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nova energy

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Dr Stephen Gale
Telecommunications Commissioner
Commerce Commission
Wellington

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Nova Energy Cross-Submission to the Commerce Commission: Fibre Regulation Emerging Views

Introduction and background

1. Nova Energy Limited (**Nova**) welcomes the opportunity to provide a cross-submission to the Commerce Commission (**Commission**) in relation to the Commission's Fibre Regulation Emerging Views summary and technical papers (**Emerging Views Paper**).

2. By way of background:

   (a) Nova is a wholly owned subsidiary of The Todd Corporation, which has been one of New Zealand's leading energy explorers and producers for around 60 years. Todd Generation Limited, also a wholly owned subsidiary of The Todd Corporation, holds an interest in approximately 170 megawatts of installed power generation capacity. Nova is a supplier of electricity and natural gas to wholesale, retail and industrial markets.

   (b) In 2018 Nova entered the telecommunications market and currently supplies fixed-line broadband and voice services to residential customers. Nova has recently purchased the business of Total Consumer Services Limited and its corporate group (trading as **MegaTEL**) including its broadband and mobile customer books. The MegaTEL business continues to operate as a standalone division of Nova, meaning that Nova is also now an MVNO.

3. Nova did not make an initial submission on the Emerging Views Paper due to internal resourcing constraints and competing business priorities. We have therefore been careful not to raise any "new" views on the Emerging Issues Paper in this cross-submission. However, Nova now wishes to provide the Commission with our views on certain matters that were raised in other parties' submissions on the Emerging Issues Paper (and in the case of Internet NZ, its 2018 submission on the Commission's initial Proposed Approach Paper, which remain relevant in the context of the Emerging Views). We have focussed especially on matters that are likely to have particular relevance to the effective participation by RSPs in the telecommunications sector under the new regulatory regime or that may result in undesirable end-user customer outcomes.

Structure of this cross-submission

4. As the Commission is clearly aware, the process of determining and applying the necessary IMs to FFLAS (and other regulated fibre services) is extremely complex. There are also a wide range of potentially negative implications that could easily arise under the new regime, impacting on both consumer outcomes and retail competition generally (especially given the uncertain relationships between FFLAS and substitute telecommunication services, particularly where FFLAS is an input into those substitute services).

5. This cross-submission does not focus (in any great detail) on other parties' submissions regarding the Commission's interpretation of the legal framework, the "key economic principles" that the Commission proposes to adopt, the "quality dimensions" IM, or the technical (economic/accounting) components the Commission (currently) proposes to apply to the mandatory IMs (i.e. IMs for asset valuation, cost allocation, WACC, capex and treatment of tax).

6. Rather, the purpose of this cross-submission is to support/challenge (at a high level) other parties' specific submissions on the following topics:

   (a) Ensuring the Commission will have sufficient flexibility to help prevent unintended and undesirable consumer impacts (such as price shocks) and negative competitive outcomes from arising (e.g. especially by the Commission being able and willing to review and change the anchor services, both immediately prior to, and at any time following, the implementation date).

   (b) Clearly defining/understanding the scope of "regulated services" under the new regulatory regime (especially with regard to which assets can be included by Chorus in the RAB) and associated IM matters including: the extent to which financial losses incurred by Chorus prior to the implementation date can be applied to initial RAB valuation; risks associated with overallocation and double-recovery of "common costs"; and the lack of any substantive or justifiable evidence for any WACC uplift.

   (c) Ensuring that the new fibre regulatory regime will result in a "level playing field" for RSPs (especially with regard to how non-discrimination and equivalence obligations should apply to both Chorus and the other regulated fibre service providers[1]).

