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STOCK EXCHANGE ANNOUNCEMENT

8 September 2014

Court of Appeal judgment dismisses Chorus' appeal on the initial pricing principle set for UBA

The Court of Appeal's judgment, released today, dismissed Chorus' appeal to overturn the High Court's judgment on the Unbundled Bitstream Access (UBA) price set by the Commerce Commission's Initial Pricing Principle (IPP) process.

"We're clearly disappointed by today's decision to maintain the status quo, but it is not entirely unexpected," said Vanessa Oakley, Chorus General Counsel.

"Today's regulatory environment is completely out of kilter with the industry's structure and the effective delivery of the Government's policy. We felt it necessary to appeal the High Court's decision to try to get some further clarification on the fundamental issues around pricing UBA in New Zealand."

Chorus intends to make a thorough analysis of the Court of Appeal's judgment. In the meantime, it will engage constructively with the Commerce Commission to deliver a sustainable Final Pricing Principle (FPP) outcome that truly reflects the costs to efficiently deliver regulated broadband services in New Zealand, while encouraging future network investment.

The Court of Appeal's media release is attached.

ENDS

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COURT OF APPEAL OF NEW ZEALAND

8 September 2014

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

Chorus Limited v Commerce Commission And Ors
(CA 229/2014) [2014] NZCA 440

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest:

<http://www.courtsfnz.govt.nz/from/decisions/judgments.html>

Chorus Ltd has sought to challenge the Commerce Commission’s November 2013 determination setting prices for the use of its copper wire network. The appeal raised six questions of law arising from the Commission’s determination of the price Chorus can charge for its unbundled bitstream access (UBA) service. Chorus unsuccessfully challenged the Commission’s determination in the High Court.

There Justice Kós rejected all Chorus’s arguments. He found that the Commission had done what Parliament had prescribed, if not more, in setting the IPP price. If Chorus was not satisfied, the solution was to seek a review of the price under the Telecommunications Act using a “Final Pricing Principle” (FPP) involving detailed modelling.

The context was that the Commission set the UBA monthly price (to apply from 1 December 2014) at \$34.44 per line. The price consists of an additional UBA component of \$10.92 and the unbundled copper loop price of \$23.52 (set earlier by the Commission). The new price is significantly lower than the existing UBA component price of \$21.46. In making its decision the

Commission followed an extensive consultative process with interested parties.

On appeal Chorus repeated its claim that the regulator erred in law when setting the \$10.92 UBA component price using the “Initial Pricing Principle” (IPP). Chorus argued that the Commission had wrongly directed itself not to go beyond the higher of the two international benchmarks used to set the price (the Swedish benchmark) and failed to consider the evidence for different New Zealand “costs drivers” that might have required a higher price. Chorus also alleged that the Commission had not respected the requirement to incentivise innovation and investment (particularly the building of a nationwide fibre network) provided for in the Telecommunications Act in making a price reduction from \$21.46 to \$10.92 per month.

The decision of the panel of the Court of Appeal in this case (Justice Ellen France, Justice Stevens and Justice White) is that Justice Kós was correct to find the Commission made no error of law in coming to its decision. The Commission exercised its judgment in a way that was reasonable, factually supportable and consistent with the Telecommunications Act. The Commission carefully considered the differences in comparability between the benchmark countries and New Zealand, within the limits of the relatively modest and straightforward exercise it was undertaking, recognised that the possible range of prices extended beyond the benchmark range and appropriately took into account the statutory requirement to address the need to facilitate innovation in new telecommunications services.

Chorus has invoked the Final Pricing Principle review process under the Telecommunications Act. That process is not affected by this decision. It is anticipated that the review will not be completed before April 2015.

Contact person: Clare O'Brien, Registrar of the Court of Appeal, 04 914 3540.