

**A Guide to Regulatory Decision Making
by the Commerce Commission for the
Telecommunications Sector**

Discussion Paper

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COMMERCE COMMISSION

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EXECUTIVE SUMMARY

This discussion paper sets out guidelines to provide greater clarity to stakeholders on how the Commerce Commission discharges its powers and functions under the Telecommunications Act 2001. This initiative supports the Commission's strategy of proactive engagement with stakeholders to enhance mutual understanding and promote regulatory certainty in telecommunications markets.

The paper provides an overview of the telecommunications sector, including its contributions to the economy and society, its characteristics, and their implications for competition and regulation. It outlines the legislative framework within which the Commission fulfils its obligations. It also explains the economic principles that guide the Commission's approach in promoting dynamic and responsive telecommunications markets.

The paper identifies and discusses the relevant considerations and factors that guide the Commission in making decisions, including its exercise of discretion at various stages of the regulatory process. In particular, it discusses how the Commission performs its key roles and functions under the Act in relation to market monitoring, Schedule 3 investigations, the consideration of Schedule 3A undertakings, access determinations, reviews of regulated services, the operational and accounting separation of Telecom, the Telecommunications Service Obligations, and industry decisions. The discussion is informed by the Commission's body of work and practice since the Act's implementation.

The Commission seeks feedback from stakeholders and interested parties on the guidelines and relevant issues discussed in this paper.

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1 INTRODUCTION

1. The telecommunications sector is a significant contributor to New Zealand's economic and social well-being. The telecommunications industry generated over \$5 billion in revenues and undertook investments totalling \$1.5 billion in 2008.¹ More importantly, it is a key enabler of productivity and innovation in other sectors and the wider economy. Productivity and innovation are key drivers of economic growth, which is necessary to maintain and improve New Zealanders' standard of living.
2. Telecommunications plays a key role in the provision of leading-edge technologies and services that enable New Zealand to produce innovative goods and services of higher value. Emerging telecommunications technologies will enable New Zealand firms to establish or improve linkages to international markets and access know-how from the rest of the world more quickly and at lower costs. These technologies further enable New Zealanders to easily connect with their families, communities, schools and hospitals, and social networks, which generally enhances social well-being.
3. Telecommunications markets are dynamic and are characterised by technological progress and uptake of new technologies. In an environment of rapid technological and economic change, industry participants, including access providers and access seekers, will be looking for regulatory certainty and incentives to invest and innovate as they go forward. It is also vitally important that end-users of telecommunications receive the best possible services to assist them to be most productive, at prices competition would deliver.
4. This chapter sets out the purpose and structure of this discussion paper.

Purpose of this discussion paper

5. In 2002 the Commission released *A Guide to the Role of the Commerce Commission in Making Access Determinations under the Telecommunications Act*. The purpose of that document was to inform industry and other interested parties of the Commission's role under the Telecommunications Act 2001 ("the Act")² and the general approach that the Commission intended to take in exercising its powers under the Act. The guide was subject to a consultation process.
6. The Commission has made various key decisions since the Act's implementation and the regulatory reforms in 2006. The purpose of this paper is to set out guidelines to provide greater clarity on how the Commission discharges its powers and functions under the Act. It discusses the relevant

¹http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/MonitoringandReporting/ContentFiles/Documents/2008%20report_2.pdf, pages 7 and 9.

²http://www.legislation.govt.nz/act/public/2001/0103/latest/DLM124961.html?search=ts_act_telecommunications+act_rese1&sr=1.

considerations and factors that the Commission takes into account in making decisions, and when and how it exercises discretion at various stages of the regulatory process.

7. This discussion paper is informed by the Commission's body of work and practice since the Act's implementation, particularly the amendments to the Act in 2006. It expands on and replaces the 2002 guide.
8. This initiative supports the Commission's strategy of proactive engagement with stakeholders to enhance mutual understanding and promote regulatory certainty in telecommunications markets. The Commission intends to increase its public information activities over time to provide greater clarity of its key roles and functions, and as it looks for new ways to influence industry behaviour in order to promote dynamic and responsive telecommunications markets.
9. The broad analytical approach adopted in this paper is consistent with those of other Commission guidelines, such as the *Regulatory Provisions of the Commerce Act Discussion Paper*³ (i.e., general rationale for regulation and economic principles) and the *Commerce Commission Mergers and Acquisition Guidelines*⁴ (i.e., market definition and competition assessment).
10. These guidelines cannot fully address every aspect of the Commission's decision-making processes, and they are not binding on the Commission. However, they should provide useful guidance to interested parties on many key aspects of how the Commission discharges its powers and functions.
11. The Commission notes that these guidelines will be adopted within the context of reasonable flexibility and are not intended to limit the Commission's ability to fulfil its statutory obligations.
12. The Commission seeks feedback from stakeholders on the guidelines and relevant issues discussed in this paper. A version of these guidelines will be released, following the submission process.

Structure of this discussion paper

13. This discussion paper has five substantive chapters.
14. Chapter 2 provides an overview of the telecommunications sector. This includes the sector's contributions to the economy and society, its characteristics, the implications for competition and regulation, and the New Zealand perspective.

³ <http://www.comcom.govt.nz/IndustryRegulation/ContentFiles/Documents/Regulatory%20Provisions%20of%20the%20Commerce%20Act%201986%20-%20Discussion%20Paper.pdf>

⁴ <http://www.comcom.govt.nz/Publications/ContentFiles/Documents/MergersandAcquisitionsGuidelines.PDF>

15. Chapter 3 outlines the legislative framework within which the Commission fulfils its statutory obligations, the regulatory mechanisms available to it in meeting the Act's purpose, and how the Telecommunications Act interfaces with the Commerce Act.
16. Chapter 4 explains the economic principles that inform the Commission's assessment of existing and potential competition issues, in order to make decisions.
17. Chapter 5 discusses the relevant considerations and factors that the Commission takes into account in making regulatory decisions, and how it implements the legal framework and economic principles discussed in previous chapters.
18. The last chapter provides guidance to those who wish to make submissions on this paper.

2 SECTOR OVERVIEW

19. This chapter provides an overview of the telecommunications sector, including its characteristics and their implications for regulation and competition, and the New Zealand perspective.

Institutional arrangements

20. Telecommunications sector reforms were implemented in many countries in the 1980s and 1990s to create transparent and stable regulatory frameworks, and provide regulatory authorities with mechanisms with which to promote competition. Such reforms were designed to move from a state-owned or legislated monopoly supplier of telecommunications services⁵ to a liberalised market in which the monopoly supplier faced some competition from new entrants. Market liberalisation often coincided with corporatisation or privatisation of the former state-owned monopoly, and the introduction of a telecommunications regulatory framework to ensure that efficient entry could occur. A major objective of these reforms was to attract investment by opening markets to new operators and service providers.
21. In New Zealand, the introduction of the Telecommunications Act in 1987 established Telecom as a state-owned enterprise.⁶ The New Zealand telecommunications market was opened to competition in 1989 and Telecom was privatised in 1990. However, unlike many other countries, there was initially no sector-specific telecommunications regulation in New Zealand, with the telecommunications industry only subject to general competition law up until 2001. The passage of the Telecommunications Act 2001 (along with subsequent amendments) introduced telecommunications-specific regulation.
22. Utilities such as electricity and gas suppliers have often been structurally separated through legislation to deliver more competitive outcomes. In New Zealand, electricity and gas generation and retail have been opened to competition, while segments of transmission and distribution markets remain regulated.
23. In contrast to the utility sector, telecommunications providers worldwide have not been structurally separated and tend to remain vertically integrated. Operational or functional separation in telecommunications markets has been implemented more recently. New Zealand's incumbent fixed-line operator, Telecom New Zealand Ltd ("Telecom") was operationally separated in 2008 into three separate business units (wholesale, retail and network access), as required by the amendments to the Telecommunications Act in 2006. This form of separation was modelled on the operational separation of British

⁵ In the US, telephony services have historically been provided by privately-owned telephone companies, which were protected from competition through state laws and regulatory policies. In Europe and elsewhere, telephone companies were initially owned by the state, with privatisation a more common feature in recent decades.

⁶ Prior to 1987, telecommunications in New Zealand were supplied through a division of the government-owned New Zealand Post Office.

Telecom in the U.K. The purposes of operational separation are to promote competition, require transparency and non-discrimination, and facilitate investment in telecommunications infrastructure and services.

Industry characteristics

24. The telecommunications industry is generally characterised by a number of functional levels through which retail telecommunications services are supplied to end-users. At the upstream level, the establishment of telecommunications networks requires significant initial investment, for example, in the digging of trenches and laying of fixed cables, or rolling out facilities to deliver wireless services. These facilities are then used to supply a range of downstream services to wholesale and retail customers. Demand for these services is based on the desire to communicate with other consumers and businesses, including those that subscribe to competing telecommunications networks.
25. Important characteristics of the industry include the level of irreversible capital-intensive investments, the existence of economies of scale and scope, and the prevalence of network effects. In addition, rapid technological change has important implications for a regulatory framework that seeks to promote competition in the industry for the long-term benefit of its end-users.

Sunk investments

26. The initial investments required to deploy telecommunications networks tend to be long-lived, irreversible and specific. Once capital is committed to deploying a network, the network can sometimes have little or no value in its next best use.⁷
27. Sunk investments may provide an incumbent with absolute cost advantages and may act as a deterrent to other parties intending to replicate large parts of the network.
28. The need to recover the costs derived from the initial investments may lead incumbents to respond, or threaten to respond, aggressively to potential competitors, which may act as a barrier to entry. It will also act as a barrier to exit, as exit from the market is not costless.
29. In parts of the market where competition is absent, or the threat of market entry is limited, incumbents will have reduced incentives to operate efficiently to produce services valued by consumers, and to invest in new and more efficient technologies.

⁷ Specifically, the costs incurred in digging trenches cannot be recovered. Other assets may be capable of being redeployed, such as electronic equipment and, in some cases, fibre and copper cable.

