

28 September 2023

Keston Ruxton
Manager, Fibre PQ Regulation
Commerce Commission
44 The Terrace
Wellington 6140
By email: infrastructure.regulation@comcom.govt.nz

Vector Communications Ltd
110 Carlton Gore Road
PO Box 99882
Newmarket
Auckland 1149
+64 9 978 7788
vectorcomms.co.nz

Dear Keston,

Fibre price-quality regulation - Proposed process and approach for the 2025-2028 regulatory period ("Process Paper")

Introduction

1. Vector Fibre appreciates the opportunity to provide its views on the Process Paper.
2. This submission responds to the consultation question posed in the Process Paper - *"QUAL 2: Do you see the need for a new quality standard, what would you propose and why?"*
3. The Process Paper states that, as part of the Quality Standards Review, the Commission will consider whether to add new quality standards for the optional dimensions.¹ Specifically, while the Commission did not feel it was necessary to set a provisioning standard in PQP1, it now intends to "re-evaluate this and consider the impact of series of initiatives Chorus has implemented to improve provisioning beyond the current disclosure period."²
4. Vector Fibre submits that:
 - a. there is a need for a new quality standard for provisioning of fixed fibre line access services ("**FFLAS**") by Chorus. It will promote competition and innovation for the benefit of consumers; and
 - b. the Input Methodologies for Price-Quality ("**PQ IMs**")³ give the Commission the ability to impose a new quality standard for Chorus' provisioning of FFLAS services.

A new quality standard for provisioning FFLAS is required

5. Vector's view is that Chorus' approach to provisioning layer 1 FFLAS during PQP1 has unacceptably advantaged its layer 2 business to the detriment of access seekers. It is

¹ Process Paper at [7.21].

² Process Paper at [7.31].

³ Commerce Commission "Fibre Input Methodologies Determination 2020".

preventing workable competition from developing in downstream markets. Customers are being deprived of access to new and innovative services that could be provided as alternatives to Chorus' fibre services, contrary to the objectives of Chorus' obligation to provide unbundled layer 1 services.

6. Additional regulation of provisioning is therefore needed to prevent this conduct and to promote the long-term benefit of end-users. Accordingly, a provisioning quality standard would best give effect to:
 - a. The purpose in section 162 of the Telecommunications Act; and
 - b. The promotion of workable competition in telecommunications markets for the long-term benefit of end-users.⁴
7. Chorus has been under a legal obligation to provide layer 1 FFLAS to access seekers in accordance with equivalence and non-discrimination obligations since 1 January 2020 under the Telecommunications Act and its Fibre Deed with the Crown. Access to layer 1 services is an essential input for access seekers, such as Vector, to provide layer 2 services (eg bitstream services) as an alternative to Chorus layer 2 services.
8. Vector has previously provided information to the Commission expressing its concerns about the way in which Chorus provisions layer 1 FFLAS (particularly PONFAS) to access seekers.
9. Vector's experience has been that Chorus provisions layer 1 services to its own downstream layer 2 business much more quickly than it provisions to access seekers. While Chorus provisions layer 1 inputs necessary for its downstream business to provide layer 2 services to customers in a 30 working-day timeframe, it has provisioned the same inputs to access seekers in a 95 working-day timeframe. This 65 working-day discrepancy means that Chorus has a material competitive advantage, incentivising customers of layer 2 services to purchase from Chorus, rather than access seekers who may be able to compete on price and quality, but not on delivery timeframes, which are often an essential aspect of the overall service offering.
10. Given that there is no technical justification for Chorus giving itself preferential access to layer 1 services to the detriment of access seekers, the evidence suggests that the intention and effect of Chorus' approach is to restrict investment in, and take-up of, layer 1 services by access seekers, therefore reducing competition in the downstream market for layer 2 services.
11. In response to the concerns raised by Vector and other access seekers, on 23 December 2021 the Commission opened an investigation into whether the non-price terms of Chorus' PONFAS complied with the equivalence and non-discrimination obligations in the Fibre Deed. Among other things, the Commission looked at provisioning time for new connections and transfers. The investigation was closed on 28 April 2023. The Commission's letter to Chorus of that date stated that:

⁴ In accordance with section 166 of the Telecommunications Act.

