CHAPMAN TRIPP

Memorandum

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by email

UNBUNDLED COPPER LOCAL LOOP (*UCLL*) AND UNBUNDLED BITSTREAM (*UBA*) ACCESS SERVICES – PRICING REVIEW DETERMINATION (*PRDs*) – LEGAL FRAMEWORK

1 This memorandum addresses the relevant legal framework for, and in the context of, the Commerce Commission's current work towards PRDs for UCLL and UBA under section 51 of the Telecommunications Act 2001 (*Act*). The Commission has issued consultation papers (dated 6 December 2013, 14 March 2014 and 25 March 2014) which include preliminary views or suggestions about the legal framework. The papers include written advice to the Commission by a Wellington barrister, Dr James Every-Palmer, dated 12 March 2014 (*JEP Advice I*) and 24 March 2014 (*JEP Advice II*).

2 The tenor of some aspects of the Commission's papers indicates a different perspective of the relevant legal framework from that which underpins Chorus' submissions (of 14 February 2014, on UCLL; and also of 21 February 2014, on UBA).

3 You have asked us to reconsider the legal framework, including by engaging with Dr Every-Palmer's reasoning, to ascertain the existence and (if any) the scope and seriousness of significant points of concern or doubt about the Commission's perspective. For convenience, we summarise our views in the two Appendices annexed to this memorandum:

3.1 **Appendix A** provides a statement of the significant propositions arising from our analysis of the relevant legal framework for the determinations; and

3.2 **Appendix B** provides a summary of our views on certain specific topics arising from that framework on which the Commission is currently consulting and which you have asked us to specifically address in this advice.

4 As explained below, there does appear to be a significant divergence between the Commission's perspective of the legal framework and our perspective on the scope of the Commission's discretion in relation to a PRD. In broad terms, the Commission's papers, including the JEP Advices, assert a considerably wider

discretion for the Commission in its PRD analyses, and conversely less adherence to the terms of the Act, than we perceive to be justified on an orthodox approach to statutory powers and the requirements of the Act.

5 More particularly, we consider that, on a number of important issues, the Commission's powers are constrained (although the Commission retains discretion in relation to a number of aspects of the PRDs):

- ***the relevant services***

5.1 the Act requires any PRD to relate only to the service within the STD for which the price is subject to review, and to be analysed separately;

5.2 while parallel work may be efficient and permissible, a PRD process for that service must not produce a joint analysis which establishes a price applicable to both that service and any other service subject to any contemporaneous PRD for a separate service. Thus, in the present case, the Commission must make separate PRDs in respect of the UCLL STD and SLU STD services, as well as the UBA service;

- ***requirements for setting the MEA***

5.3 the required FPP analysis, being long term and not of the incumbent access provider's actual operations, permits and may require the use of available alternative technology (modern equivalent assets, or "MEA"). The MEA must, however, be capable of delivering the (already defined) facilities and functions of the "service";

5.4 the scope of the "service" to which a PRD relates is defined by reference to the service description in Schedule 1 of the Act and the STD in accordance with which the service is provided. The "service" cannot be redefined by a focus on a TSLRIC analysis utilising MEA if the hypothetical scenario involves a service which cannot provide the full functionality which access seekers currently require to provide their existing range of retail services which are (or could be expected to be) founded on the described access service;

5.5 in the case of the UBA STD, the "additional costs" of the service required to be determined in accordance with TSLIRIC, are the costs additional to Chorus' copper local loop network. It follows that the MEA for the required FPP analysis for the UBA STD must be both capable of delivering the (already defined) facilities and functions of the service, but also capable of interconnection with Chorus' copper local loop network such that the "additional costs" of the service to, and provided over, that network may be identified;

- ***disaggregation of UBA price***

5.6 to the extent that the "additional costs" of the UBA service vary depending on the characteristics (other than geographic) of that part of Chorus' copper local loop which it is provided over, the Commission may (but is not required) to set multiple price points for the UBA service;

