SUBMISSION BY TUATAHI FIRST FIBRE LIMITED ON THE NEW ZEALAND COMMERCE COMMISSION REASONABLE GROUNDS ASSESSMENT DRAFT DECISION ON FIBRE FIXED LINE ACCESS SERVICE DEREGULATION REVIEW UNDER SECTION 210 OF THE TELECOMMUNICATIONS ACT

1. Introduction and summary of submission

1.1 This submission is made by Tuatahi First Fibre Limited in response to the Commission's *Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act: Reasonable grounds assessment draft decision* published on 27 August 2024 (**Draft Decision**). A confidential presentation and economic report from NERA are filed with this submission.

1.2 We agree with most of the elements of the Commission's revised approach to assessing whether there are reasonable grounds to start a Fixed Fibre Line Access Services (**FFLAS**) deregulation review, namely:

1.2.1 the assessment will:

(a) consider the factors listed in s 210(4) of the Telecommunications Act 2001 (**the Act**);[1]

(b) be forward looking and will not be limited to assessing whether there has been a change in circumstances;[2]

(c) consider FFLAS in the seven service categories adopted by the Commission in its final decision on Chorus' first price quality (**PQ**) path;[3]

(d) identify the geographic area in which the service is supplied;[4]

(i) The potential geographic area of FFLAS is anywhere **a regulated provider** has installed a fibre network.[5]

(ii) The roll-out of the Ultrafast Broadband (**UFB**) network means there are differing levels of competition across different parts of New Zealand.[6]

(iii) Describing the geographic areas in which competition for FFLAS differs allows us to assess FFLAS markets more accurately for the existence of reasonable grounds.[7]

(iv) Markets will be assessed on a service-by-service basis at the start of the analysis of

[1] Draft Decision [2.16]

[2] Draft Decision [2.17]

[3] Draft Decision [2.26]

[4] Draft Decision [2.27]

[5] Draft Decision [3.16]

[6] Draft Decision footnote 38, referring to [4.5] of the Draft assessment Framework Paper

[7] Draft Decision [3.16]

each category of services.[8]

(e) identify the availability of alternative services comparable to the defined regulated services in the relevant market;[9]

(f) consider how much competition each FFLAS faces and could be expected to face into the foreseeable future in the relevant market;[10]

(g) consider the effectiveness of that competition in constraining substantial market power (**SMP**). SMP exists where the actions of a business are not effectively constrained by competition, for example, a business with SMP can profitably hold prices above competitive levels for a sustained period of time;[11] and

(h) keep in mind the principles that regulation is only applied to the extent necessary to address a lack of competition, and where possible, regulation should be platform and technology neutral.[12]

1.2.2 The Commission could find reasonable grounds to start a deregulation review into ancillary services (Transport, Co-location and Connection services) even if it found no reasonable grounds to start a deregulation review in any of the four primary FFLAS (Voice, Bitstream PON, Point-to-point and Unbundled PON services).[13]

1.3 We do not agree with the elements of the Commission's revised approach discussed at [1.4] – [1.6] below.

1.4 **Purpose of section 210**

1.4.1 The Commission states that "*Section 210 was intended to promote the long-term interests of consumers by avoiding the cost of regulation that is no longer necessary to address a lack of competition, while also avoiding the cost and uncertainty of unnecessary regulatory reviews*".[14]

1.4.2 This does not reflect the legislative history. The purpose of s 210 was to create a process for regular regulatory reviews to take account of the fast-changing nature of telecommunications technologies that were possible fibre substitutes, as reflected in the Select Committee's report that s 210:[15]

> *[…] provides for the Commission to review whether fibre fixed line access services should be deregulated. This is designed to take into account the* ***changing nature of telecommunications technologies that are possible substitutes for fibre****.*

1.4.3 The Commission's interpretation of the purpose is also inconsistent with the plain wording of ss 210(4)(i) and (ii).

---

[8] Draft Decision [2.40]

[9] Draft Decision [2.42]

[10] Draft Decision [2.47]

[11] Draft Decision [2.48]

[12] Draft Decision [Table B2, p80]

[13] Draft Decision [3.13] – [3.14]

[14] Draft Decision [2.15.3]

[15] Select Committee report, Telecommunications (New Regulatory Framework) Amendment Bill (own emphasis)

1.5 Change of circumstances and comparison date

1.5.1 The Commission concludes that it "*does not need to focus on whether circumstances may have changed as a trigger for reasonable grounds*".[16] This conclusion is contrary to the purpose of s 210 discussed above, and the plain wording of s 210(4)(i) and (ii).

1.5.2 While the Commission disagrees with our view that the comparison date should be December 2016 (which was the actual date the decision to regulate was made by Cabinet following a competition assessment by MBIE) because regulation occurred in the form of statutory amendments and regulatory instruments that were issued after that date,[17] we have in this submission (without conceding that point) used the date of the latest relevant regulatory instrument, November 2019, as the comparison date for our analysis. This was the date of promulgation of the Telecommunications Regulated Fibre Service Providers Regulations 2019.

1.5.3 Our analysis in **Section 9** of this submission unequivocally demonstrates the explosive growth of, and improvement in, fixed wireless access (**FWA**), and the emergence of satellite and Digital Microwave Radio (**DMR**) as broadband access technologies since 2019. These technologies comfortably exceed the "*possible substitute for fibre*" threshold which Parliament intended sufficient to trigger a deregulation review, and also exceed the "*significant change in circumstances*" threshold in the Commission's revised approach.

