Submission on Commerce Commission Regulatory Processes and Rules Input Methodology Topic Paper

September 2019

Introduction

2degrees welcomes the invitation to comment on the Commerce Commission's (the **Commission**) fibre Input Methodologies (**IMs**) topic paper "Regulatory processes and rules", 19 August 2019.

There may be merit in undertaking further consultation prior to the draft decisions, particularly in areas that are contentious e.g. in relation to the double recovery and financial loss topics.

Responses to specific questions

Q1 What are your views on what we propose to include in the regulatory processes and rules IM? Are there any other issues we should consider within the scope of regulatory processes and rules IM?

We note the section 176(1)(c) provisions for a Regulatory Processes and Rules IM are open-ended with subsections (i) and (ii) serving as a non-exhaustive list. We are interested in understanding what additional matters the Commission considers might warrant inclusion.

We are aware, for example, that there was a lot of debate and uncertainty under Part 4 of the Commerce Act 1986 (**Part 4**) about what should or needed to be included under section 52T (1)(c). This included debate over a methodology for starting price adjustments.[1]

Q6 What are your views on which events should trigger the reconsideration of a price-quality path?

2degrees does not consider the "false and misleading" re-opener provision is broad enough. We have already submitted that "[i]f the Commission relies on Chorus' supplier proposal as part of the price-quality determination, it should consider adopting a 're-opener' that would allow the price-quality path to be adjusted if Chorus' actual capex and/or opex is below the levels in its proposals and allowed for in the price path".[2] This re-opener provision should apply regardless of whether the incorrect information "has been knowingly provided" by Chorus and irrespective of the reason the information is incorrect.

We note the Commission is proposing to adopt the re-opener provisions from the Transpower Input Methodologies Determination 2010, including provision for a re-opener where "false or misleading information" is supplied. While this may be suitable under Part 4, our submission and cross-submission in response to the Emerging Views Paper detailed the risk of Chorus exploiting information asymmetries and the limited oversight given time pressures in order to 'game' its supplier proposal.

For the avoidance of doubt, the concerns we raised are not concerns about suppliers engaging in the process in good faith, as cited in the topic paper. Rather they are specific concerns related to Chorus' engagement. Our cross-submission in relation to the Emerging

[1] We originally raised this issue in our submission "Submission in response to the Commerce Commission's proposed approach on the new regulatory framework for fibre", December 2018.

[2] 2degrees, Submission on Commerce Commission Fibre Regulation Emerging Views Paper, 16 July 2019.

Views Paper specifically contrasted experience with Chorus against the more positive experience with regulated suppliers under Part 4.

In this context, the circumstances under Part 6 of the Telecommunications Act 2001 (**Part 6**) are quite distinct from those under Part 4. We consider this necessitates greater flexibility to re-open a price-quality path where Chorus has overstated its capex and/or opex requirements in the supplier proposal.

Q8 What particular approach do you think should be taken to balance dates and why? How would that approach best promote the purpose of Part 6 of the Act?

We support the Commission's proposal to "include methodologies relating to regulatory balance dates" in the Regulatory Processes and Rules IM. We agree "… this is a fundamental aspect of the IMs … and centralising our decisions will make the potential impacts more transparent to stakeholders".

We also support the Commission's proposal that "all regulated suppliers have the same disclosure year so interested parties can assess performance more easily". We agree with the Commission's reasoning that "… if each regulated supplier has the same disclosure year for ID, this might facilitate interested persons (including the Commission) to compare financial and other information about the performance of regulated suppliers".

Other comments

2degrees has the following additional comments in relation to matters where the topic paper did not include any questions:

- *PQR proposal/evaluation processes:*

  Given the concerns we have raised about the risk that Chorus will game the supplier proposals in an attempt to extract additional excessive profits the PQR proposal/evaluation processes will be particularly important.

  The Commission has stated that it considers "it would be difficult to consult on the draft IMs for proposal/evaluations when we have not yet begun the consultation process for PQR". We consider this to be largely a matter of implementation timing rather than whether proposal/evaluation processes should be covered within the Regulatory Processes and Rules IM. It may be that some elements of the IMs should be determined in conjunction with the development of the PQR, given the time constraints under which the Commission is working.

- *Wash-up mechanisms:*

  We are concerned by Chorus' suggestion it should be able to operate an unconstrained wash-up for under-recovery. We consider that the Regulatory Rules and Processes IM should include the wash-up mechanism and should include specific limits on the extent of wash-up that is permissible. We note there is precedent for this under Part 4 that the Commission can draw on.

  We would have liked to have seen the topic paper reference this Part 4 precedent given its direct relevance to the development of the Regulatory Rules and Processes IM. The Commission referenced elements of the Part 4 IMs that supported its proposals, e.g. in

relation to re-openers. It is important to be equally clear about where the Commission is proposing to deviate from Part 4 precedent.[3]

- *Price cap versus revenue cap:*

  We support the Commission's view that given it does not have a choice over whether a price cap or revenue cap is adopted for the first regulatory period, it is not necessary to cover this component of the form of control in the initial Regulatory Processes and Rules IM.

  2degrees considers that the Commission should invoke section 181(1) provisions to determine whether a price or revenue cap should be specified in the IM after the first regulatory period has commenced. We consider that the Regulatory Processes and Rules IM should specify the form of control for the second regulatory period onwards, consistent with Part 4 precedent.

[3] We have previously emphasised the importance of being clear about the relevance of regulatory precedence. Refer to 2degrees, "Submission in response to the Commerce Commission's proposed approach on the new regulatory framework for fibre", December 2018.