Economies of scale and scope

30. As a network industry, telecommunications is characterised by economies of scale and scope, which are caused by either technological factors (e.g., increasing functionality of specific equipment) or costs that remain constant irrespective of the level of services being supplied.
31. The presence of significant fixed and common costs in a telecommunications network, combined with a low incremental cost of serving an additional customer, indicates the presence of economies of scale and scope which may deter its large-scale replication. These characteristics will tend to limit the extent to which network competition can be sustained, and tend to be most evident in the access part of a telecommunications network.
32. Economies of scale occur where supplying an additional unit of a service is less costly than supplying the previous unit in the long run. Economies of scale arise in the presence of significant fixed costs, resulting in a declining average cost as output increases. This can lead to a “natural monopoly” situation whereby a single firm could supply the entire market at a lower cost than multiple firms.⁸
33. Economies of scope exist when it is less costly to supply services in combination than it would be to supply each service separately in the long run. The presence of “common costs”, which cannot be attributed exclusively to the supply of any particular service, may present regulatory challenges. Issues could arise, for example, in relation to the efficient allocation of common costs across regulated and unregulated services, and in ensuring that the resulting efficiencies are shared with consumers, as would occur in a competitive market.
34. Economies of scale and scope in telecommunications may also increase incentives to engage in bundling, which allows for supply-side efficiency gains, but may also have implications for the level of competition in certain markets. These occur particularly where services supplied in competitive and non-competitive markets are bundled together.

Network effects

35. Network effects are more profound in telecommunications than in other network industries.
36. The value of a telecommunications network to any consumer of that network increases with the number of users connected to that network, and as the network is interconnected with other networks.⁹ Such network effects are a

⁸ Technically, a firm will be a natural monopoly if its cost function is “subadditive”. This occurs when the firm can supply services at lower cost than where supply is spread across multiple firms, for all possible levels of service.

⁹ In principle, network effects can also be negative, such as where congestion occurs. See for example Liebowitz Stanley J. and Stephen E. Margolis, *Network Effects*, in *Handbook of Telecommunications Economics* (Volume 1).

form of demand-side economies of scale. If a telecommunications network is not able to offer services based on a large number of users, its value would be significantly lower to potential customers. In order to effectively compete in the marketplace, network operators need to be interconnected with existing networks.

37. New or potential industry entrants are not encumbered by existing (legacy) systems and technologies or ageing fixed networks. Nevertheless, in investing in new networks, market entrants need to gain access to existing networks in order to provide “any-to-any connectivity” to their customers.

Technological progress

38. In recent decades, technological innovation, rapid uptake of new technologies, and much shorter product life spans have distinguished telecommunications from other network industries. These characteristics drive the sector as a whole and are likely to have an impact on the level of competition in telecommunications markets in the long run.
39. The migration from legacy to future technologies will have an impact on competition in telecommunications markets. Convergence on the supply side of telecommunications, broadcasting and the Internet is testing the relevance of existing business models and regulatory frameworks.
40. This transition can potentially increase or limit competition. For example, the emergence of new technological platforms may lead to new ways of delivering services to end-users, resulting in increased competition. New or existing services may be seen by customers as increasingly strong substitutes for traditional services, which may have demand-side implications for the level of competition in supplying such services. However, technological developments may also lead to reduced competition, by entrenching and/or shifting a source of market power.
41. Emerging technologies may exert competitive pressure on existing providers, while they may also extend the life of existing networks. There may also be broader implications for the communications and broadcasting sectors, for example, in relation to the provision of content over next-generation networks. In light of technological developments, existing regulatory settings may have to be reviewed. Potential issues that could arise, which may restrict competition and investment or may be detrimental to end-users, should be addressed.

Implications for competition and regulation

42. The level of competition in the downstream markets in which residential and business customers are served will typically be influenced by competitive conditions in the upstream markets. The significance of the above industry characteristics is that they tend to limit the amount of competition that occurs at the upstream level.

43. It is at this upstream level where telecommunications “bottleneck” facilities tend to emerge. A bottleneck facility refers to a necessary input that is used by a competitor in order to provide downstream services, and which cannot be economically duplicated.¹⁰
44. While a bottleneck tends to be enduring, such as where a firm has unique access to a customer base, or where there are strong natural monopoly characteristics in supplying the input, there is also the potential for technological change to alleviate or shift the bottleneck. As noted above, regulation may need to be reviewed in light of such developments to ensure that it remains appropriate.
45. Regulation in New Zealand and other jurisdictions has typically been focused on the upstream level, as this is where traditional bottlenecks have been present. In the absence of regulation, access may either be withheld, or only supplied at a price that is substantially above the cost of supply. In focusing on the upstream level, regulation can lead to increased competition in the provision of downstream services. Regulated terms for access and interconnection services can thereby allow downstream competition to deliver long-term benefits to end-users.

New Zealand telecommunications markets

46. Over the past decade, the telecommunications sector internationally has experienced significant changes flowing from competition, technological innovation, and the convergence of services.
47. There have been significant changes in New Zealand’s telecommunications markets, following the regulatory reforms in 2006. These included increased competition in the broadband retail market, the deployment of advanced networks in the mobile market, and a shift from old telephone-based technology to new broadband-based technologies.
48. Telecom remains the largest operator in the fixed telecommunications market. Local loop unbundling was successfully introduced in 2007, and there are signs of an increasing uptake of some existing regulated services.¹¹
49. Broadband penetration continues to grow.¹² Consumers face increasing choice as a result of new bundled offers, often incorporating calling, line rental and broadband. Geographically, Auckland has been the first place where exchanges have been unbundled. Telecom faces some competition in

¹⁰ Bottlenecks can be “one-way”, such as an unbundled local loop, where a competitor purchases a local loop from the incumbent (for example, to supply broadband services), but not vice versa; or “two-way”, such as interconnection, where both parties purchase services from each other (for example, to supply end-to-end calling services).

¹¹ http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/MonitoringandReporting/ContentFiles/Documents/2008%20report_2.pdf, page 6.

¹² Broadband penetration in New Zealand is estimated by the OECD to be the third strongest for 2008, with an improvement in ranking for broadband subscribers per 100 inhabitants from 19th to 18th out of 30 countries.

Wellington and Christchurch from TelstraClear, which owns cable infrastructure.

50. The increasing penetration of fibre in the access network is likely to have implications for the take-up of regulated access products. For example, under Telecom's fibre-to-the-node programme, the take-up of unbundled local loops may largely be replaced by sub-loop services and/or wholesale bitstream access services.
51. Market penetration for mobile phones reached 106% in 2008.¹³ There are currently two mobile network operators in New Zealand, Vodafone and Telecom, with subscriber market shares of 52% and 48%, respectively.¹⁴ Telecom launched its 3G mobile network in May 2009. A third entrant, 2degrees, has announced the launch of its new mobile network in August 2009. Additionally, mobile virtual network operators, providing retail services without owning infrastructure, are also present.
52. Continued capital expenditure is expected in New Zealand, with the increased cabinetisation of Telecom's fixed-line network, and the rollout of new mobile networks. Telecom and access seekers have been undergoing network modernisation, migrating towards all-IP based networks and a more efficient supply of broadband services.
53. The Government recognises the importance of fostering competition in broadband markets. Its \$1.5 billion investment initiative, which aims to deliver ultra-fast broadband to 75% of New Zealanders over the next ten years, proposes to open access at the dark fibre level, effectively separate retail and wholesale service provision, and require the network topology to support unbundled fibre access.

¹³ <http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobiletoMobileTermination/ContentFiles/Documents/Mobile%20termination.pdf>, page 14.

¹⁴ Ibid, page 13.

3 LEGISLATIVE FRAMEWORK

54. This chapter sets out the legislative framework within which the Commission fulfils its obligations, primarily under the Telecommunications Act 2001.

Historical background

55. Prior to 2001, telecommunications markets in New Zealand were subject only to general competition law and information disclosure requirements.
56. A *Ministerial Inquiry into Telecommunications* in 2000 recommended that changes be made to the telecommunications regulatory regime to promote competition in relevant services markets and deliver benefits to end-users. This provided the context for the passage of the Telecommunications Act 2001, which introduced the regulatory regime of New Zealand's telecommunications sector.

Telecommunications Act 2001

57. The main purpose of the Act is to regulate the supply of telecommunications services.¹⁵ While various parts of the Act have specific purpose statements, the general theme from these statements is the promotion of competition in telecommunications markets for the long-term benefit of end-users within New Zealand. The next two chapters discuss the relevant considerations and factors that the Commission takes into account in making decisions to achieve the Act's purpose.
58. The Act established a Telecommunications Commissioner who is a member of the Commerce Commission and is appointed by the Minister responsible for the Act.
59. The Act also established the regulatory framework for Telecommunications Service Obligations.

Telecommunications Amendment Act 2006

60. In December 2006 the Government introduced the Telecommunications Amendment Act (No 2), following a stocktake of the telecommunications sector.
61. The amended Act provides for a broader set of regulatory tools and greater scope for the Commission to be proactive in order to achieve the statutory purposes of the Act. It extended the Commission's powers and functions to determine the terms of access to regulated services, monitor and provide public information on telecommunications service market performance, enforce Telecom's Operational Separation Undertakings, set up an accounting

¹⁵ See Telecommunications Act 2001, s3(1).

information disclosure regime (accounting separation), and strengthen the enforcement provisions.

The Commerce Commission

62. Under the Act, the Commission exercises various powers and functions in relation to the telecommunications sector. Table 1 summarises its key functions, and their legal basis, with respect to the sector.

Table 1. Commerce Commission’s Key Telecommunications Functions

	Sector Monitoring	Regulatory Reviews	Operational Separation	Information Disclosure	STD Development	TSO Administration
Key statutory functions	S9A(1)(a) must monitor markets S9A(1)(b) may conduct studies	Schedule 3 investigations	Part 2A: Telecom Undertakings S69R order to prevent or remedy breach S69X variation of Undertakings	Part 2B: S692B Accounting Separation S69ZG information publication	Part 2: S300 terms within STDs Schedule 1 S5 Access principles S30R STD reviews	Part 3 TSO administration
How key functions are carried out	Structured information gathering of telecommunications market effects and overall performance and specific studies	Formal investigations on whether schedule of regulated services should be altered	Draw on IOG and other sources to identify potential for breach, and monitor the broader effects of the Undertakings in markets	Formal requirements for Telecom to provide a broad range of information to the Commission for publication	Specific monitoring terms in STDs; issue information requirements to access providers as part of a review under S30R	Monitor compliance; determine cost faced by service providers; determine liable persons; apportion costs among liable persons
Deliverables	Market Monitoring reports NGN work stream	Report to Minister with the Commission’s recommendations	Review of Undertakings Compliance monitoring	Regulatory accounts Public reports STD and access provider reports	Reports on compliance with both STD terms and with access principles	Cost allocation determinations
Goals	Monitor overall regime, inform public and identify market failure	Identify whether regulatory changes are required	Non-discrimination, transparency and efficient investment in telco sector (s69A)	Public disclosure of information on operation and behaviour of Telecom, other access providers and STDs	Effective and transparent STDs	Effective TSO instrument
Other Functions	Publish reports and reviews	Power to investigate changes to	Enforcement powers: Part 4A	Enforcement powers to prescribe	STD decision making powers	Enforcement of TSO conditions

		regulated services	S69R S69Q	information for disclosure		
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Fair process

63. In addition to its statutory powers and functions, the Commission is required as a matter of law to ensure a fair decision-making process. Many fair process obligations, particularly with regards to the nature and extent of consultation, are required by the Act. Where necessary or desirable, the Commission may take additional steps to ensure a fair process. For instance, the Commission has standard procedures for managing consultations or commercially sensitive information, and will not usually allow new information to be introduced during cross-submissions or Commission conferences as this does not allow other interested parties to properly consider that information.
64. The Commission also usually takes into account natural justice considerations, including ensuring its processes are timely and fair to all parties, within the context of the Act, and given the significant impact of its decisions on telecommunications markets and businesses. The specific fair process obligations on the Commission are usually determined by the circumstances of each case, but the Commission is also mindful of the need for consistent processes, where possible.