10. Based on the information reviewed, the Commission has decided not to progress the investigation further. We will therefore close the investigation without taking enforcement action.

11. This was a finely balanced decision. It should not be taken as an endorsement that we consider Chorus' wider PONFAS offer to be compliant with the equivalence and non-discrimination obligations in the Fibre Deed.

12. Closing the investigation at this time does not in any way limit our ability to consider aspects of Chorus' PONFAS offer in any future investigation or regulatory work.

12. Vector considers this letter to be a clear indication that the Commission was not satisfied that Chorus was complying with its equivalence and non-discrimination obligations. However, for unexplained reasons it decided not to take further action.
13. In accordance with paragraph 12 of the Commission's letter, Vector submits that the Quality Standards Review provides an opportunity for the Commission to implement clear FFLAS provisioning standards to prevent the problematic conduct from continuing.
14. In its PQP1 reasons paper, the Commission stated that its decision to not impose quality standards for optional quality dimensions at that time was based on the rationale that serious enforcement consequences of a breach of quality standard meant that it did not consider it proportionate to set additional quality standards. The Commission also considered that Chorus had existing incentives for delivering appropriate FFLAS quality, negating the need for specifying optional quality standards. However, the current circumstances, whereby Chorus' provisioning times for Layer 1 FFLAS are undermining competition in telecommunications markets, strongly suggest that this rationale can no longer be relied upon. Rather, Vector urges the Commission to use this opportunity to impose provisioning quality standards for PQP2 to ensure that access seekers and Chorus' downstream business are treated equally.
15. Equal provisioning times for access seekers and Chorus would promote competition and innovation in downstream markets.

The Commission has the ability to set a new quality standard for provisioning FFLAS

16. The PQ IMs provide that, in a PQ determination, the Commission may set standards for any of the optional quality dimensions – one of which is "provisioning". Provisioning refers to the process by which a regulated provider installs, activates, changes and disconnects PQ FFLAS. The PQ IMs state that the "provisioning" standards that the Commission may specify includes quality standards relating to the time to provision FFLAS.⁵
17. The PQP1 final determination confirms that layer 1 services are within the Commission's scope for the setting of quality standards. Chorus already faces quality standards for

⁵ Commerce Commission "Fibre Input Methodologies Determination 2020" at [3.6.2].

layer 1 services relating to the mandatory quality dimension of availability.⁶ However, these standards are silent on the timing in which Chorus must provide Layer 1 services to itself and access seekers.

18. Vector submits that a provisioning quality standard should be set to require Chorus to ensure that Chorus offers and delivers the same FFLAS provisioning timeframes to all access seekers as it does to itself. To illustrate, a new clause in the PQ Determination could be drafted along the following lines:

Compliance with the provisioning quality standard

To comply with the layer 1 provisioning quality standard for a regulatory year, the average time taken from receipt of an order for Chorus to provision a layer 1 FFLAS to an access seeker must be no greater than the average time taken from receipt of an order for Chorus to provision a layer 2 FFLAS that uses the same network inputs as the layer 1 FFLAS (for example, the average time taken to provision layer 1 PONFAS must be no greater than the average time taken to provision layer 2 Bitstream).

19. The Commission may also wish to consider whether to amend the information disclosure requirements to require the disclosure of information by Chorus that will demonstrate whether Chorus is complying with any provisioning standards. However, this may not be required to encourage compliance with new provisioning quality standards given that Chorus is required to provide an annual compliance statement in relation to the quality standards (which includes certification by directors confirming Chorus is meeting these), while information about service offers and performance by Chorus is also readily available to access seekers. Therefore, new quality standards alone could be sufficient.
20. A potential counterargument is that quality and information disclosure standards of this type are unnecessary because the equivalence and non-discrimination obligations under the Fibre Deed are sufficient. Vector submits that the Commission's lengthy investigation, which concluded with a "finely balanced decision" to take no further action, demonstrates that those obligations are not sufficient. The industry and consumers require clear and unambiguous provisioning standards with a clear compliance and enforcement path if they are breached.

Yours sincerely

Susannah Garwell
Senior Economic Regulation and Pricing Specialist

⁶ Fibre Price-Quality Path Determination 2021 [2021] NZCC 27 at [8.1].