- ***relativity between UCLL, SLU and UBA services***

5.7 the Commission is required, when exercising any necessary judgement in the determination of the TSLIRIC of the "service" for services within the UCLL and UBA service descriptions in Schedule 1, or when exercising any discretion as to the setting of price points and terms (referred to above), to have regard to the relativity (encompassing the concept of a "ladder of investment") between the UCLL and UBA services. It is an error of law to merely set TSLIRIC prices on the assumption that this will address relativity issues without express regard to this consideration;

- ***backdating***

5.8 the analysis of Part 2 of the Act in the Court of Appeal's 2006 judgment on backdating must be adhered to by the Commission, and cannot be disregarded as mere observations. Backdating of a PRD will be required irrespective of whether in involves an increase or decrease compared to the initially determined price.

6 In the balance of this memorandum, we proceed by setting out the significant propositions which, in our view, establish the relevant legal framework for the PRD exercise, and then engage with the Commission's papers where those indicate a possible departure from those propositions. We use the term "possible departure" because the Commission and Dr Every-Palmer have been properly careful to express their views as being preliminary and designed to assist the overall consultation phase.

Foundational propositions

7 In our view, the following relatively general propositions go to the foundations of the relevant legal framework, and ought not to be controversial:

(A) The Commission is a creation of statute, and its functions and powers in relation to a PRD are both provided and limited by the Act.

(B) In undertaking a PRD exercise, under Part 2(4) of the Act, the Commission is required to comply with all of the provisions of the Act.

(C) Insofar as the courts have analysed and opined on the purposes and provisions of the Act, and especially Part 2, the Commission is required to adhere to – and not disregard – such analyses and opinions.

(D) Insofar as the Commission has a discretion under the Act, including in deciding various issues that go to making a PRD, that discretion is not unfettered but must be exercised lawfully, rationally, having regard to the section 18 purpose, the Act as a whole, and other relevant considerations.

(E) While the purpose of the Act is to provide for regulation of certain designated telecommunications services, and the provisions of the Act are paramount, the avoidance of unnecessary and damaging constraints being imposed on an access provider's economic existence is a relevant consideration as a matter of general rule of law factors, as well as being indirectly reflected in the Act's purpose.

8 Those five propositions are not directly addressed in the Commission's papers, probably because they are able to be taken for granted. In our view, it is important that they be consciously in mind when the Commission is required to address more specific issues.

9 Two of the propositions might justify some additional comments. First, in Proposition (C), on prior judicial analysis and opinion, we are not referring here to the "ratio" and "obiter" concepts and distinction occasionally deployed in litigation to decide whether the doctrine of precedent is truly applicable in a particular case. Rather, the point is that, where a superior court has issued a reasoned judgment analysing aspects of a statute and stating their purpose and effect, a regulatory body such as the Commission must adhere to that judicial exposition. Such a body is not (unlike, say, the position in the USA) the primary interpreter of its governing statutes. We return to this topic in relation to the backdating issue, addressed below.

10 Second, in Proposition (E), our reference to an access provider's "economic existence" is a shorthand expression to cover the common law entitlements (subject always to statutory interventions) to utilise property rights and engage in lawful business activities. The relevance of these in a statutory framework has been restated in *Bennion on Statutory Interpretation: A Code* (6th ed, 2013) as follows:

> **Section 271 Principle against penalisation under a doubtful law**
>
> It is a principle of legal policy that a person should not be penalised except under clear law (in this Code called the principle against doubtful penalisation). The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful, or penalises him or her in a way which was not made clear. In some cases however the court may find that the intention to impose the detriment was so strong as to require the doubt to be overridden.
>
> **Section 278 Statutory interference with economic interests**
>
> One aspect of the principle against doubtful penalisation is that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law.