Regulatory mechanisms

65. This section outlines the regulatory mechanisms available to the Commission in achieving the Act's objectives. Chapter 5 discusses in more detail how the Commission makes decisions through these mechanisms.

Schedule 3 investigations

66. Under Schedule 3 of the Act, the Commission may, on its own initiative, or if requested to do so by the Minister, commence an investigation on any proposed alterations to designated (price and non-price regulated) and specified (non-price only regulated) services in Schedule 1.
67. The outcome of an investigation is a recommendation to the Minister. The Commission must make the recommendation that best gives, or is likely to best give, effect to the promotion of competition for the long-term benefit of end-users.¹⁶ It must also consider the efficiencies that will result, or will likely result, from that act or omission.¹⁷
68. In conducting Schedule 3 investigations, the Commission must also have regard to any economic policies of the Government transmitted, in writing, to the Commission by the Minister.¹⁸ In February 2009 the Government

¹⁶ See Telecommunications Act 2001, s 19.

¹⁷ See Telecommunications Act 2001, s 18(2).

¹⁸ See Telecommunications Act 2001, s 19A.

transmitted a Statement of Economic Policy which provides that decisions concerning the regulation of telecommunications services should be consistent with, and take full account of, New Zealand's relevant international commitments, as expressed in bilateral and multilateral international instruments in effect in New Zealand.

69. The Telecommunications Commissioner must report to the Minister about proposed alterations to regulated services in the Act. The report must include the views of two other members of the Commission. The Minister, after receiving a final report from the Commission, may accept, reject, or require the Commission to reconsider its recommendations.

Undertakings

70. Schedule 3A of the Act provides a mechanism for an access provider to supply a service to all access seekers on a voluntary basis that avoids the need for and the costs of regulation, and on terms and conditions agreed between the access provider and the Commission, as an alternative to a proposed regulatory change.
71. The undertakings mechanism provides service providers an opportunity to present proposals (“undertakings”) in lieu of, and to avoid the cost of, regulation. It allows them to shape some of the form and content of the price and many of the non-price terms.
72. This mechanism potentially enables an accelerated take-up of services, provides market certainty much sooner, and delivers benefits to end-users earlier compared to a regulatory process.

Access determinations

73. The amended Act introduced a standard terms determination (“STD”) process as an alternative to bilateral access determinations. This enables the Commission to make a determination on how a designated or specified service must be supplied with reference to all access seekers and providers of the service. The Commission may, on its own initiative, initiate the STD process for any of the designated or specified services in Schedule 1 of the Act.
74. The STD is required to be comprehensive enough and contain sufficient detail so there is no need for further agreement between an access seeker and access provider for provision of the service within the specified timeframe.
75. The Act also enables the Commission to make a determination between parties for specific purposes. The Commission considers bilateral determinations on a case-by-case basis.
76. A guide to the STD process is available on the Commission's website: <http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/StandardTermsDeterminations/ContentFiles/Documents/Overview%20of%20STD%20process0.pdf>.

Review of designated and specified services

77. Schedule 3 further provides that the Commission must consider, at intervals of not more than five years after the regulated service came into force, whether there are reasonable grounds for commencing an investigation whether services in Schedule 1 should remain regulated.
78. Under Schedule 3, the Commission can also consider whether to designate a service that is currently specified by omitting the service from Part 3 of Schedule 1 and adding it to Part 2 of that Schedule.
79. Should the Commission decide to initiate an investigation, this must commence at least one year prior to the expiry of the service. The Commission will conduct an investigation in accordance with the process set out for Schedule 3 investigations.

Operational separation of Telecom

80. One of the key amendments to the Act in 2006 was Part 2A, which sets out the requirements for the operational separation of Telecom. The purposes of operational separation are to:
 - promote competition in the telecommunications markets for the long-term benefit of end-users;
 - require transparency, non-discrimination and equivalence of supply in relation to certain services; and
 - facilitate efficient investment in telecommunications services.
81. Part 2A is implemented through the Operational Separation Undertakings (“the Undertakings”) agreed between the Minister and Telecom on 25 March 2008. The Undertakings require Telecom to establish a number of business units, including a core access network unit, a wholesale unit, and one or more retail business units.
82. The requirements of the Undertakings largely consist of two related components: the arm's-length rules and the equivalency of inputs (“EOI”) obligations. The arm's-length rules limit and regulate the ability of the Telecom business units to collaborate on commercial policy and investment decisions.
83. EOI requires Telecom to act as if its business units are separate companies acquiring services from one another in a manner substantially similar to the way in which other service providers acquire services from Telecom. It requires Telecom’s business units to use the same services and infrastructure in providing their commercial services, on the same terms and conditions (including price) as other service providers acquiring similar services from Telecom and with whom they compete. The EOI obligations are phased in over a number of years, with full equivalence for most services expected no later than 1 January 2012.

84. The Undertakings include milestones that must be met over a defined period. There are specific migration plans for relevant access and wholesale services to be supplied on a fully equivalent basis by 2010, as well as a specific migration path with set milestones to allow at least 80% of PSTN lines to be high speed broadband-capable by 2012.
85. A guide to the complaints process for breach of the Undertakings is available on the Commission's website: <http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/Guidelines/ContentFiles/Documents/Operational%20Separation%20Complaints%20Guideline.pdf>.
86. The Undertakings required the formation of an Independent Oversight Group ("IOG").¹⁹ The IOG monitors Telecom's compliance with the Undertakings. In addition to the Commission's monitoring role, it is also responsible for the enforcement of the Undertakings.

Accounting separation of Telecom

87. The 2006 amendments to the Act introduced new information disclosure requirements which include the accounting separation of Telecom. It is a means by which Telecom's compliance with the Undertakings can be ascertained.
88. Under Part 2B, Telecom is required to prepare and disclose such information which the Commission requires as if any of its network, wholesale and retail activities were operated as independent or unrelated companies. This information will be publicly available and is designed to inform a wide audience about the operation and behaviour of Telecom's business activities.
89. Part 2B of the Act requires the Commission to implement information disclosure requirements for the accounting separation of Telecom. The Act grants the Commission discretion to determine what information Telecom will be required to provide and the methodologies to be used. This includes the discretion to request other forms of information such as cost information, asset valuations, non-financial information and information about certain other business activities.
90. The Commission is responsible for monitoring Telecom's compliance with the accounting separation requirements, and must publish summaries and analysis of the information disclosed by Telecom.

Telecommunications Service Obligations

91. Part 3 of the Act provides for Ministerial declarations of Telecommunications Service Obligations ("TSO"). The purpose of the TSO is to facilitate the supply of certain telecommunications services to groups of end-users within

¹⁹ <http://www.iog.org.nz/>

New Zealand to whom these services may not otherwise be supplied commercially or may not be affordable to such groups.

92. There are currently two TSOs:
- TSO Deed for Local Residential Telephone Service between the Crown and Telecom; and
 - TSO Deed for Telecommunications Relay Service for the hearing impaired between the Crown and Sprint International New Zealand.
93. The Commission administers the TSO deeds by annually:
- monitoring compliance of the service providers with their deeds;
 - determining the net cost faced by the service providers, or the agreed cost in the case of a specified amount of TSO;
 - determining the liable persons; and
 - apportioning this cost amongst the liable persons.
94. Part 3, Subpart 2 of the Act provides the annual procedure for determining amounts payable by liable persons.

Enforcement

95. The Commission has a number of remedies available for the enforcement of statutory and regulatory provisions under the Act. The Commission's enforcement powers are described in Part 4A of the Act, though some parts of the Act have additional Part-specific enforcement provisions.
96. In deciding to take enforcement action, the Commission considers a number of factors, including the seriousness of the alleged breach, the circumstances in which the alleged breach took place, and the nature and extent of the commercial gain resulting from the alleged breach.
97. There are two primary enforcement mechanisms available to the Commission under the Act: a civil infringement notice, and a petition to the High Court for a pecuniary penalty. These can lead to financial penalties of up to \$1 million, plus ongoing penalties of \$50,000 per day.
98. For a breach of the Undertakings, the penalty under the Act can be up to \$10 million and/or up to \$500,000 a day.

Sector Monitoring

99. The Commission has a statutory obligation to undertake "sector monitoring" of telecommunications markets. Under section 9A of the Act, the Commission:²⁰

²⁰ Commerce Commission, *Sector Monitoring and Information Dissemination Under Section 9A of the Telecommunications Act 2001*, available at <http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Guidelines/ContentFiles/Documents/Section%209A%20Guidelines%20October%202008.pdf>.

- must monitor competition and the performance and development of telecommunications markets;
 - may conduct inquiries, reviews and studies (including international benchmarking) into any matter relating to the telecommunications industry or the long-term benefit of end-users; and
 - must make available reports and information resulting from these activities.
100. The Commission is not required to release all documents it produces or acquires for its sector monitoring and information dissemination function. This allows the Commission to obtain some commercially sensitive information without having to publicly release it.

Other relevant legislation

101. The Commission is also the agency responsible for the Commerce Act 1986, which has the potential to impact on competition in telecommunications markets. In addition, while the Commission does not have an oversight role with respect to the Radiocommunications Act 1989 and the Resource Management Act 1991, each statute impacts significantly on telecommunications markets.

