ULTRAFAST FIBRE LIMITED

SUBMISSION ON NZCC COMPETITION RISKS CONSULTATION

25 FEBRUARY 2021

PUBLIC VERSION

1. Introduction and Summary

1.1 This submission is made by and Ultrafast Fibre Limited (**Ultrafast Fibre**) (collectively referred to in this submission as **we** or **us**) in response to the Commerce Commission's (**Commission**) *Promoting competition in telecommunications markets as part of fibre information disclosure (***ID***) and price-quality (***PQ***) regulation – consultation on competition risks, opportunities and the corresponding role of ID and PQ regulation* dated 28 January 2021 (**Consultation Paper**).

1.2 The purpose of the Consultation Paper is stated to be to identify key risks that may lead to a lessening of competition and key opportunities to promote competition in telecommunications markets[1]. Relevantly for us, the Commission is considering the role that ID regulations can play in mitigating these risks or seizing these opportunities.[2]

1.3 As an initial point, we express our concern at the narrow focus of the Consultation Paper. The Commission is considering the wider impact of fibre regulation on workable competition in telecommunications markets, as required by s166(2)(b). It describes its approach as identifying relevant market segments and identifying the state of competition.

1.4 The Commission has identified four fibre market segments but ignored completely the competitive impact of fixed wireless access (**FWA**) on the wholesale broadband access market. Not only has this led it to identify "competition risks" which are simply not plausible but has led the Commission to fail in its first stated objective of assessing competition-related risks in telecommunications markets.

1.5 The real competition risk in the wholesale broadband access market arises from the fact that one technology (fixed fibre) is regulated as a structurally separated wholesale only service, while a competing service, FWA, is unregulated and delivered by vertically integrated providers who also consume more than 80% of the fixed fibre providers wholesale services.

1.6 The Commission should be conscious that the technology specific Part 6 regime is already distorting competition in favour of FWA providers. It should be very careful not to increase the regulatory burden on fibre providers as this will simply tilt the playing field even more in their competitors' favour.

1.7 In relation to the competition risks the Commission has identified relevant to us, three (B, E, and F) relate to the price, non-price terms and investment in unbundled layer 1 services, and the fourth (H) contemplates that we could charge "anti-competitive prices" for layer 2 services where we face competition from other broadband technologies. As we explain below, none of these risks are plausible. In addition, using Part 6 to monitor our Part 4AA obligations would be inconsistent with the policy of the Act.

1.8 In relation to geographically consistent pricing, we note that this has been a policy decision in telecommunications since 2011. It was a requirement of the UFB rollout, was mandated for Chorus' unbundled copper local loop and bitstream services under clause 4A of Schedule 1 of the Act in November 2011 and has been incorporated into Part 6 by section 201.

1.9 The policy was designed to remove the digital divide between urban and rural areas. Its success is evident from the fact that the highest level of UFB uptake is in smaller rural centres. We do not think that imposing a requirement on Chorus to report on urban and rural areas separately would satisfy a cost/benefit analysis.

[1] Consultation Paper [1.3.1]

[2] Consultation Paper [1.3.2]

2. The Competition Analysis

2.1 The Commission is considering the wider impact of fibre regulation on workable competition in telecommunications markets, as required by s166(2)(b). It describes it approach as identifying relevant market segments[3], and identifying the state of competition[4], but the "relevant market segments" it identifies are four fibre services[5].

2.2 The Commission has ignored the competitive impact of FWA on the wholesale broadband access market. This has not only led it to identify "competition risks" which are simply not plausible but makes it impossible for it to assess competition-related risks in telecommunications markets.

2.3 According to the Commission's 2019 market monitoring report, FWA then accounted for 11% of total broadband connections. Vodafone has just released 5G FWA and expressed an intention to migrate 25% of its customers to FWA over the next 2 -3 years,[6] while Spark has reported a 25% increase in FWA customers in 2020 and plans to move 30% to 40% of its current fixed line broadband customers to FWA over the next 18 months.[7]

2.4 The real competition risk in the wholesale broadband access market arises from the fact that one technology (fixed fibre) is a heavily regulated structurally separated wholesale only service, while a competing service (FWA) is unregulated, delivered by vertically integrated providers, and those providers consume more than 80% of the fixed fibre providers wholesale services.

2.5 MBIE noted in its first consultation on the new regulatory regime that "where possible, policies and regulation should be platform and technology neutral to support digital innovation and respond to technical change".[8] The Commission should be conscious that the technology specific Part 6 regime is already distorting competition in favour of FWA providers. Increasing the regulatory burden on fibre providers while ignoring the competitive impact of FWA providers in the wholesale broadband market will simply tilt the playing field even more in their favour.

3. Layer 1 (Risks B, E and F)

3.1 The Commission has suggested that there are potential competition risks that we may charge anti-competitive prices for unbundled layer 1 services in order to raise the costs of downstream rivals or reduce the quality of, or investment in, those services to make them less competitive.

3.2 There is no likelihood any of these "risks" would materialise. Our unbundled layer 1 services are regulated under Part 4AA of the Act. We are subject to equivalence obligations in our respective Deeds of Open Access Undertakings for Fibre Services given under Part 4AA (**Undertakings**). Equivalence requires that we provide layer 1 services to access seekers in the same way as we provide the service to our own business operations, "including in relation to pricing, procedures, operational support, supply of information and other relevant matters".[9]

3.3 The Undertakings contain their own information disclosure obligations and are enforceable by the Commission.

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[3] Consultation Paper [2.6]

[4] Consultation Paper [2.9]

[5] Layer 2, PQ areas, Layer 2, ID-only areas, Layer 1, PQ areas and Layer1, ID-only areas. Consultation Paper [2.8]

[6] NZ Herald *Vodafone NZ first to go big with 5G wireless* 22 February 2021

[7] NZ Herald *Wireless ambition, Spark has begun migrating its fixed-line broadband users en masse to fast in-house technology, cutting UFB out of the loop* 25 February 2021

[8] Ministry of Business, Innovation and Employment *Regulating communications for the future: Review of the Telecommunications Act 2001* (September 2015) at 24.