11 To be clear, we do not contend that Proposition (E) and the common law entitlements directly constrain a clear statutory discretion, but they remain within the range of considerations relevant to the exercise of a regulatory discretion. As it happens, in the context of the Act, and its section 18 purpose provision (not least the section 18(2A) references to investor risks and innovation incentives), this proposition is effectively subsumed into the incentives necessarily associated with long-term investment and fostering dynamic competition.

General propositions for section 51 PRDs

12 In relation to undertaking a "final pricing principle" (*FPP*) review to make a section 51 PRD, it is our view that the following propositions are applicable, and essentially uncontroversial:

(F) *The structure and logic of the two-stage price determination process (using "initial" and "final" principles) provides a statutory assumption that the PRD (using the FPP) will produce a more accurately efficient price for supply of the service regulated under the relevant STD.*

(G) *A PRD necessarily relates to the service which is the subject of the STD, which itself may be narrower than the full Schedule 1 (Part 2, Subpart 1) service description, and must follow its own process (that is, it cannot be dealt with jointly with another PRD for a separate service).*

(H) *While the service description may be amended, that requires compliance with a meaningful procedure prescribed by the Act, and is irrelevant until and unless a new service description is in place.*

13 We note that Proposition (F) is founded on a rationale prominent in the Court of Appeal's analysis of Part 2 of the Act in *Telecom New Zealand Ltd* v *Commerce Commission* (Anderson P, Glazebrook and Hammond JJ, CA 75/05; 25 May 2006 – "*2006 CA judgment*"), addressed below in relation to the backdating issue. Self evidently, Proposition (F) also relates to our Proposition (C). Further, Proposition (F) reflects the reasoning of the (Fletcher) Report of the Ministerial Inquiry into Telecommunications, September 1990, for example at pages 47 and 65-68.

14 Proposition (G) responds to the suggestion, in part raised by the titles of the Commission's 14 and 25 March 2014 "further consultation" papers, each of which refers to "Chorus UCLL and UBA services", that the Commission may make a single PRD in relation to two separate access services. In our view, the scope of the PRD is determined by the standard terms determination (*STD*) in which the price is subject to review.[1] This follows from the ordinary use of language in section 42(1) of the Act. In turn, there must be a distinct analysis undertaken for every PRD. We understand this view to be the same as that set out in the JEP Advice I at paras [32-34].

15 More specifically, in case it is an issue, we do not consider that the Commission can undertake a joint analysis which establishes a price applicable to both UCLL and UBA services. Rather, although parallel work may be sensible and efficient, the intellectual work must be done separately for each service. The same reasoning would apply to the separate STDs, and subsequent PRDs, applicable to the "UCLL" and "SLU" components within the Schedule 1 service description for UCLL.

Specific propositions on the relevant "service" requirements

16 Following on from our Propositions (G) and (H), but apparently more controversially, it is our view that the following propositions apply to the nature of the "service" that must be analysed for the purposes of a PRD:

(I) *The TSLRIC FPP is defined in Schedule 1 (Part 1, Subpart 1) in terms of "forward-looking costs", and plainly contemplates and permits analysis of technologies other than those actually deployed by the current access provider,*

[1] In the present case, the Commission has received price review applications in relation to the UCLL STD (from five applicants), the SLU STD (from three applicants) and UBA STD (from five applicants).

but *the definition and concept of TSLRIC cannot dictate the description or scope of the "service" to which the PRD will apply.*

(J) The Act reflects a legislative intent or expectation that, at the time of a PRD, access seekers would already be utilising the designated access service as defined in the Schedule 1 service description and the STD, and have reflected and relied on aspects of the functionality of that (described) service in their own (retail) services.

(K) Conversely, while there may well be some "abstraction" of service functionality involved in a TSLRIC analysis, it cannot have been a legislative intent that the service to be the subject of the PRD exercise would be one which (in the relevant hypothesis) was inconsistent with, or assumed away, such functionality.