Commerce Act

102. The purpose of the Commerce Act is to promote competition in markets within New Zealand. It prohibits conduct that restricts competition. Part 2 of the Commerce Act applies to behaviour in the telecommunications sector, except where the Telecommunications Act excludes its application.²¹
103. Complaints to the Commission about behaviour in the telecommunications industry will be dealt with under the appropriate legislative instrument. Where applicable, the Commission may monitor the potential impact of the behaviour in the marketplace using section 9A of the Telecommunications Act (functions in relation to sector monitoring and information dissemination) to complement the Commerce Act regime.
104. The interrelationship between Part 2 of the Telecommunications Act and the Commerce Act is discussed in more detail in a paper published by the Commission in 2007: <http://www.comcom.govt.nz//Publications/ContentFiles/Documents/Telecommunications%20Discussion%20Paper.pdf>.

Radiocommunications Act

105. The Radiocommunications Act 1989 has an impact on the telecommunications industry. This legislation introduced privately-held, tradable management

²¹ See Telecommunications Act 2001, s 63.

rights to radio spectrum, while also continuing the system of administrative licensing that existed before 1989.

106. The Government's current practice is to allocate management rights and spectrum licences granted under a Crown-retained management right through auctions or tenders, except for frequencies reserved to meet specific public policy objectives. It is also currently inviting applications from interested parties to access a Managed Spectrum Park, a new and flexible concept in New Zealand that allocates a block of radio spectrum for shared use.
107. Regulatory functions with respect to spectrum are held by the Ministry of Economic Development. Under the Commerce Act, the Commission considers the impact of various parties' spectrum holdings on market competition.

Resource Management Act

108. The Resource Management Act ("RMA") has a material impact on competition in telecommunications markets. It has been a major concern for most telecommunications infrastructure providers, which describe plan preparation and consenting processes, including non-notified consents, under the RMA as slow and costly.
109. The Government is currently undertaking reforms of the RMA in an effort to simplify decision-making and streamline consent processes.

4 ECONOMIC PRINCIPLES

110. This chapter sets out economic principles that guide the Commission in making regulatory decisions that are consistent with its statutory obligation of promoting competition for the long-term benefit of end-users in New Zealand.
111. The consideration of the likely efficiencies is often an important part in considering whether an act or omission is likely to result in competition in telecommunication markets for the long-term benefit of end-users.

Competition and economic efficiency

112. The Commission's key economic principles stem from the three dimensions of economic efficiency:
- Allocative efficiency – where suppliers produce what consumers demand. The willingness and ability of suppliers to devote the correct amounts of resources to meet consumer demands will determine the degree of allocative efficiency achieved. Allocative efficiency is maximised where price is equal to marginal cost.
 - Productive efficiency – where suppliers are able to produce the desired goods and services at minimum cost. Productive efficiency involves using the least-cost combination of inputs and production techniques. In the telecommunications sector, it is particularly important for suppliers to choose appropriate technologies, and to adopt and exploit the rapid advances in that technology, in order to minimise costs.
 - Dynamic efficiency – where suppliers efficiently deploy resources between present and future uses such that the welfare of society is maximised over time. Dynamic efficiency incorporates efficiencies flowing from innovation leading to the development of new services or improvements in production techniques, and is based on the presence of appropriate incentives for investment.²²
113. Economic efficiency is generally enhanced in markets that are competitive. Firms that are subject to competitive pressures from other firms that are supplying the market, or from the threat of new entry, have an incentive to meet the demands of their customers (allocative efficiency), at minimum cost (productive efficiency), as they would otherwise lose market share to more responsive and efficient competitors. Such firms also face an incentive to

²² Australian Competition and Consumer Commission (ACCC), *Fixed Services Review — A Second Position Paper*, April 2007, page 74, available at [http://www.accc.gov.au/content/item.phtml?itemId=784802&nodeId=8241d42512e3eff76e447301d24d80c&fn=Fixed%20services%20review%E2%80%94a%20second%20position%20paper%20\(Apr%2007\).pdf](http://www.accc.gov.au/content/item.phtml?itemId=784802&nodeId=8241d42512e3eff76e447301d24d80c&fn=Fixed%20services%20review%E2%80%94a%20second%20position%20paper%20(Apr%2007).pdf).

invest and innovate over time, in order to achieve and maintain a competitive advantage over their rivals (dynamic efficiency).

114. In the absence of such competitive pressures, a supplier will have incentives to restrict output in order to increase prices and maximise profits. The resulting price will exceed the marginal cost of production, thereby providing an outcome that is allocatively inefficient (i.e., some consumers are not able to purchase the product or service even though they value it more than the marginal cost of production). In the absence of competitive incentives to minimise costs and innovate, firms will also face less pressure to be productively and dynamically efficient.²³ However, in the case of a natural monopoly, where very large economies of scale mean that it is more efficient to have a single supplier in a market, it may be productively more efficient than where that market is fragmented across multiple suppliers.
115. In telecommunications, the local loop network is sometimes regarded as exhibiting natural monopoly characteristics, at least in areas outside of the most densely populated or CBD areas. The substantial costs associated with digging trenches and laying cables through to end-user premises has meant that most premises are served by a single access line. As a result, it may be productively inefficient to duplicate this part of a telecommunications network.
116. In markets that are subject to monopoly market power or limited competition, end-users may suffer in the long term due to poor incentives for existing providers to operate efficiently, produce services valued by their customers, and invest in new and more efficient technologies. In such cases, it may be appropriate to consider whether economic regulation might result in workably competitive and efficient outcomes.
117. Workable competition is the standard often used by regulatory agencies to determine whether there might be a case for regulation. The basic characteristic of workable competition in the economic sense is that no one seller has an enduring ability to choose its level of profits by giving less and charging more.²⁴ Workable competition provides incentives for market participants to act in ways that are efficient, for a given level of service quality, while ensuring that efficiency gains are shared with consumers over time. In addition, firms are limited in their ability to earn excessive profits, but superior performances will be rewarded with profits above normal levels over the short to medium term.
118. Under workable competition, each existing competitor or new entrant has the opportunity to achieve an equal footing with the efficient participants in the market by having equivalent access to the means of entry, sources of supply, outlets for product, information, expertise and finance. This emphasises the

²³ This is sometimes referred to as “X-inefficiency”, where the absence of competitive pressures on a firm results in its total costs not being minimised.

²⁴ Commerce Commission, *Regulatory Provisions of the Commerce Act 1986*, Discussion Paper, 19 December 2008, pages 13-14, available at <http://www.comcom.govt.nz/IndustryRegulation/regulatoryprovisionsofthecommercea.aspx>.

importance of addressing any barriers to new entry and/or expansion by existing market participants.

119. There may be some trade-offs between the forms of efficiency discussed above. For example, allocative efficiency is maximised at the point where price is set equal to marginal cost. In the presence of fixed and common costs, a price that only covers marginal cost may be insufficient to elicit ongoing investment, and may therefore damage incentives for dynamic efficiency. Some implications of such trade-offs for regulation are discussed further below.

Long-term benefit of end-users: facilities-based and access-based competition

120. Facilities-based competition occurs when an entrant constructs a new network without the use of the incumbent's network. The new entrant can install more advanced and more efficient technology, which may cost less.
121. Access-based competition is where a competitor purchases a wholesale input from a network operator, and uses that input to supply downstream products and services.
122. The Commission considers that economically viable facilities-based competition is usually a more effective form of competition for the long-term benefit of end-users. This could create competitive pressure on the incumbent to upgrade its network and drive competition with minimal regulatory presence. It may introduce strong incentives for productive efficiency across the value chain, leading to greater pricing innovation and sustainable competition. As this form of competition takes a stronger foothold, access regulation may be lifted and focused on remaining bottlenecks.
123. One objective of an access-based regime is to prevent the inefficient duplication of networks. An entrant into a naturally monopolistic market would result in significant duplication of facilities, which could be productively inefficient. An access regime may therefore play an important role in ensuring that existing infrastructure is efficiently utilised. On the other hand, the Commission considers that an access regime needs to ensure that efficient network investment is not undermined.
124. A related concern that can arise for access-based competition relates to the potential for discrimination where the access provider is vertically integrated. Competitors may require access to part of a firm's network, in order for them to be able to compete with that firm in a related downstream market. In such cases, the incumbent access provider may set its access charges or its non-price terms to potential competitors in a manner intended to preclude those firms from entering or vigorously competing in the downstream market. For example, the access provider may set an internal charge for its downstream operation that is below the access price paid by competitors. Non-price discrimination could be achieved by imposing higher equipment standards on competitors or by providing services of lower quality or in a less timely manner.

125. In such cases, competition in the downstream market can be promoted by the regulator mandating access terms and requiring non-discrimination.²⁵
126. In promoting competition for the long-term benefit of end-users, the Commission considers the impact on and balances the interests of access providers, access seekers and end-users. From the perspective of the access provider, it will be important that the regulated access price allows for the recovery of efficiently-incurred long-run costs (i.e., including an appropriate risk-adjusted return on capital). For an access seeker, it is important for an access price to reflect an efficient build or buy decision. For end-users, regulation that promotes competition should deliver lower prices and increased quality and innovation.

Long-term benefit of end-users: the regulatory framework

127. Access-based regulation in telecommunications focuses on providing access at various levels, such as resale, wholesale unbundled bitstream access, and access to the local loop. Two-way wholesale interconnection services are also often subject to regulation, to ensure any-to-any connectivity between multiple networks on reasonable terms.
128. By addressing market power concerns at the wholesale upstream level, regulation can potentially promote competition in the relevant downstream markets. This is because the upstream markets may often be a bottleneck,²⁶ while the downstream markets are often potentially competitive. By promoting competition in the downstream markets, regulation may result in a range of positive benefits to end-users in the form of lower retail prices and greater range and quality of the final goods and services being delivered.
129. Although regulation is unable to fully replicate competitive market outcomes, the regulatory instruments provided for in the Act can, by promoting competition, provide incentives for improvements across the three dimensions of efficiency. In turn, competitive markets will contribute to the long-term benefit of consumers. However, as noted above, the Commission is mindful that there may be tensions between the various forms of economic efficiency, particularly where the relevant markets exhibit natural monopoly characteristics.
130. The telecommunications industry exhibits a number of characteristics that have important implications for the regulatory framework. In particular, the presence of significant fixed costs and common costs indicate that access prices based on the allocatively efficient standard of marginal cost may be insufficient to encourage ongoing investment which is critical in a capital-intensive industry such as telecommunications. In addition, the sunk nature of

²⁵ The Act currently contains a number of standard access principles, several of which relate to non-discrimination. Further regulatory interventions include forms of accounting and operational separation of the incumbent's activities.