[9] Section 156AB Telecommunications Act 2001

3.4 As equivalence requires us to use the same systems to deliver input services as we use to provide layer 1 services to our own business operations, we have invested a considerable amount to build processes and systems to meet these obligations. As a result, the delivery of input services is fully automated and seamless. The Commission is aware of this from information we have provided to it in our previous consultations.

3.5 The Commission now suggests that it may use ID regulation under Part 6 to specify input services as product groups and require us to report specifically on input services in relation to price and pricing methodologies, quality performance, investment and non-price terms. In other words, having been required to fully integrate input services into our systems under Part 4AA, we would need to dis-integrate those services for ID purposes under Part 6. We are unclear how we could isolate input services for ID purposes, but we do know it would be very expensive if it can be done.

3.6 However, as a matter of principle we do not think it is appropriate that the significant compliance obligations we have in relation to input services under Part 4AA should be augmented by disclosure obligations under Part 6. Part 6 deferred the potential regulation of unbundled fibre services until 2026 in recognition that Part 4AA continued to apply. It would be inconsistent with this policy decision for the Commission to use Part 6 ID requirements to monitor our Part 4AA obligations.

4. Layer 2 (Risk H)

4.1 The Commission identifies as a risk to competition that we may "lessen competition by charging anti-competitive prices for specific layer 2 services where [we] face competition (e.g. lower speed broadband)". Although not stated, this appears to be a reference to the competition we face from FWA services.

4.2 The Commission unfortunately does not define what it believes is an "anti-competitive price". As reducing price to meet the market has never been regarded as anti-competitive, we assume that the Commission is referring to predatory pricing – i.e. that there is a risk that we could engage in pricing below cost for the purpose of driving FWA out of the market, and then increasing prices to recoup the loss once FWA competition has been eliminated..

4.3 We are surprised that the Commission would regard this as a "potential risk to competition based on a high-level understanding of industry structure and regulated providers' possible incentives to compete or exclude competitors".[10]

4.4 Firstly, lower speed broadband plans (below 100Mbps) make up a small part (respectively [ ]% and [ ]%) of our services. Our focus is on high-speed plans (100Mps, 200 Mbps and 1Gbps). There is no business case in reducing price to expand our share of low speed/low value services; out strategy instead is to promote higher speed (100Mbps+) plans which outperform FWA in terms of speed consistency and reliability.

4.5 Secondly, FWA services are provided by our wholesale customers in competition to our fibre services. Once they have invested in FWA technology there is no price which would make it unprofitable for them to employ their own network in preference to paying us a wholesale access fee.[11] There is no likelihood that they would exit the market to enable a recoupment strategy to be implemented – the only situation that could amount to "anti-competitive prices".

4.6 As the Undertakings already set out a comprehensive information disclosure regime for our Layer 2 services, including that all terms be set out in a Reference Offer which we must publicly disclose, including on our website,[12] further regulation is not warranted. In addition, as we do not allocate costs by separate layer 2 services, the cost to do so would be significant. A decision to require cost allocation by service would be inconsistent with the principle that cost allocation should apply

[10] Consultation Paper [2.3]

[11] "Wireless broadband is cheaper than UFB fibre…but still more lucrative for a retail telco…because they pocket all of the bill. With a landline Chorus clips roughly half the ticket" NZ Herald, above n7.

[12] Deed of Open Access Undertakings for Fibre Services, [8.2]

between, not within, FFLAS families that bear essentially the same costs, geographic coverage and functionality.[13]

4.7 The Commission has recognised that "it is important to also consider the risk of regulatory failure or unintended consequences of regulation when thinking about intervening in markets".[14] The Commission's proposed solution to Risk H would harm competition, not promote it. In this context it is strange that the Commission should consider it was appropriate to consider increasing the regulatory burden on fibre providers.

5. Chorus actions in our UFB areas (Risks I, J, L, M, N and O)

5.1 These risks refer to actions Chorus could take in our UFB areas. While there is precedent for Chorus acting differently in relation to it copper network in our UFB areas, we do not intend to comment on these risks.

6. Geographically consistent pricing (Risk P)

6.1 Geographically consistent pricing has been a feature of New Zealand's telecommunications regulatory framework for the last decade. It was a requirement of the UFB fibre rollout from the outset[15] and was incorporated into the copper regime for Chorus' unbundled copper local loop network service and unbundled bitstream access service in November 2011 by clause 4A of Schedule 1 of the Act.

6.2 The policy was designed to remove the digital divide between urban and rural areas. Its success is evident from the fact that the highest levels of UFB uptake as at 30 September 2020 are in smaller rural centres – Morrinsville (88%), Whatawhata (85%) and Horotiu (81%).[16]While Risk P relates only to PQ areas, we think a proposal to segment disclosure between urban and rural areas is likely to impose significant cost on Chorus and is not justified.

[13] NZCC *Fibre input methodologies: Draft decision – reasons paper*, 19 November 2019 [[3.453]

[14] Consultation Paper [2.16]

[15] The contract between (then) Crown Fibre Holdings Limited and UFB participants set standard price caps and required that the participants cooperate with each other to deliver nationally consistent services.

[16] Crown Infrastructure Partners, *Quarterly Connectivity Update to 30 September 2020*, 6