(L) The provisions of the Act relating to the TSO (in Part 3) are directed to quite different concepts than Part 2, and have no direct relevance to the PRD analyses. However, as an indirect matter of relevance, it would be inconsistent with an overall legislative intent or expectation if the PRD analysis involved assumptions about technology which were inconsistent with, or assumed away, the ability of service providers to comply with the TSO.

17 It is at this point that, as we apprehend matters, our views on the legal framework clearly diverge from the JEP Advice I. In that advice, albeit with cautionary reservations, an argument is advanced to support a proposition that, in a PRD, the FPP (the TSLRIC concept) is to be applied to a "service" described as "a more abstract description of the regulated service that is technology neutral and captures its core functionality": paras [13], [16].

18 More particularly, the argument proceeds to explain that, interpreting the "service" in this abstracted way enables the Commission to elect to disregard the current use of copper-based technology: JEP Advice, I, para [18].

19 In our view, as outlined below, this argument departs too far from the provisions of the Act, and reads too much into the language used in the Schedule 1 (Part 1, Subpart 1, clause 1) definition of TSLRIC – the FPP relevant to a PRD for UCLL.

20 We can agree with the JEP Advice I views that the required FPP analysis, being long term and not of the incumbent access provider's actual operations, permits and may require the use of available alternative technology (that is, MEA). If the "service" could be provided by an hypothetical new access provider more efficiently with available new technology, then that technology should feature in the TSLRIC analysis. In other words, and (again) consistently with the Fletcher Report, a TSLRIC analysis involves an hypothetical scenario where a notional new entrant is efficiently resourced (including with MEA) to provide the designated access service that the incumbent provides and which is subject to the relevant STD.

21 However, the question of what "the service" is cannot be lost sight of. As our Propositions (J) and (K) state, the context for a PRD is (or must include) that there is an existing service being provided, consistently with the requirements of the

Schedule 1 service description and (here) an STD, and that there is a contest about the appropriate price, or at least dissatisfaction with the price determined by an initial pricing principle. That existing (described) service enables the access seeker to provide retail services of its own – that is, the whole point of regulation of the designated access services. But there is neither necessity nor logic in undertaking a TSLRIC analysis which assumes *not* a "service" compliant with the service description and STD criteria, but rather a "service" which cannot functionally support the retail services which are (or could be expected to be) founded on the described access service. The access seeker cannot be assumed to have abandoned part of its retail service, nor to anticipate that this might flow from a PRD. And the access provider cannot be penalised by a TSLRIC analysis which fails to "compare apples with apples" – that is, which does not reflect the range of the "service" which is defined and required to be provided.

22 In other words, the PRD exercise is simply about identifying an assumed more efficient price for the (already defined) "service", utilising TSLRIC. Conversely, and crucially, it does *not* involve the use of TSLRIC to redefine that service. There is doubtless scope for some "abstraction", and for a technology-neutral approach in the TSLRIC analysis, but not if that contravenes Propositions (I)-(M), above.

Specific propositions relating to the UBA service

23 Following on from propositions (G) to (H) but moving specifically to the FPP for the UBA service, it is our view that the following – and it appears less controversial - propositions apply:

(M) The UBA FPP requires the Commission to consider the "additional costs" of the UBA service – that is, additional to the price of Chorus' unbundled copper local loop network. The forward looking additional costs must therefore be based on technologies not only capable of delivering the (already defined) facilities and functions of the service, but also capable of interconnection with Chorus' copper local loop network such that the "additional costs" of that service to, and over, that network may be identified.

(N) To the extent that the "additional costs" of the UBA service may vary depending on the characteristics (other than geographic) of Chorus' unbundled copper local loop network over which it is provided, the Commission may (but is not required) to set multiple price points for the UBA service.