²⁶ See paragraph 43.

many costs associated with a telecommunications network suggest that valuations based on opportunity cost may also be inappropriate.

131. The Commission notes that the regulated access pricing principles in the Act take account of these characteristics. For example, the use of Total Service Long-run Incremental Cost (“TSLRIC”)²⁷ as the basis on which to establish access prices for a number of key access services allows for the recovery of the efficiently-incurred costs of supplying the entire service, including an appropriate return on capital and return of capital, as well as a contribution to common costs.²⁸ In other words, a TSLRIC-based price is likely to exceed the allocatively-efficient price based on marginal cost.
132. For other regulated access services, the use of a “retail minus”²⁹ pricing principle will also ensure that the access provider can recover its costs of supplying access. Retail minus-based access prices may include any rents that are embedded in retail prices, and to that extent will exceed the cost of supplying the access service.
133. In setting wholesale prices that are based on the efficiently-incurred long-run costs of supplying access, the Commission considers that such regulated access is likely to best promote the three forms of economic efficiency referred to above. By enhancing competition in the downstream market, allocative efficiency is likely to be increased as prices more closely reflect the cost of supplying the downstream services. Cost-based wholesale inputs and enhanced downstream competition is also likely to improve productive efficiency.
134. In terms of dynamic efficiency, efficient investment in both the upstream market and downstream market should be encouraged. In the upstream market, incentives for efficient investment by both the access provider and potential competitors should be preserved as long as the access price allows for the recovery of efficiently-incurred costs, including an appropriate return on (and of) capital. In the downstream market, increased competition should result in greater investment by both the access provider and access-based competitors. The Commission considers it important to take account of the investment incentives facing all of these parties when exercising its judgement in determining the terms of access to regulated services.
135. The Commission has previously indicated that where a tension exists between short-term allocative efficiency and long-term dynamic efficiency, the Commission will give greater weight to the promotion of the latter.³⁰ The

²⁷ Similar cost terminology is used in other jurisdictions. In the US, the term Total Element Long-run Incremental Cost (“TELRIC”) is used. In Australia, the term “TSLRIC+” (where the “+” refers to a contribution to common costs) is equivalent to the definition of TSLRIC in the New Zealand Telecommunications Act.

²⁸ The Act’s definition of TSLRIC includes “a reasonable allocation of forward-looking common costs.” See Schedule 1, Part 1, Subpart 1.

²⁹ The initial pricing principle for a number of designated access services is based on a retail minus principle, where the access price is set as the retail price of the service, less a benchmarked discount.

³⁰ Commerce Commission, *A Guide to the Role of the Commerce Commission in making Access Determinations under the Telecommunications Act*, 28 May 2002, paragraph 68.

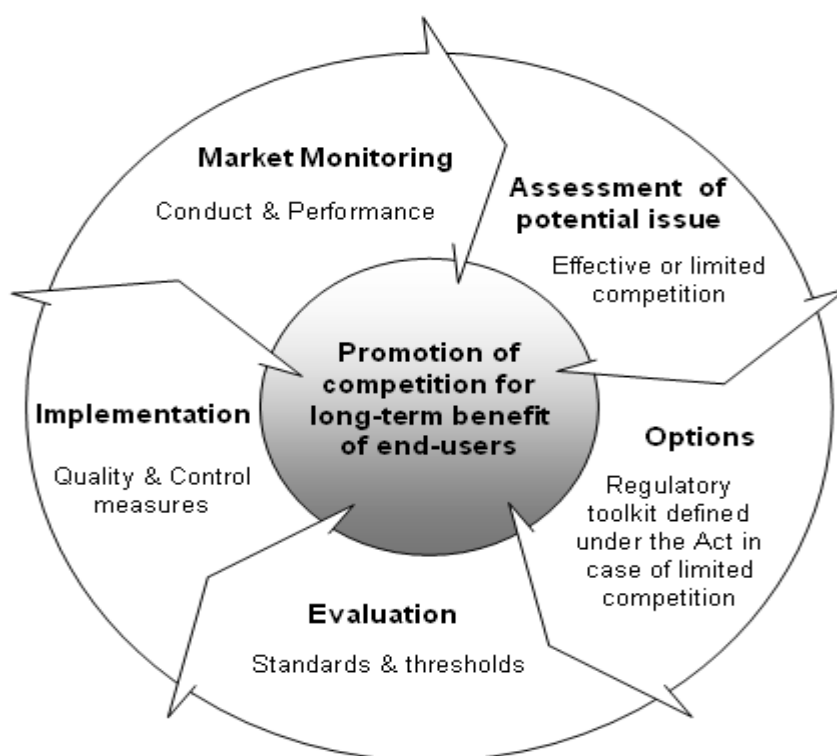
Commission considers that this approach remains appropriate. Ongoing innovation and efficient investment over time can deliver significant long-term benefits to end-users, and the adverse consequences of deterring or delaying such investment may be substantial.

136. In evaluating the potential impact of regulation on dynamic efficiency, a number of factors are likely to be relevant. First, in the upstream market in which the regulated service is supplied, the investment incentives of the access provider should be preserved where the recovery of efficiently-incurred costs is allowed. Second, to the extent that regulation promotes competition, the incentives to continue investing may be strengthened. Finally, as noted above, the Commission takes into account the incentives for efficient investment by both access providers and access seekers.
137. The Commission will continue to take into account such factors when exercising its judgement in relation to the implementation of the regulatory framework for telecommunications in New Zealand.

5 DECISION MAKING

138. The telecommunications regulatory environment is characterised by “shifting bottlenecks” due to the dynamic nature of telecommunications technologies. This makes regulatory decision making an evolving process in which regulatory settings are reviewed to ensure that they remain appropriate and proportionate. This process is summarised in Figure 1, and could involve actions that could lead to new regulation or the alteration or removal of existing regulation (deregulation) in particular market segments.
139. The objective of regulation is to produce outcomes that are consistent with a workably competitive market. This can be achieved either through direct regulatory intervention such as where the Commission sets the terms of access, or through incentivising parties to reach the kind of commercial agreements which would be expected in a competitive market, avoiding the costs of the regulatory process and accelerating the delivery of benefits to end-users.

Figure 1: The Regulatory Process³¹



140. An important part of such a process is an effective monitoring strategy to ensure that relevant information is collected, for example, on the development of competition and the effectiveness of existing regulatory interventions.

³¹ This diagram is derived from the ROAMEF cycle (Rational – Objectives – Appraisal – Monitoring [Implementation] – Evaluation – Feedback) adopted by HM Treasury, U.K.

141. Based on the Commission’s monitoring, it may be appropriate to investigate in greater detail the effectiveness of competition in particular markets, and whether new regulation is required or existing regulation can be amended or removed.
142. The Commission is also required to implement existing regulatory functions, such as the preparation of Standard Terms Determinations (“STDs”) and TSO determinations.
143. This chapter discusses the relevant considerations and factors that the Commission takes into account in making decisions, including its exercise of discretion at various stages of the regulatory process.
144. The legislative framework and economic principles discussed in Chapters 3 and 4 inform and influence decision making by the Commission for the telecommunications sector.

Monitoring

145. The Commission has been increasing its focus on monitoring and assessing new market developments, in light of emerging technologies and the changes in consumer demand and behaviour that this may bring. Continuous monitoring by the Commission can be an effective tool that provides incentives for market participants to behave in a manner that is consistent with a competitive market. It enables the Commission to make timely and informed decisions and keep the public and industry informed of developments in the telecommunications sector.
146. The Commission uses monitoring information to help evaluate:
 - the extent to which competition is improving in the market segments that have been regulated and how this is impacting those markets;
 - the effectiveness of the regulatory tools provided for under the Act to promote competition;
 - how unregulated segments of the telecommunications market are evolving and whether there are signs of any distortions to competition;
 - whether certain markets are effectively competitive and whether there is a need for deregulation; and
 - historical and current market trends which could potentially inform the Commission’s future work streams.
147. The Commission currently produces a quarterly monitoring report,³² a quarterly broadband monitoring report,³³ an annual market monitoring

³² This report provides statistics on broadband connections, OECD benchmarking rankings, Telecom average prices, publicly announced price changes, notable market developments, and comments on anticipated developments that have not transpired.

³³ This report examines the quality of broadband services provided by New Zealand internet service providers.

report,³⁴ and special topic reports.³⁵ These reports are available on the Commission website, <http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/MonitoringandReporting/DecisionsList.aspx>.

148. These reports, while keeping the public informed, also provide a venue for the Commission to articulate its assessment of and views on relevant issues, and be a significant contributor to national discussions on competition and regulation in telecommunications markets.
149. The Commission is considering how it can further make its monitoring reports more relevant and useful to market participants and other stakeholders. It aims to align these reports with its strategic focus on mobile services markets, fixed services (including voice and broadband) and industry investment.

Reasonable grounds for investigation

150. Grounds for proposed alterations to regulated services in the Act may be brought to the Commission's attention by industry participants and other stakeholders or through its monitoring activities (e.g., prices for particular services are above cost, as benchmarked internationally, or there had been significant developments that could have an impact on market competition).
151. The decision to commence any Schedule 3 investigation is at the discretion of the Commission. The Commission will use available information in making an independent judgement, including its accumulated knowledge and experience from making determinations since the Act was implemented. Its increasing focus on market monitoring and proactive engagement with stakeholders will provide useful market information and insights that would assist in making a judgement.
152. The Commission has a preference for commercial solutions. It will consider reasonable grounds for a Schedule 3 investigation on a case-by-case basis, and will generally seek to test a potential issue with stakeholders before deciding whether reasonable grounds exist.

Competition assessment

153. The assessment of whether or not amending regulation best gives effect to the promotion of competition for the long-term benefit of end-users can be broken down into a number of stages. In coming to a recommendation, the Commerce Commission will generally:

³⁴ This report contains a more comprehensive set of statistics, and commentary and analysis of New Zealand's telecommunications markets. It includes analysis of price indices, price surveys, average prices, consumption patterns, quality of service, market shares, industry investment, international benchmarks and any industry developments.

³⁵ These are one-off reports that contain detailed data on particular topics of interest, and are driven by particular circumstances such as Commission priorities, and concerns arising from regular monitoring reports and from public interest (for example, studies on the behaviour and consumption patterns of consumers).

- identify the relevant telecommunications markets;
 - assess whether competition is limited in the relevant market or markets; and
 - if competition is found to be limited, undertake an assessment of the potential impact of regulation on competition and the long-term benefit of end users.
154. The Commission is also required to define markets and assess competition as part of a number of existing regulated access services. For example, a number of the regulated resale services contain a condition relating to whether Telecom faces limited, or is likely to face lessened, competition in a market. In these cases, the form of the regulated pricing principle depends on the competition assessment.

