



ENABLE NETWORKS LIMITED AND ULTRAFast FIBRE LIMITED

SUBMISSION ON NZCC FUNDING REQUIREMENTS CONSULTATION

12 FEBRUARY 2021

1. Introduction

- 1.1 This submission is made by Enable Networks Limited (**Enable**) and Ultrafast Fibre Limited (**Ultrafast Fibre**) (collectively referred to in this submission as **we**) in response to the Commerce Commission's (**Commission**) *Review of the Commerce Commission's funding for the regulation of Telecommunications and Fibre under the Telecommunications Act 2001 – Discussion paper* dated 10 December 2021 (**Discussion Paper**).
- 1.2 In response to the proposals in the Discussion Paper we submit, for reasons set out below:
- (a) the proposal that we bear the cost of information disclosure (**ID**) regulation with other fibre providers only, and also contribute to the cost of the Commission's other responsibilities under the Telecommunications Act 2001 (**Act**) is inappropriate; and
 - (b) the proposed significant increase in the funding for the Commission's other responsibilities under the Act is not justified.
- 1.3 We cannot respond meaningfully to the quantum of the proposed fibre sub-levies as the Discussion Paper does not provide sufficient detail of the various fibre workstreams, the costs allocated to each of them, or the proposed allocation of cost between the price quality (**PQ**) and ID sub-levies. Our expectation is that ID costs would not exceed 10% of the total fibre levy.

2. Proposed Levy Allocation inappropriate

- 2.1 The Discussion Paper proposes that only providers of fibre fixed line access services (**FFLAS**) will bear the cost of the Commission's fibre regime work, and that "those parties liable to pay for the fibre work are also liable for the wider work under the Act".¹
- 2.2 The Discussion Paper notes that this additional work relates to "fulfilling our pre-existing and continuing responsibilities for regulating copper and mobile services"² and "giving effect to our new consumer and retail service quality provisions".³
- 2.3 The reason for the cost of the Commission's current work on implementing the fibre regime being borne only by FFLAS providers was explained by MBIE in its 2018 consultation:
- "We believe it is appropriate for the companies benefiting most from regulatory certainty to pay for the cost of regulation...This is the approach taken under the Commerce Act where electricity suppliers pay for the Commission's regulatory work".*
- 2.4 On that basis, there is no basis upon which we should be required to contribute to the costs of fibre, mobile or retail regulation as we receive no benefit at all from that regulation. Our obligation should be limited to contributing to the relevant fibre regulation costs – in our case the cost associated with ID regulation.
- 2.5 This is even more important in our case as the regulatory framework does not allow us to provide copper, mobile or retail services. Non-fibre providers clearly benefit from regulatory certainty for

¹ Discussion Paper [92]

² Discussion Paper [5.1]

³ Discussion Paper [5.2]

fibre as they use fibre as an input to their own services, but we do not benefit at all from regulatory certainty for copper, mobile or retail services that we are not permitted to supply.

- 2.6 A proposal which would increase our proportionate share of the cost of telecommunications regulation compared to the cost borne by our fixed wireless access (FWA) competitors has the effect of raising our costs, putting us at a competitive disadvantage.
- 2.7 One of the reasons the Commission gives for continuing to allocate fibre regulatory costs exclusively to FFLAS providers beyond June 2021 is that “these costs can be passed on through their wholesale prices”.⁴ This is an unfounded assumption. We face significant competition from FWA operators, which limits our ability to simply pass through cost increases. The Commission’s proposal that we bear a disproportionate share of the regulatory levy does not meet the section 18 purpose test of the Act.
- 2.8 If, contrary to our submission, the Commission believes it is appropriate that we contribute to the non-fibre regulatory costs, non-fibre providers must also contribute to fibre regulatory costs. In other words, the Commission must abandon the fibre sub-levy proposal, and it must set a single levy for all its regulatory work, shared by all telecommunications service providers in proportion to their respective qualified revenue.

3. Increase in levy for the Commission’s other responsibilities under the Act not justified

- 3.1 We do not think the Discussion Paper supports the proposed increase in the “other responsibilities” levy from \$6million to \$9.5million; to the contrary, it would be reasonable to have expected a fall in the “other responsibilities” levy in light of the regulatory maturity of services other than FFLAS. While the Commission does have additional responsibilities for consumer matters under Part 7 of the Act, this is offset by the lessened workload in other areas.
- 3.2 Regulation of copper and mobile services is well established. Copper is declining in importance as FFLAS and FWA uptake increases, while the mobile market is characterised by three well established mobile networks competing vigorously on price and quality. The benefits flowing to consumers from the competitive environment which has been created over the last decade is evidenced in the Commission’s annual Telecommunications Monitoring Reports.
- 3.3 The Discussion Paper implies the Commission requires more resources in this area in order to “increase our impact in helping the sector”, including “ensuring wholesale and retail competition are at the forefront of decisions on 5G and other spectrum allocations”.⁵
- 3.4 It is not the role of the Commission to “help the sector”. Its role is simply to implement the statutory regime as provided for in the Act. Spectrum allocation is not a Commission function. Decisions on 5G are, and will continue to be, made by the three mobile networks within the context of a three party competitive market. There is no place for regulatory intervention in competitive markets other than the Commission’s well established role of monitoring market performance.
- 3.5 The Commission claims that without the increase it proposes “we would be unable to meet the increased stakeholder expectations on us, particularly in terms of the new consumer powers granted to us and increasing our monitoring and reporting on the market”.⁶ In particular it claims that, without an increase “in a relatively short period of time, important responsibilities would need to be scaled back or stopped completely, in areas that include broadband testing, market surveys, consumer engagement and compliance”.⁷