24 Propositions (M) and (N) follow from the requirement in the UBA FPP that the Commission determine "*TSLIRIC of additional costs incurred in providing the unbundled bitstream access service*". The "*additional costs*" to be modelled are therefore those that are *additional* to Chorus' existing copper local loop network, rather than a hypothetical MEA network constructed for the purposes of the enquiry into the TSLIRIC costs of the UCLL or SLU service. This interpretation is consistent with and reinforced by reference both to the structure of the designated access services in Schedule 1 of the Act, and the express reference to relativity as a mandatory relevant consideration (on which we elaborate, below). The JEP Advice I acknowledges the force of this view at paras [27-28].

25 A further issue implicitly raised in the JEP Advice I is whether if different prices are set for the UCLL and SLU components of the UCLL Schedule 1 service description, the Commission may set multiple price points for the UBA service to the extent that the "additional costs" of the service vary depending on the underlying characteristics of Chorus' copper local loop network. This is, again implicitly, answered in the affirmative at para [37]. We agree that this follows from the power of the Commission in section 52 of the Act to set the price payable for the service (with the singular being interpreted as including the plural: Interpretation Act 1999, s33) as well as from the express limitation of that general discretion in respect of geographic price discrimination by clause 4A of Schedule 1.

Specific propositions relating to "relativity" as a mandatory relevant consideration

26 In relation to the determination of a PRD for the UCLL, SLU and UBA services, our view is that the following – again, apparently less controversial - proposition applies to the statutory requirement that the Commission take into account "relativity" as a mandatory relevant consideration:

(O) The Commission is required, when exercising any necessary judgement in the determination of the TSLIRIC of the "service" for services within the UCLL and UBA service descriptions in Schedule 1 by reference to section 18 of the Act, to have regard to relativity (encompassing the "build/buy" concept) between the UCLL and UBA services.

27 Proposition (O) reflects the express statutory direction in the FPP of each of the UCLL and UBA designated access services to take into account "relativity" between the services as an additional matter that must be considered regarding the application of section 18. The legislative history of the Act indicates that "relativity" should be interpreted with regard to promoting efficient build/buy decisions by network competitors in choosing wither to seek access to the layer 1 and layer 2 services designated in Schedule 1 (the "build/buy" concept). We apprehend that the JEP Advice I includes a similar conclusion at paras [26-27]

Propositions relating to backdating of a PRD

28 In our view, and founded on Proposition (C) (on prior judicial analysis), above, and the 2006 CA judgment, the following – apparently controversial – proposition applies to the backdating of a PRD:

(P) At least in the absence of some truly extraordinary countervailing considerations, any PRD must operate retrospectively, substituting for the (statutorily assumed) less efficient initial price in the STD – regardless of whether the PRD involves an increased or decreased price for the services.

29 Proposition (P) flows directly from the 2006 CA judgment. The Court stated (at [41]):

> If the reviewed price is lower than the initial price the end users will have paid an inefficiently excessive price for the service. But if it is higher the end users would have paid an inefficiently inadequate price for the service. Absent the possibility of the consequences being passed on to the end users in some way, the potential for inefficiencies in relation to end users is unavoidable on either the Telecom position or the respondent's position. What

> can be achieved, however, is the establishment of the most efficient price as between the access provider and the access seeker.

30 Further, the Court stated (at [44]):

> 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 negativing 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.

31 In our view, those passages are unambiguous and authoritative. However, the JEP Advice II states – albeit as "preliminary views" - that these passages are "obiter", and that the Court of Appeal did not consciously reject the High Court's view "that the Commission has discretion as to whether to backdate". As mentioned in relation to Proposition (C), above, we consider that the "obiter" description is not to the point. The governing point is that, having carefully reviewed the purpose and structure of Part 2 of the Act, the 2006 CA judgment explains that a PRD must be regarded as being of a "substitutionary nature".

32 That appellate analysis is plainly inconsistent with the suggestion that the High Court's simple "discretion" statement remains. That suggestion is, in our view, one of the reasons why the Court of Appeal stated (at [33]) that it agreed with the reasons given by the High Court only "to a large extent". In other words, the aforementioned inconsistency goes to define in part the Court of Appeal's reservation in its agreement with the High Court.