Market definition

155. The purpose of defining a market is to provide a framework within which competition can be assessed. The Commission can use such a framework to consider whether regulation is likely to promote competition, compared to what would occur in the absence of such regulation.
156. The Commission's Mergers and Acquisitions Guidelines sets out its approach to market definition:

For competition purposes, a market is defined to include all those suppliers, and all those buyers, between whom there is close competition, and to exclude all other suppliers and buyers. The focus is upon those goods or services that are close substitutes in the eyes of buyers, and upon those suppliers who produce, or could easily switch to produce, those goods or services. Within that broad approach, the Commission defines relevant markets in a way that best assists the analysis of the competitive impact...bearing in mind the need for a commonsense, pragmatic approach to market definition.³⁶

157. The Commission usually considers markets to have five dimensions:³⁷
- the goods or services supplied or purchased (product dimension);
 - the geographic area from which the goods or services are obtained, or within which the goods or services are supplied (geographic dimension);
 - the level in the production or distribution chain (functional dimension);
 - the timeframe or timing within which the market operates, where relevant (temporal dimension); and
 - the different customer types within a market, where relevant (customer dimension).
158. The Commission retains the discretion to determine which dimensions are of particular relevance to the market being analysed.

³⁶ Commerce Commission, *Mergers and Acquisition Guidelines*, page 14, available at <http://www.comcom.govt.nz/Publications/ContentFiles/Documents/MergersandAcquisitionsGuidelines.PDF>

³⁷ Ibid.

159. An appropriately defined market includes products which are regarded by buyers as being similar or close substitutes and in close proximity and are thus products to which they could switch if a monopolist were to attempt to exert market power.³⁸ It also includes those suppliers currently in production who are likely, in that event, to shift promptly to offer a suitable alternative product even though they do not currently do so.
160. In considering whether regulation of a service is likely to promote competition for the long-term benefit of end users, the relevant markets will typically include the market in which the service is directly supplied, as well as the relevant downstream markets in which the service is used to deliver retail services to end-users.
161. The Commission usually adopts the above approach as appropriate for telecommunications regulation. Its Mergers and Acquisition Guidelines are available at <http://www.comcom.govt.nz//Publications/ContentFiles/Documents/MergersandAcquisitionsGuidelines.PDF>.

Limited competition

162. Assessing the degree of competition in the relevant markets involves looking at particular indicators of competition and market development.
163. The Commission considers the following factors to be generally relevant in assessing whether competition is limited in a relevant market:³⁹

Existing competition

- the number and relative size of competitors in the market, including where possible, an assessment of trends in shares over time;
- the extent to which there is product differentiation;
- the degree to which competitors engage in independent rivalry;
- the degree of vertical integration;
- the absence of barriers to customer switching;
- the movement in prices over time, and any evidence of their broad relationship to underlying costs; and
- evidence that the access provider is acting inefficiently or achieving excess returns.

³⁸ One approach to identifying the relevant market is the hypothetical monopolist test. This asks whether a hypothetical monopolist of a particular product, or group of products, could increase profits by imposing a small but significant and non-transitory increase in price (*ssnip*) above the competitive level. For the purposes of determining relevant markets, the Commission will generally consider a *ssnip* to involve a five or ten percent increase in price for a period of one year. Starting from a small initial group of close substitutes, other potential substitutes are added to the group until the hypothetical monopolist of those products is able to profitably impose a *ssnip*. When this occurs, then all the potential substitutes included so far are encompassed by the proposed market definition.

³⁹ Decision 497, pages 72-73, available at <http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/Wholesale/WholesaleDeterminations/ContentFiles/Documents/tclwd12may2003.PDF>.

Potential competition

- the potential for entry and the significance of any barriers to entry and expansion that may exist, and evidence of recent entry and/or expansion;
- the movement in prices over time, and any evidence of their broad relationship to underlying costs; and
- evidence that the access provider is acting inefficiently or achieving excess returns.

Other competition factors

- the existence of any countervailing power; and
- the constraints imposed by the regulatory environment.

164. The competition assessment is usually both current and forward-looking.
165. The Commission takes account of the experience of other jurisdictions where the same service has been subject to regulation or the threat of regulation. It may conduct benchmarking exercises in respect of similar jurisdictions to inform its assessment, including the alignment between price and cost in the markets being examined.
166. If competition is not limited in the relevant market, intervention is unlikely to promote competition further and could impose costs without commensurate benefits. Conversely, if competition is not effective or workable, it is possible that appropriate regulation could promote competition, but this must be subject to an overall assessment of the net costs and benefits of regulatory action.

Assessing potential impact of regulation

167. In considering the potential impact of regulation, the Commission takes into account quantitative and qualitative assessments of the extent to which regulation is likely to promote competition. The Commission recognises that quantitative analysis is useful, particularly to the extent that it focuses on key assumptions regarding characteristics of the market, the way in which market participants are likely to act with and without regulation, and the tangible benefits it may have for end-users. However, the Commission also acknowledges the limitations of quantifying some of the potential effects of regulation.
168. The Commission will weigh expected costs and benefits – whether the cost of achieving the difference in competition would be outweighed by the benefits delivered. It will have regard to all relevant matters, on balance, in determining whether regulation is likely to promote competition in the long run.

Counterfactual and factual scenarios

169. The Commission's approach to assessing the likely impact of regulation is based on a comparison of:
- relevant counterfactual scenarios, which represent the Commission's view on what is likely to happen in the absence of regulation; and
 - a factual scenario, where regulation is implemented.
170. It may be appropriate to compare the factual with more than one counterfactual scenario, for example, where regulation relates to a service that is supplied by several potential access providers, or where there are a number of alternative scenarios, each of which are considered to be a real possibility.⁴⁰ In such cases, the Commission's approach has been to compare regulation against each of the relevant counterfactual scenarios.
171. In comparing a regulatory factual scenario with relevant counterfactual scenarios, the Commission takes into account both qualitative and quantitative analyses of whether the proposed regulation will promote competition for the long-term benefit of end-users.
172. Appropriate counterfactual scenarios form hypothetical yardsticks against which changes arising from the proposed regulation can be measured. The most likely counterfactual may be a continuation of the status quo, but encompassing the existing regulatory regime, maintaining its current level of effectiveness, and the constraint from the threat of regulation being as efficient as it is now. The investigations themselves may have some impact on the future environment, and may take into consideration likely market trends.
173. The factual scenario represents the Commission's view of what is likely to happen where regulation is introduced. The Commission bases its view of a suitable factual on an assessment of what is likely to occur as a result of any regulatory amendments, following the investigation. In addition, it is necessary to consider what impact the amended regulation would have in promoting new entry, and the effect of any such new entry, among others, on the level of prices, service range and quality, and innovation in the market in which the services are supplied to end-users.⁴¹
174. The Commission must form a view as to the likely price of the service that would be set under the factual scenario. As discussed below, it generally uses a benchmarking exercise to estimate the factual price.

⁴⁰ See *Woolworths v Commerce Commission* (29 November 2007), paragraph 122.

⁴¹ <http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobileTerminationRates/ContentFiles/Documents/Mobile%20Termination%20Reconsideration%20Final%20Report%2021%20April%202006%20.pdf>, page 69.

Benefits and costs of regulation

175. The Commission assesses the potential impact of regulation by considering whether the proposed regulation is likely to promote competition in a relevant market, for example, by removing or reducing barriers to entry or expansion.
176. In considering whether regulation will promote competition for the long-term benefit of end-users, the Commission has regard to the likely impact of regulation in the relevant downstream markets in which services are supplied to end-users. In the absence of competitive pressures operating in the upstream market (for example, in supplying local loop access or interconnection services), regulation attempts to mimic or proxy competitive supply in that market, such that downstream competition is intensified and long-term benefits to end-users are realised, in the form of lower retail prices, increased quality and choice, and greater levels of innovation and responsiveness to the demands of consumers.
177. In attempting to replicate competitive outcomes, the Commission considers that it is appropriate to place significant weight on the resulting gains in ‘consumer surplus’.⁴² In the absence of a competitive market, suppliers are likely to exercise significant market power that enables suppliers to capture surplus gains that would otherwise be passed on to end-users. In assessing the long-term benefits to end-users, the Commission includes the price effects from the proposed regulatory change that result directly from the promotion of competition.
178. The potential benefits of regulation relate to reducing any inefficiency and/or excess returns in a market. The threshold test for regulatory intervention requires the Commission to reach a view that competitive forces are not operating fully in the relevant market, so that it is unlikely that the interplay of competitive forces will by themselves eradicate any monopoly profits. To the extent that regulation increases existing competition or facilitates efficient new entry in the upstream and/or downstream market, such regulation is likely to promote competition for the long-term benefit of end-users.
179. The impact of entry may be evaluated by its potential impact on prices, quality, and the range of goods or services being delivered. While it may be difficult to anticipate the precise impact of new entry, the Commission notes that new entrants on a sufficient scale can have a disproportionate impact on the retail market, both in terms of the entrant attempting to attract subscribers and build up scale, as well as any competitive response from the established competitors. Evidence of the impact of new entrants in other markets or jurisdictions may be useful in this regard.
180. The potential costs of regulation are also taken into account by the Commission. These may include the direct costs associated with the regulatory processes (such as determining a regulated price for a designated

⁴² Consumer surplus is an economic measure of the satisfaction (or “utility”) that consumers receive for which they do not have to pay for. It is the difference between what consumers are willing to pay for a product or service and its current market price.

access service), as well as potentially detrimental indirect effects of regulation. Alternatives to regulation (such as undertakings, which are discussed further below) may also be able to bring forward benefits to end-users, compared to the outcomes of a regulatory determination process.

181. In considering whether a regulatory act or intervention will promote competition for the long-term benefit of end-users, the Commission considers the efficiencies that will likely result from that act or intervention. As discussed in Chapter 4, efficiencies may be either static or dynamic in nature. Static efficiencies (allocative and productive) refer to the way in which goods or services are consumed and produced at a point in time, whereas dynamic efficiency refers to how well the market ultimately responds to the demands of end-users over time by changes to what is produced and how it is produced.
182. To the extent that regulation promotes competition, such regulation is also likely to increase efficiencies. However, where a tension arises between the different forms of efficiency, and given the importance of investment in the telecommunications industry, the Commission is likely to give more weight to dynamic efficiency, which is more likely to benefit end-users in the longer term, over static efficiency.
183. Dynamic efficiency generally requires investment, but there is no direct relationship between investment in one period and the level of dynamic efficiency in the next. In order for resources used to create innovation to produce dynamically efficient gains, it has to add directly or indirectly to end-users' welfare.
184. Given the highly dynamic nature of telecommunications technologies, where the costs of acts or omissions that slow innovation are potentially large, and the complex interactions between activities in the sector, considerations may also include network complementarities and externalities, opportunities for leverage, and infrastructure revenue recovery.

