisaged.
14. Furthermore, it may be difficult to deal definitively with backdating in advance of the rest of the PRD. That is, it is conceivable that the position the Commission reaches on other matters (such as the quantum and direction of change between the IPP and FPP prices and the timing of the PRD) could affect its view on backdating.
15. As a practical matter, the apparent extra certainty from an advanced decision about backdating would be lost if it was challenged by a credible judicial review.
16. For these reasons, I would advise against the Commission making a final determination regarding backdating in advance of the rest of the PRD. The Commission may, however, follow its conventional practice of expressing a preliminary view during the consultation process if it considers this to be appropriate.

Yours faithfully



James Every-Palmer