33 The prefatory words of our Proposition (P) reflect the fact that the Act does not expressly state that the PRD must invariably be backdated to the commencement of the STD. The 2006 CA judgment establishes that as the normal expectation from the structure and purpose of Part 2 of the Act. But it may be that some extraordinary circumstances demand, consistently with the section 18 purpose and other properly relevant considerations, some modification. We have seen nothing which might be so described in relation to the UCLL PRD.

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APPENDIX A (TO CT MEMORANDUM OF LEGAL FRAMEWORK FOR UCLL AND UBA PRDs): LEGAL FRAMEWORK PROPOSITIONS

(A) The Commission is a creation of statute, and its functions and powers in relation to a PRD are both provided and limited by the Act.

(B) In undertaking a PRD exercise, under Part 2(4) of the Act, the Commission is required to comply with all of the provisions of the Act.

(C) Insofar as the courts have analysed and opined on the purposes and provisions of the Act, and especially Part 2, the Commission is required to adhere to – and not disregard – such analyses and opinions.

(D) Insofar as the Commission has a discretion under the Act, including in deciding various issues that go to making a PRD, that discretion is not unfettered but must be exercised lawfully, rationally, having regard to the section 18 purpose, the Act as a whole, and other relevant considerations.

(E) While the purpose of the Act is to provide for regulation of certain designated telecommunications services, and the provisions of the Act are paramount, the avoidance of unnecessary and damaging constraints being imposed on an access provider's economic existence is a relevant consideration as a matter of general rule of law factors, as well as being indirectly reflected in the Act's purpose.

(F) The structure and logic of the two-stage price determination process (using "initial" and "final" principles) provides a statutory assumption that the PRD (using the FPP) will produce a more accurately efficient price for supply of the service regulated under the relevant STD.

(G) A PRD necessarily relates to the service which is the subject of the STD, which itself may be narrower than the full Schedule 1 (Part 2, Subpart 1) service description, and must follow its own process (that is, it cannot be dealt with jointly with another PRD for a separate service).

(H) While the service description may be amended, that requires compliance with a meaningful procedure prescribed by the Act, and is irrelevant until and unless a new service description is in place.

*(I) The TSLRIC FPP is defined in Schedule 1 (Part 1, Subpart 1) in terms of "forward-looking costs", and plainly contemplates and permits analysis of technologies other than those actually deployed by the current access provider, **but** the definition and concept of TSLRIC cannot dictate the description or scope of the "service" to which the PRD will apply.*

(J) The Act reflects a legislative intent or expectation that, at the time of a PRD, access seekers would already be utilising the designated access service as defined in the Schedule 1 service description and the STD, and have reflected and relied on aspects of the functionality of that (described) service in their own (retail) services.

(K) Conversely, while there may well be some "abstraction" of service functionality involved in a TSLRIC analysis, it cannot have been a legislative intent that the service to be the subject of the PRD exercise would be one which (in the relevant hypothesis) was inconsistent with, or assumed away, such functionality.

(L) The provisions of the Act relating to the TSO (in Part 3) are directed to quite different concepts than Part 2, and have no direct relevance to the PRD analyses. However, as an indirect matter of relevance, it would be inconsistent with an overall legislative intent or expectation if the PRD analysis involved assumptions about technology which were inconsistent with, or assumed away, the ability of service providers to comply with the TSO.

(M) The UBA FPP requires the Commission to consider the "additional costs" of the UBA service – that is, additional to the price of Chorus' unbundled copper local loop network. The forward looking additional costs must therefore be based on technologies not only capable of delivering the (already defined) facilities and functions of the service, but also capable of interconnection with Chorus' copper local loop network such that the "additional costs" of that service to, and over, that network may be identified.