Flexibility to prevent undesirable consumer impacts and competition outcomes

7. Trustpower (among other submitters including Vector and Vodafone) has raised the importance of ensuring flexibility is incorporated into the new regulatory process (and the Commission's IM decision making) to help prevent against unintended and undesirable consumer impacts and competition outcomes arising (while also balancing the need for regulatory certainty and robustness in determining mandatory IMs).[2]

8. In particular, Nova firmly supports Trustpower's submission that the necessary flexibility (and the overall **effectiveness** of the new regulatory regime) hinges on the "anchor services" being:

   (a) appropriately defined at the implementation date;

   (b) subject to review prior to the implementation date (i.e. to ensure they remain in-synch with end-user service preferences and improvements in fibre service offerings, which are rapidly changing and will continue to do so – especially with the trend in ever increasing speeds); and

   (c) easily and quickly subject to change post implementation.[3]

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[1] In this cross-submission, if we are referring to all regulated fibre service providers, we will say "Chorus". If we are referring to regulated fibre services providers that will not be initially subject to price-quality regulation (as currently proposed by the Commission), we will say "LFCs".
[2] Trustpower submission – paragraphs 3.2.6 and 3.2.7.
[3] Trustpower submission – paragraphs 3.2.8 and 3.2.9.

9. Nova also agrees with Internet NZ's approach to encourage fast and improving anchor products with a defined performance improvement path (based on market data and input from industry participants) to apply over time, including by default. Such an approach would mitigate the risk that "up-front, set-and-forget regulation" fails to fully benefit end-users over time.[4]

10. Effectiveness of the anchor products is especially important in providing an appropriate constraint on the price and quality of other FFLAS variants offered by Chorus. Similarly, the regulated price of DFAS and, in the future, unbundled fibre services, will also impact on the effectiveness of the regime in constraining Chorus.

11. Given the statutory purpose of anchor products is to act as an appropriate constraint on price (and to encourage quality and efficiency improvements of other fibre services and non-regulated services provided by Chorus),[5] Nova also supports Internet NZ's submission and would welcome further guidance from the Commission on how it intends to maintain the anchor services as a driver of beneficial price and quality outcomes for both end-users of other fibre services and for RSPs at a wholesale level.

Scope of "regulated services" and initial RAB calculation

12. Nova acknowledges that various submitters have raised a wide range of contrasting concerns, arguments and detailed submissions on the technical (economic/accounting) components currently proposed by the Commission in relation to the mandatory IMs.

13. Consistent with Vocus' submission,[6] Nova is especially concerned about the current lack of clarity regarding the **scope of** "**regulated services**" under the new regulatory regime. Having a clear, industry-wide understanding of which activities and services are (and are not) a "regulated service" is extremely important, as this will determine which assets can be included in the RAB. The scope of regulated services has not been made clear in the Act, nor in the Commission's Emerging Views Paper or earlier initial Proposed Approach Paper (see chapter 7 in particular). We understand the Commission's current position is that Chorus and the other LFCs will be left to determine themselves:

    (a) which of their fibre services are subject to regulation;

    (b) the associated "regulated" assets to be included in the RAB (wholly or partly); and

    (c) the value attributed to those assets.

14. Nova agrees with Vocus that a more perspective approach to RAB IMs is desirable,[7] otherwise there is a major risk that the initial RAB will become overloaded and inflated by Chorus and the LFCs, which could have a large (and most likely negative) impact on competition and end-user outcomes. For instance, the limitation on excessive profits under the BBM could be undermined if an LFC's unreached revenue cap is able to be washed-up across regulatory periods leading to higher (and potentially unreasonable) pricing for non-anchor regulated fibre services.

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[4] Internet NZ submission dated 21 December 2018 – paragraphs 1.25 - 1.31.
[5] As noted in the explanatory note to the Telecommunications (New Regulatory Framework) Amendment Bill and section 208 of the Act.
[6] Vocus submission – paragraph 27.
[7] Vocus submission – paragraph 28.

