Commerce Commission Fibre Fixed Line Access Service Deregulation: Draft Assessment Framework Paper

2degrees' Cross-Submission in response to Commerce Commission consultation

March 2024

PUBLIC

Introduction

2degrees welcomes the opportunity to cross-submit in response to the Commerce Commission's draft assessment framework for determining whether to initiate a fibre fixed line access service (FFLAS) deregulation review under section 210 of the Telecommunications Act 2001 (the Act).

The submissions the Commerce Commission has received canvas both the assessment framework the Commission should adopt and also whether there is reasonable grounds for the Commission to: (i) start a deregulation review (section 210(3)), and/or (ii) consider FFLAS should no longer be regulated under Part 6 of the Telecommunications Act and/or (iii) in relation to Chorus, FFLAS should no longer be subject to price-quality regulation under Part 6 (section 210(1)). 2degrees does not consider any of the submissions provide a reasonable or realistic basis for determining a deregulation review should be undertaken.

In particular, Chorus' current position that competitive constraint from alternative technologies such as FWA means regulation is no longer needed is contrary to both its own views (most recently expressed as part of its expenditure proposal) and the position of the Telecommunications Commissioner about the extent to which other technologies can substitute for fibre.[1] Chorus repeatedly claiming there is "overwhelming" evidence competitive circumstances have changed does not mean it doesn't still have SMP. RSPs will be reliant on purchasing fibre wholesale inputs from relevant local fibre companies for the predictable future.

We agree with One NZ "There is no credible prospect of Chorus relinquishing SMP in the foreseeable future" and "In respect of FWA services, these are provided using mobile networks that rely on Chorus' FFLAS in many locations (for example, in relation to the provision of backhaul to mobile services."

While we do not consider a deregulation review is justified at this time, if the Commission did undertake a deregulation review, we consider this could highlight the anomaly that only Chorus is subject to price-quality regulation. There has been comment about the small size of the other LFCs but this is no different to electricity where similarly sized electricity distributors are also subject to price-quality regulation.

[1] Telecommunications Commissioner: "we certainly don't want to hear that customers are being led to believe that fixed-wireless is a substitute for fibre because it is not." https://www.stuff.co.nz/business/124795218/telco-commissioner-tristan-gilbertson-has-two-big-tasksand-a-paradox-to-fix

The LFC submissions provide no reasonable basis that deregulation is justified

We do not consider there is anything in the Chorus, Enable/Tuatahi or Northpower (the LFC) submissions that should give the Commission cause to consider that a deregulation review under section 210 should be undertaken. Chorus and the other LFCs have provided no reasonable basis for the Commission to consider that FFLAS should no longer be regulated (in terms of information disclosure or price-quality regulation), justifying such a review.

As outlined below, many of their submission points suggest incorrect or irrelevant considerations for the Commission's assessment framework:

- Chorus claims "There is overwhelming evidence that circumstances impacting the competitive environment have changed significantly" and "overwhelming evidence that circumstances have changed". They also propose a 2016 date for this assessment of whether circumstances have changed, versus the 2022 date proposed by the Commission (which appropriately represents the new fibre regime implementation date). At best, the Chorus submission provides a list of alternative services, which in other commercial and regulatory settings it has dismissed as inadequate and inferior to fibre services.
- We consider Chorus is engaging in regulatory and commercial 'cakeism' by advocating that consumers should adopt fibre and the Commerce Commission should approve capital expenditure for fibre network extension on the grounds that alternatives like FWA are inadequate substitutes, while arguing regulation under Part 6 is no longer needed on the basis that alternatives like FWA provide a competitive constraint and can substitute for fibre.

  There are many examples where Chorus downplays or is critical of the efficacy of alternative technologies to fibre.[2] One NZ's submission anticipated such contradictory arguments by Chorus noting "Support for deregulation based on the assumption that Chorus faces sufficient competition from alternative access technologies … wouldn't be in line with Chorus' own prior arguments and campaigns claiming superiority of fibre compared to these alternatives". One NZ's quotation from the Chorus CEO's address to their Annual General Meeting in November 2023 captures Chorus' real views about competitive constraints from alternative technologies: "So let's be clear: There's no "fibre-like" performance when comparing technologies. It's either fibre, or it's not."
- Chorus seems to be suggesting that – regardless of any change in competition/SMP – "the Commission should consider the following in determining whether there are reasonable grounds to conduct a deregulation review: … … Any other evidence indicating the purposes of Part 6 would be better met if regulation were altered." We are not aware of any credible evidence to suggest price-quality regulation of Chorus' natural monopoly FFLAS services may not be warranted. The suggestion that the regulation might be better if it were altered is

[2] For example, see: https://www.chorus.co.nz/blog/fibre-outperforms-other-tech-during-lockdown.

a matter for Parliament and beyond the section 210 binary question of whether or not FFLAS should be regulated under Part 6 and/or subject to price-quality regulation under Part 6.

- It may be self-evident that the longer the period of time used to determine whether there is a change in circumstances the more likely there was a change. However, this doesn't tell us about whether there have been changes which mean there has been an increase in competition/decrease in ability to exercise substantial market power (SMP) such that regulation may no longer be needed (section 210(4)).

  The LFC commentary about the start date used to determine whether there has been a change in circumstances reinforces to 2degrees that the economic framework used for assessing reasonable grounds should be grounded more overtly in terms of FFLAS being a natural monopoly service, and relevant SMP tests.

- If the Commission adopted Chorus' recommendation that the Commission "Adopt a low threshold for finding that reasonable grounds to review exist" it would increase the likelihood of a wasteful or needless review. The "low threshold" doesn't fit with the "reasonable grounds" threshold in section 210(1).

- Northpower's argument that "end users can now choose between FLAS [sic], 4G, 5G, satellite internet and, in some cases, embedded networks" but "These other market participants … are not regulated in the same way" lacks insight of when services should be regulated or not. Northpower's regulatory relativism argument is completely divorced from the difference between provision of FFLAS as a natural monopoly service (with SMP) and competitive market services such as cellular services with three competing networks (and MVNOs). Part 6 regulation is targeted – as with economic regulation in Part 4 of the Commerce Act, etc – on the natural monopoly/non-competitive parts of the market.

  The Enable/Tuatahi arguments about "technological neutrality suffer from the same flaws and deficiencies. It is not technologically neutral to regulate competitive market services just because natural monopoly FFLAS is regulated.

- Section 210 does not provide any basis for determining whether an LFC should be regulated based on its ownership model. Consistent with Part 4 of the Commerce Act, this was a matter for Parliament to consider at the time the legislation was introduced. Regardless, we note Northpower is subject to information disclosure regulation under Part 4 of the Commerce Act, consistent with the information disclosure regulation its FFLAS business is subject to under Part 6 of the Telecommunications Act.

Concluding remarks

We do not agree with Chorus' criticism that the Commerce Commission is creating regulatory uncertainty. The reality is that Chorus will be well aware there is negligible, if any, prospect FFLAS will be deregulated.

After reviewing the submissions, 2degrees considers that:

- Undertaking a deregulation review at this point in time would not be good use of resources. There is no prospect of a finding that the section 210(4)(c) requirements would be met.
- The criteria or framework the Commission uses to determine whether it should initiate a review should be firmly grounded in SMP tests.
- The Commission should put the onus/burden of proof on Chorus and LFCs to demonstrate that the section 210(1) requirements have been met and a deregulation review should be undertaken.