(N) To the extent that the "additional costs" of the UBA service may vary depending on the characteristics (other than geographic) of Chorus' copper unbundled local loop network over which it is provided, the Commission may (but is not required) to set multiple price points for the UBA service.

(O) The Commission is required, when exercising any necessary judgement in the determination of the TSLIRIC of the "service" for services within the UCLL and UBA service descriptions in Schedule 1 by reference to section 18 of the Act, to have regard to relativity (encompassing the "build/buy" concept) between the UCLL and UBA services.

(P) At least in the absence of some truly extraordinary countervailing considerations, any PRD must operate retrospectively, substituting for the (statutorily assumed) less efficient initial price in the STD – regardless of whether the PRD involves an increased or decreased price for the services.

APPENDIX B (TO CT MEMORANDUM OF LEGAL FRAMEWORK FOR UCLL AND UBA PRDs): ANSWERS TO SPECIFIC QUESTIONS

For what service(s) is the Commission required to undertake PRD?

B1 The scope of a PRD is determined by the standard terms determination (*STD*) in which the price is subject to review. There must be a distinct analysis undertaken for every PRD. In the present context, we understand that the Commission has received review applications in respect of the UCLL, SLU and UBA STDs.

Is the Commission required to set separate prices for UCLL and SLU?

B2 A PRD necessarily relates to the service which is the subject of the STD, which itself may be narrower than the full Schedule 1 (Part 2, Subpart 1) service description, and which must follow its own process (that is, it cannot be decided jointly with another PRD for a separate service).

For each PRD, what is the service that the Commission is required to determine the TSLIRIC of?

B3 The TSLRIC FPP is defined in Schedule 1 (Part 1, Subpart 1) in terms of "forward-looking costs", and plainly contemplates and permits analysis of technologies other than those actually deployed by the current access provider, but the definition and concept of TSLRIC cannot dictate the description or scope of the "service" to which the PRD will apply.

B4 Instead, the total quantity of the facilities and functions directly attributable to, or reasonably identifiable as incremental to, the service must be identified – that is, the current functionality of the service defined in Schedule 1 and as elaborated in the STD which supports the retail services which are (or could be expected to be) founded on the described access service.

What are the requirements for selecting the MEA?

B5 The required FPP analysis, being long term and not of the incumbent access provider's actual operations, permits and may require the use of available alternative technology (modern equivalent assets, or "MEAs"). The MEA must, however, be capable of delivering the (already defined) facilities and functions of the "service".

B6 In the case of the UBA STD, the "additional costs" of the service required to be determined in accordance with TSLIRIC, are the costs additional to those of Chorus' unbundled copper local loop network. It follows that the MEA for the required FPP analysis for the UBA STD must be not only capable of delivering the (already defined) facilities and functions of the service, but also capable of interconnection with Chorus' copper local loop network such that the "additional costs" of the UBA service to, and provided over, that network may be identified.

May the Commission set multiple price points for a service subject to a PRD?

B7 In general, the Commission's power to set the price payable and related terms for each service subject to a PRD includes a power to set multiple price points (but may not determine geographically de-averaged prices for the UBA and UCLL designated access services).

B8 In particular, to the extent that the "additional costs" of the UBA service vary depending on the characteristics (other than geographic) of that part of Chorus' copper local loop network over which it is provided, the Commission may (but is not required) to set multiple price points for the UBA service.

What is the Commission to have regard to in considering relativity?

B9 The Commission is required, when exercising any necessary judgement in the determination of the TSLIRIC of the "service" for services within the UCLL and UBA service descriptions in Schedule 1 by reference to section 18 of the Act, to have regard to relativity (encompassing the "build/buy" concept) between the UCLL and UBA services.

Is the Commission required to undertake backdating of the price determined in accordance with the FPP?

B10 Yes, at least in the absence of some truly extraordinary countervailing considerations. Absent those considerations, any PRD must operate retrospectively, substituting for the (statutorily assumed) less efficient initial price in the STD.