15. While this cross-submission does not focus heavily on the technical (economic/accounting) components the Commission currently proposes to apply to the mandatory IMs, Nova is also particularly concerned about:

    (a) the inclusion of accumulated financial losses between December 2011 and the implementation date in the RAB (pursuant to the proposed Asset Valuation IM);

    (b) the risk that "common costs" relating to both FFLAS and other services will be over-allocated by Chorus and/or lead to double-recovery across multiple regulatory frameworks (pursuant to a Cost Allocation IM that is not particularly prescriptive); and

16. In this regard Nova support's Trustpower's submissions that:[8]

    (a) Risks/losses which were assumed by Chorus in the early days of UFB should not be compensated under the new regulatory regime. Chorus and the other LFCs were fully liable for these losses prior to the new regime coming into force, and as a result it is reasonable to assume that they have efficiently incurred the relevant costs and assumed risks. After the 2018 amendments to the Telecommunications Act came into force, the risk shifted as there was certainty that further losses incurred would be included in the future RAB.

    (b) The Commission should specifically focus on scrutinising losses incurred after 2018 (not 2011) and before the implementation date. Chorus and the LFCs, at that point, were subject to a different set of incentives which may have affected how they incurred costs and took on risks.

    (c) The Commission should be prescriptive in relation to the Cost Allocation IM, particularly in those sensitive areas where a misallocation of costs is likely to impact on competition, and to ensure consistency across how Chorus and the LFCs allocate their "common costs" when establishing its initial RAB.

17. Nova also supports the views raised by Trustpower, Vocus, and Vodafone opposing any uplift to the WACC. We also consider that neither Chorus (nor Houston Kemp for Chorus) has provided any real, substantive or justifiable evidence in their recent submissions to support any such uplift.

Ensuring a "level playing field" for RSPs

18. Nova supports Trustpower's submission that, in order to achieve the Act's purpose and avoid undesirable customer and competition outcomes, it is extremely important that the new regulatory regime will deliver a "level playing field" and should remain "technology agnostic" (i.e. not favour one form of technology over the other).[9]

19. In this regard, similar to Trustpower, we also agree with the Commission's general views regarding the legal framework (especially the view that the Commission should not focus on promoting a particular form of competition, or that there is any "presumed hierarchy" between different types of competition that the Commission could promote).

20. However, we understand that the Commission is currently of the view that it should not set any non-mandatory IMs (under section 178(2) of the Act) at this stage, including any IM to cover equivalence of inputs and non-discrimination in relation to regulated fibre services (and/or non-

[8] Trustpower submission – paragraphs 3.4.6, 3.5.2, 3.5.3 and 3.6.2.
[9] Trustpower submission – paragraphs 2.1.4, 3.2.2 and 3.3.4.

regulated fibre services). Nova disagrees with this position and instead supports Vector's submission that:[10]

(a) The Commission should go "one step further" (i.e. beyond commencing work on the equivalence and non-discrimination obligations in the open access deeds governing unbundled fibre services) and should develop competition principles that address the application of the non-discrimination and equivalence of inputs obligations, as they apply to FFLAS in the Deeds.

(b) Ensuring non-discrimination and equivalence of inputs principles apply to regulated fibre services (i.e. beyond the statutory requirement for Chorus alone to charge the same price for FFLAS regardless of geographic location[11]) is extremely important, especially where FFLAS is a key input to substitute telecommunication services (such as unbundling fibre services and FWA).

21. Nova also considers that a specific IM covering equivalence of inputs and non-discrimination obligations would:

(a) ensure that RSP access to wholesale inputs is provided (by Chorus and the other LFCs) on terms that will allow competition with larger participants, particularly those who benefit from vertically integrated mobile businesses – as submitted by Trustpower;[12] and

(b) mitigate the risk of the RAB being overloaded and inflated (as discussed at paragraphs 13 - 17 above); and

(c) provide an extremely useful tool for the Commission to minimise any price shocks to end-users through smoothing revenues and prices.

22. Nova encourages the Commission to actively seek targeted input from less well-resourced parties and smaller players throughout the remainder of the consultation process. We would be happy to meet with the Commission to further discuss our cross-submission and to answer any questions that you may have. Please direct any questions or other matters regarding this cross-submission, in the first instance, to:

[redacted]

Yours sincerely

[redacted]

Babu Bahirathan
Chief Executive Officer
Nova Energy Limited

[10] Vector submission – Appendix 1 – clauses 5 and 6.
[11] Section 201 of the Act.
[12] Trustpower submission – paragraph 2.1.3.