Other efficiency considerations

185. The concept of efficiency also arises elsewhere in the Act. For example, the Commission is required to determine the annual net cost of providing the Telecommunications Service Obligations (TSO), and the Act defines the net cost of the TSO with reference to the costs of an efficient service provider. The Commission's modelling of the net cost of the TSO is based on efficient costs, while the allocation of the net cost across liable persons is designed to minimise the distortionary impact of the TSO charge.⁴³
186. The cost-based pricing principles for designated access services refer to the Total Service Long-Run Incremental Cost ("TSLRIC") of supplying the service. TSLRIC is defined in the Act as being the forward-looking long-run costs that are directly attributable (or incremental) to the service. The use of

⁴³ See for example, Commerce Commission *Determination for TSO Instrument for Local Residential Service for period between 20 December 2001 and 30 June 2002I, 17 December 2003*, paragraphs 490 to 513.

forward-looking costs is typically regarded as being efficiently-incurred costs.⁴⁴

Undertakings

187. For the Commission to be able to recommend that the Minister accept undertakings, they would have to deliver comparable benefits to end-users over the assessment period, taking into account quantitative and qualitative factors. The Commission will take into account the advantages offered by any undertaking, including the potential delivery of outcomes similar to those available under regulation, the avoidance of direct costs of regulation and the regulatory process, timing advantages, and certainty for markets. In particular, an undertaking is capable of providing for the earlier delivery of benefits to end-users.
188. This mechanism is intended to be quick and efficient, and is not designed to unduly delay a Schedule 3 investigation. The Commission has the discretion to set the timeframe for any undertakings process, and will do so in a transparent, consistent and timely manner. It will consult with relevant stakeholders in an open and fair manner with respect to any undertakings.

Access determinations

189. The Act enables the Commission to make a determination on how a designated or specified service must be supplied with reference to all access seekers and providers of the service (standard terms determination or “STD”). An STD contains sufficient terms to allow an access provider to make the services which are the subject of the STD available to access seekers without the need for the access seekers to enter into an agreement with the access provider.
190. In reaching a view in any determination, the Commission is required to make the recommendation that best gives, or is likely to best give, effect to the purpose set out in section 18 of the Act, which is the promotion of competition for the long-term benefit of end-users.⁴⁵
191. In determining the non-price terms of an STD, the Commission will generally have high regard to the recommendations of the Telecommunications Carriers’ Forum (“TCF”), but will make changes to unanimously-agreed TCF recommendations that have been included in a Standard Terms Proposal (“STP”) if the Commission considers that doing so best gives effect to section 18 of the Act.
192. The Commission will consult with relevant stakeholders with respect to any determination in an open, fair and expeditious manner. It generally engages with the TCF on operational and technical matters. Any TCF proposal will be assessed in accordance with the objectives of the Act.

⁴⁴ For example, in defining ‘forward-looking common costs’, the Act refers to efficiently incurred costs.

⁴⁵ See Telecommunications Act 2001, s 19.

Access principles

193. Schedule 1 of the Act provides for standard access principles for designated and specified services. These include:
- the timely provision of services;
 - provision of standards consistent with international best practice;
 - provision of terms and conditions (excluding price) that are consistent with those terms and conditions on which the access provider provides the services to itself; and
 - provision of information about a designated or specified service at the same level of detail and within the same time that the access provider would provide that information had it been requested by one of its own business units.
194. There are specified limits to the application of these principles under Schedule 1. These include factors such as reasonable technical and operational practicability, network security and safety, existing legal duties, inability or likely inability of the access seeker to comply with any reasonable conditions, and any request for a lesser standard of service from an access seeker.
195. The Commission generally considers it appropriate for the standard access principles and the limits on those principles to be ‘built into’ the terms of any STD. The Commission will assess the terms of an STD to ensure that those terms are consistent with the standard access principles.

Pricing principles

196. For designated services, the Commission is required to determine the price terms of access for the service, as well as the non-price terms.
197. The Initial Pricing Principle (“IPP”)⁴⁶ provides the mechanism by which the price is to be initially determined. The IPP is used to set a benchmarked price that acts as a proxy for an efficient price for the service, and is designed to be applied relatively quickly by the Commission.
198. The Commission seeks to apply the plain and ordinary meaning of the IPP within the wider context of section 18 of the Act to its determinations. It is able to give effect to the IPP in a manner that promotes competition for the long-term benefit of end-users.
199. In meeting this obligation, the Commission is required to consider the range of efficiencies discussed in Chapter 4 (productive, allocative and dynamic efficiencies). In practical terms, in order to best meet section 18 of the Act, the Commission must select the option that it considers to most effectively balance incentives for provision of the service and take-up of the service by access seekers. While the former factor ensures that the service will be provided where it is efficient to do so, access seeker take-up enables greater

⁴⁶ See Telecommunications Act 2001, Schedule 1.

price and non-price competition at the retail level. Fundamental to reaching this balance is that the regulated price reflects or provides a reasonable proxy for the efficient costs of providing the service.

200. The Act provides for the Final Pricing Principle (“FPP”) for designated access services, which would be applied in the event that parties request the Commission to undertake a pricing review. In such cases, the Commission would be required to undertake a more detailed examination of the likely costs of supplying the access service, for example, by developing a cost model for the service.

Benchmarking

201. Benchmarking forms part of the Commission’s monitoring and market assessment activities, and informs its other work such as Schedule 3 investigations and setting prices for regulated services.
202. The purpose of benchmarking is to simulate the efficient outcomes of a competitive market, by providing a cost-based ‘yardstick’. Where regulation is being considered (as in the case of a Schedule 3 investigation) or is being implemented (as in the case of an STD), the absence of effective competition in the supply of an access service reduces the incentives for an incumbent to supply the service, or to supply the service at minimum cost. Benchmarking provides such an incumbent with an incentive to reduce its costs. Provided that cost differentials between firms can be appropriately identified and accounted for (such as network size, technologies, the customer mix, population density and terrain), benchmarking can induce efficient outcomes, and can reduce information asymmetries in a relatively timely and simple manner.
203. In the context of an STD or an investigation under Schedule 3 of the Act, benchmarking establishes a reasonable approximation of the cost of supplying the regulated service in New Zealand, without having to resort to the development of a cost model. This exercise establishes a price by identifying cost-based prices for similar services in other jurisdictions, taking into account any identifiable differences in conditions that are likely to influence the cost of the service.
204. For an STD, the Commission is generally required to use benchmarking to determine an initial price for the regulated service. The initial pricing principles for designated access services refer either to benchmarking against cost-based prices, or in the case of retail minus pricing, to benchmarking the avoided costs discount.
205. Where benchmarking is being used to establish a cost-based price under the IPP, the Commission’s benchmarking exercise is usually required to be undertaken according to the following IPP:⁴⁷

⁴⁷ See Telecommunications Act 2001, Schedule 1.

“Benchmarking against prices for similar services in comparable countries that use a forward-looking cost-based pricing method.”

206. In a Schedule 3 investigation, the Commission may use a similar benchmarking exercise to establish the likely regulated price of the service for which regulation is being considered.
207. The benchmarking exercise needs to have regard to whether the overseas services whose prices are being compared are similar to the service being considered for regulation.
208. Comparability is also important where conditions or factors that are likely to influence the cost of supplying the service vary across jurisdictions. To the extent that relevant cost drivers can be easily identified, benchmarking should consider adjusting for such cost differentials, in order to ensure that the benchmarked prices reflect the conditions in which the service is being supplied in New Zealand. In considering such adjustments, the Commission will take into account the range of such cost drivers for which adjustments to the benchmarks might be made, and bearing in mind the objective of a benchmarking exercise to set a price in a relatively timely manner.
209. Furthermore, the benchmarking exercise has to ensure that prices in the benchmarked jurisdictions have been determined in a way that is consistent with the regulation in New Zealand. This generally involves the use of a forward-looking cost-based pricing methodology.⁴⁸ If benchmarked rates are inflated above the cost of supplying the service in other jurisdictions, the results are unlikely to be informative as to the likely cost of supplying a similar service in New Zealand.
210. Each of the above issues is an important component of a robust benchmarking exercise. The way in which the Commission takes account of these issues may vary, depending on a number of factors, such as the availability of information in other jurisdictions, and the importance of pricing consistency between different access products. As a result, the Commission applies the above principles on a case-by-case basis.
211. Recent examples of determinations in which the Commission has made extensive use of price benchmarking include the following:
 - the Unbundled Copper Local Loop (UCLL) STD: the UCLL service is a relatively standard service across jurisdictions. To identify comparable countries, the Commission considered a range of factors that were likely to influence the costs of supplying the UCLL service, and selected overseas jurisdictions that exhibited similar characteristics to New

⁴⁸ In the case of a retail minus pricing methodology, the benchmarked discount in the Act refers to retail minus “avoided costs saved” pricing.

Zealand. The Commission also excluded countries that did not apply a forward-looking cost-based pricing method to the UCLL service;⁴⁹

- the UCLL Backhaul STD: the Commission found considerable variation in the definition of backhaul services in other countries, resulting in a relatively small number of jurisdictions with forward-looking cost-based backhaul services. The Commission assessed comparability using a regression-based approach, which estimated the relationship between cost drivers and cost-based backhaul prices;⁵⁰
- the Sub-loop STD: for the Sub-loop UCLL service, the Commission benchmarked the ratio of the sub-loop UCLL price and the full UCLL price, in order to ensure consistency between the two services. For co-location, the lack of benchmarks resulted in the Commission using actual cabinet costs, and setting a price based on the allocation methodology observed in several overseas jurisdictions. For the backhaul service, a combination of benchmarking and actual costs was used. The Commission considers that the use of actual cost information may be the best approach in cases where relevant benchmarking information is not available.⁵¹

212. While there has been some variation in the application of benchmarking in these examples, in each case the Commission has considered the similarity of the services, the comparability of the overseas countries, and whether the benchmarked prices are cost-based. Each of these are potentially important elements in benchmarking, which the Commission is required to take account of when setting a cost-based price under the IPP.