⁴ Discussion Paper [68]

⁵ Discussion Paper [15]

⁶ Discussion Paper [19]

⁷ Discussion Paper [32]

- 3.6 The claim that the Commission would be unable to carry out its functions without a levy increase is surprising given its increased focus on consumer issues is matched by a decline in copper/mobile regulatory activity.
- 3.7 According to the Commission “the performance of the industry has come under added scrutiny as a result of Covid-19”⁸ such that “sector performance is now even more crucial and heightens the importance of adequately funding a regulatory framework that is designed to improve the quality and efficiency of telecommunications services delivered to New Zealand consumers and businesses”.⁹
- 3.8 The lessons to be drawn from Covid-19 are the opposite to those postulated by the Commission. The entire telecommunications sector reacted quickly and effectively to the challenges presented by Covid-19. This occurred without “help” from the Commission because participants in competitive markets are incentivised to meet their customers’ needs. The Covid-19 experience tells us that telecommunications markets are competitive and “a more robust regulatory regime” is not required.
- 3.9 As there is no justification for the Commission to intervene more actively in telecommunications markets, and its increased focus on the consumer dimension is offset by declining activity in copper and mobile services, in our view there is no case for increased funding of the Commission’s “other responsibilities”.

4. Consultation Questions

Introduction	
Question 1	Do you have any feedback on the purpose and objectives of this consultation paper?
	We agree with the paper’s purpose and objectives – to consult with stakeholders on the appropriate level of funding for the Commission’s telecommunications regulatory responsibilities.
Question 2	Please provide feedback on whether you agree with how we have characterised the operating context of our work - in terms of technological and regulatory transition and the risks to fulfilling policymakers’ expectations - in relation to telecommunications and fibre networks.
	As set out in section 3, we think the Commission has overstated the need for regulatory intervention, disregarded the fact that telecommunications markets are competitive, and implied a more interventionist role for itself than the regime allows.
Overview of our regulatory responsibilities and funding	
Question 3	Please provide feedback on whether you agree with the proposal that the current Levy Regulations are amended to enable continuation of all the fibre sub levies for recovering fibre regulation costs going forward.
	We agree with this proposal provided we are not also liable to contribute to the funding for the Commission’s other activities. As we set out in section 2, the fibre sub-levies were imposed on fibre providers only on the principle that the cost should fall on those benefitting most from regulatory certainty. Applying that principle consistently, it is inappropriate to require us to contribute to non-fibre regulatory costs.
Our medium-term priorities for Telecommunications	
Question 4	Please provide feedback on whether you agree with the medium-term priorities for Telecommunications set out above and our focus on 'bridging the gap'. Are there other priorities that should be included?

⁸ Discussion Paper [57]

⁹ Discussion Paper [57]

Implied workplan and costing for Telecommunications	
Question 5	Does the additional funding we are seeking target the right areas of focus for our work in relation to telecommunications networks?
	No. As set out in section 3, there is no justification for the increased funding for the Commission's non-fibre regulatory responsibilities.
Question 6	Please provide feedback on whether you think the additional funding we are seeking for our telecommunications work is appropriate, and if you think a different level of funding is warranted, why?
	As explained in section 3, the Discussion Paper does not provide justification for any increase in the existing level of funding for non-fibre activities.
Implied workplan and costing for Fibre	
Question 7	Does the additional funding we are seeking target the right areas of focus for our work in relation to fibre networks?
	The Draft Paper does not provide sufficient detail of the Commission's specific workstreams and cost allocation to enable us to respond to this question.
Question 8	Please provide feedback on whether you think the additional funding we are seeking for our fibre work is appropriate, and if you think a different level of funding is warranted, why?
	See response to Question 7 above.
Our strengthened capability and impact	
Question 9	Please provide feedback on whether you think the funding we are seeking will strengthen our capability and impact leading to the right mix of business and consumer outcomes?
	See section 3 of this submission
Question 10	Are there other outcomes you would expect to see with the additional funding we are seeking in the consultation document?
Other options we considered	
Question 11	Please provide feedback on whether you think one of the other funding options set out above is more appropriate, and why?
	See section 2 of this submission.