Other considerations

213. The Commission is entitled to consider other factors beyond efficiencies that are relevant to the manner and extent to which a decision will likely promote competition. The quantification of efficiencies is a matter of judgement, but the assessment of efficiencies might not result in quantifiable efficiency gains of such magnitude as to result in a net public benefit. If the value of the quantitative cost-benefit analysis is negative, the Commission still has the discretion to act, for example, if qualitative factors are deemed to be sufficiently important.

214. The Commission also examines technical and practical considerations before making an assessment of net costs and benefits, which may include the

⁴⁹ Commerce Commission Decision 609, available at: http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/StandardTermsDeterminations/UnbundledLocalLoopService/ContentFiles/Documents/UCLL%20Dec%20609%20625260_3.pdf.

⁵⁰ Commerce Commission Decision 626, available at: <http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/StandardTermsDeterminations/UnbundledLocalLoopBackhaulService/ContentFiles/Documents/UCLL%20Backhaul%20STD%20-%20Public%20Version.pdf>.

⁵¹ Commerce Commission Decision 672, available at: <http://www.comcom.govt.nz//IndustryRegulation/Telecommunications/StandardTermsDeterminations/SubloopUCLLservice/ContentFiles/Documents/Sub-loop%20Services%20STD%20-%20Decision%20Report%20-%20PUBLIC%20VERSION.pdf>.

technical feasibility of supplying and charging for particular services given the current state of technology.

215. A number of regulatory costs and risks need to be factored into an overall assessment of the costs and benefits of regulation. Considerations include:
- whether there is demand for the service for which regulation is being considered;
 - the likelihood of the service being provided at a reasonable cost without regulation;
 - whether regulation will lead to a distortion of investment decisions and stranded asset;
 - consideration of the most efficient pricing principles⁵²; and
 - administrative and related costs of the regulatory process, including Commission costs and submission costs to relevant parties. The Commission takes into account proportionality and cost-effectiveness arguments in deciding whether or not to commence an investigation of significant administrative cost.

Review considerations

216. The Commission has to be satisfied that there are reasonable grounds for commencing an investigation whether a regulated (designated or specified) service should be altered or omitted from Schedule 1. The grounds relate to the promotion of competition for the long-term benefit of end-users.
217. In the course of reviewing designated and specified services, the Commission will adopt regulatory mechanisms that promote efficiency, innovation and investment.
218. Schedule 1 of the Act contains service descriptions for all regulated services, with a number of services having “conditions” upon them. These conditions act as competition thresholds, whereby the Commission must determine the terms of access to any service that falls within the service description, where it is satisfied that Telecom faces limited, or is likely to face lessened competition, in a market for that service.
219. In assessing whether a designated access service should remain subject to regulation, the Commission will have regard to various factors, including but not necessarily limited to:
- the availability to and take-up by access seekers of alternative access services
 - the extent to which alternative network infrastructure has emerged and is delivering competitive outcomes to consumers;
 - the level of direct demand for the designated service in question; and

⁵² Commerce Commission. *A Guide to the Role of the Commerce Commission in Making Access Determinations under the Telecommunications Act*, 28 May 2002.

- whether the availability of the designated service has influenced commercial provision of access services.
220. The Commission will assess whether the level of competition in the relevant market(s) is sufficient, such that an extension of the period of regulation would not provide any benefit. It will also consider whether benefits to end-users would only continue if the period of regulation is extended.
221. A finding of limited competition in the relevant market (in the absence of regulation) or the presence of other factors suggestive of competition concerns in the industry means that there may be ongoing benefits arising from the availability of the regulated service.
222. The Commission also has the discretion to require regulated access to a service where a provider does not face limited competition. It would only require such access if it is satisfied of significant long-term benefits for end-users of requiring such wholesale provision.
223. If access to a regulated service is not a source of concern to actual or prospective access seekers or access providers and/or satisfactory commercial solutions are in place between industry participants, the Commission may consider the rollback or removal of unnecessary regulation. The Commission encourages commercial outcomes to the extent possible, while providing a regulatory backstop where such negotiation is unlikely to result in access being provided on reasonable terms.
224. As the telecommunications markets continue to change, the Commission will consider whether there are opportunities to consider and review existing regulations, including potential deregulation (possibly, upon request or at regular periods), taking into account the requirements in the Act for this process. One way by which the Commission will be informed on developments in market competition is through its continuing monitoring activities.
225. With respect to the operational separation of Telecom, the Commission takes a pragmatic approach to its role under the Act. This is achieved by continuing to work with Telecom and the Independent Oversight Group (“IOG”) to maintain meaningful oversight over the Undertakings, while continuing to:
- react to issues raised on a case-by-case basis (for example, writing to Telecom on potential and actual breaches);
 - remain responsive to the wide range of information that must be delivered by Telecom and the IOG to the Commission under the Undertakings;
 - deal with received industry complaints directly; and
 - decide to take enforcement action, where necessary.
226. The Commission will continually review accounting separation requirements on a forward-looking basis and consider their impact on the Commission’s other processes.

Commercial agreements and industry decisions

227. Section 22 of the Act requires access seekers to make reasonable attempts to achieve commercial arrangements with access providers before turning to the Commission for a determination on designated or specified services. In deciding whether or not to make a determination, the Commission must have regard to whether the applicant for determination has made a reasonable attempt to negotiate the matter with the other party.
228. Where there is insufficient information provided to enable the Commission to assess whether or not reasonable attempts have been made to negotiate, the Commission will decline the application.
229. The development of industry codes is another way by which commercial outcomes are reached. Schedule 2 of the Act provides that the industry forum (TCF) may on its own initiative, or if invited to do so by the Commission, prepare one or more telecommunications access codes for approval by the Commission.
230. A draft code for one or more designated or specified services must be consistent with the promotion of competition for the long-term benefit of end-users and comply with the Commerce Act.⁵³
231. Since its establishment in 2002, the TCF has developed the following industry codes, among others: Co-siting Code, Customer Complaints Code, Customer Transfer Code, Disconnection Code, Mobile Content Code, Premium Messaging Services Code, and Code on the Authorised Use of Mobile Phones.

Reviewing the regulatory framework over time

232. The Commission will continue to review the appropriateness of legacy models of regulation. It will take into account market developments due to technological progress and their likely impact on competition in the long run. This may involve the removal of legacy regulation if effective competition emerges, or intervention where market failure exists.
233. The Commission's focus will likely shift from setting terms and conditions for regulated services towards monitoring the impact of recent interventions and assessing new market developments as new technologies emerge.
234. Overall, and in line with its *Statement of Intent 2009-2012*,⁵⁴ the Commission will maintain its focus on responsive and flexible regulation. The Commission will adopt forward-looking perspectives that encourage investment and innovation in the sector, giving consideration to dynamic efficiency aspects where competition is to be promoted, and taking into account investment incentives for all operators.

⁵³ See Telecommunications Act 2001, Schedule 2, clause 2.

⁵⁴ <http://www.comcom.govt.nz/Publications/ContentFiles/Documents/SoI%202009-12.pdf>.

235. The Commission will target communication with key stakeholders, engage with industry early and proactively, and consult with relevant stakeholders in an open and fair manner. The Commission also encourages engagement from parties on matters of significance to telecommunications market competition and regulation, including the satisfactory commercial resolution of disputes.

6 SUBMISSIONS

236. The Commission seeks feedback from stakeholders and interested parties on the principles and relevant issues discussed in this document.
237. Submissions should be made no later than 18 September 2009, 5.00pm.
238. To foster an informed and transparent process, the Commission intends to publish all submissions on its website. Accordingly, the Commission requests that all submissions be provided in electronic form. Submissions or any enquiries should be addressed to:

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Confidentiality

239. The Commission discourages requests for non-disclosure of submissions, in whole or in part, as it is desirable to test all information in a fully public way. It is unlikely to agree to any requests that submissions in their entirety remain confidential. However, the Commission recognises there will be cases where interested parties making submissions may wish to provide confidential information to the Commission.
240. If it is necessary to include such material in a submission, the information should be clearly marked and preferably included in an appendix to the submission. Interested parties should provide the Commission with both confidential and public versions of their submissions in both electronic and hard copy formats. The responsibility for ensuring that confidential information is not included in a public version of a submission rests entirely with the party making the submission.
241. The Commission will follow its usual process in response to any request for information under the Official Information Act 1982.

Appendix 1: Relevant Documents

Telecommunications Act 2001

http://www.legislation.govt.nz/act/public/2001/0103/latest/DLM124961.html?search=ts_act_telecommunications+act_rese&sr=1

Commerce Commission Statement of Intent, 2009-2012

<http://www.comcom.govt.nz/Publications/ContentFiles/Documents/SoI%202009-12.pdf>

Commerce Commission Mergers and Acquisition Guidelines

<http://www.comcom.govt.nz/Publications/ContentFiles/Documents/MergersandAcquisitionsGuidelines.PDF>

Regulatory Provisions of the Commerce Act 1986: Discussion Paper

<http://www.comcom.govt.nz/IndustryRegulation/ContentFiles/Documents/Regulatory%20Provisions%20of%20the%20Commerce%20Act%201986%20-%20Discussion%20Paper.pdf>

Interrelationship Between Part 2 of the Commerce Act 1986 and the Telecommunications Act 2001

<http://www.comcom.govt.nz/Publications/ContentFiles/Documents/Telecommunications%20Discussion%20Paper.pdf>

Standard Terms Determination process

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/ContentFiles/Documents/Overview%20of%20STD%20process0.pdf>

Reviewing STDs

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/ContentFiles/Documents/REVIEW%20OF%20STANDARD%20TERMS%20DETERMINATION.pdf>

Sector monitoring and information dissemination

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Guidelines/ContentFiles/Documents/Section%209A%20Guidelines%20October%202008.pdf>

Operational separation complaint guide

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Guidelines/ContentFiles/Documents/Operational%20Separation%20Complaints%20Guideline.pdf>

Commission's telecommunications monitoring functions

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Guidelines/guidelines.aspx#994>

Enforcement under Part 4A of the Telecommunications Act

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Guidelines/ContentFiles/Documents/Enforcement%20under%20Part%204%20A%20of%20the%20Telecommunications%20Act%202001.pdf>

Implementation of TSLRIC pricing methodology

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/InterconnectionDeterminations/TotalServiceLongRunningIncrementalCost/ContentFiles/Documents/TSLRICPrinciplesPaper0.pdf>