1.6 Threshold for finding reasonable grounds exist

1.6.1 The Commission describes several different formulations of the evidential threshold which must be met for it to start a s 210 deregulation review, including:

(a) "***objectively sufficient** to **leave us with a view that it is likely** that the services should no longer be regulated*";[18]

(b) "***likely** that the FFLAS should no longer be regulated*"[19]; and

(c) "*deregulation must be a **sufficiently likely** outcome*".[20]

1.6.2 "*Sufficiently likely*" is a **higher** threshold than that which applies to the subsequent deregulation review, where the standard is that the Commission must make a recommendation it considers is **likely** to best give effect to the purpose in s 162.[21] However, it is clear from the legislative background that Parliament intended a **lower** threshold should apply to the reasonable grounds assessment.

1.6.3 This is also consistent with the Commission's submission to the Select Committee that deregulation reviews "*may need to occur reasonably frequently given the fast-changing nature of telecommunications technologies that are **possible** substitutes for fibre*".[22]

1.6.4 As discussed in this submission, the reasons the Commission gives for adopting a higher threshold do not justify its adoption:

---

[16] Draft Decision [A11.1]

[17] Draft Decision [A24]

[18] Draft Decision [A16] (own emphasis)

[19] Draft Decision [A17] (original emphasis)

[20] Draft Decision [2.15.4] (own emphasis)

[21] Telecommunications Act s166(2)

[22] Commerce Commission *Submission on the Telecommunications (New Regulatory Framework) Amendment Bill* (2 February 2018) at pg. 5.

(a) The cost of undertaking the review is not a relevant consideration under s 210.

(b) The review process does not create regulatory uncertainty.

1.7 Conclusion

1.7.1 The failures of, and errors by, the Commission discussed in detail in this submission, include material errors of law and mistakes of fact. We accordingly invite the Commission to remedy these errors and properly consider all the information before it.

1.7.2 The Commission's draft decision that no reasonable grounds exist to start a deregulation review in relation to FFLAS services we supply:

(a) does not apply the principles described in [1.2] above;

(b) contains errors of law and mistakes of fact;

(c) has not properly considered information we have already provided in this consultation process; and

(d) taken into account matters which are not relevant to the s 210(4) assessment.

1.7.3 The information we have provided to date, and updated in this submission shows conclusively that we face effective competition across all of our FFLAS service categories, and there is no potential, were there no Part 6 regulation, for us to exercise SMP. The Commission is accordingly compelled under s 210 to conduct a deregulation review.

1.7.4 The reluctance of the Commission to undertake a deregulation review is inconsistent with the submission it made to the Select Committee that "*deregulation reviews may need to occur reasonably frequently given the fast-changing nature of telecommunications technologies that are possible substitutes for fibre*".[23]

1.7.5 It is also inconsistent with the statement by the Telecommunications Commissioner on the release of the Commission's Rural Connectivity Study[24] about "*the importance of regulation in keeping pace with changes in the market and remaining fit for purpose*" and can be contrasted with the decision of the Grocery Commissioner to proactively commence a review of the Grocery Supply Code a year earlier than required by the Grocery Industry Competition Act 2023.

1.7.6 The grounds for starting a deregulation review of all our FFLAS are evident in the data and wholesale and retail market behaviours. On that basis, it is reasonable to expect the Commission to commence a deregulation review early in 2025, with a view to making a recommendation to the Minister by the end of that year. Given the increasing competition from alternative technologies, it is critical the Commission use this opportunity to commence a deregulation review and ensure this regulation is fit for purpose given the significant (and continuing) changes to the competitive landscape in the relevant markets.

[23] Commerce Commission *Submission on the Telecommunications (New Regulatory Framework) Amendment Bill* (2 February 2018) at pg. 5.

[24] https://www.linkedin.com/posts/tristan-gilbertson_im-proud-of-the-hard-work-by-the-team-on-activity-7234322129444335616-

2. Purpose of section 210

2.1 The Commission states that "*Section 210 was intended to promote the long-term interests of consumers by avoiding the cost of regulation that is no longer necessary to address a lack of competition, while also avoiding the cost and uncertainty of unnecessary regulatory reviews*".[25]

2.2 There is no clear basis for the Commission's adoption of this statutory purpose. It does not reflect the purpose expressed by the Select Committee that s 210:[26]

> *[…] provides for the Commission to review whether fibre fixed line access services should be deregulated. This is designed to take into account the* ***changing nature of telecommunications technologies that are possible substitutes for fibre****.*

2.3 The Commission's interpretation of the purpose is also inconsistent with the plain wording of ss 210(4)(i) and (ii), which do not mention or require the Commission to consider any need to 'avoid the cost' of regulatory reviews in s 210 and the legislative history of the Telecommunications (New Regulatory Framework) Amendment Act.

2.4 It is clear that the purpose of s 210 is to create a mechanism to enable regular reviews of the Part 6 regime to take account of the quickly changing telecommunications technologies which could be possible substitutes for fibre. This accords with the principle underpinning the enactment of Part 6 that "*regulation is only applied to the extent necessary to address a lack of competition*".[27]

2.5 Relevantly, this principle was relied on during the consultation process for the Telecommunications (Regulated Fibre Service Providers) Regulations 2019 and ultimately lead to the Minister exempting Chorus from PQ regulation in areas where there was competition between Chorus and LFCs (namely, areas where the LFCs had installed a fibre network as part of the UFB initiative).[28]

2.6 This purpose was also acknowledged by the Commission in its 2018 submission to the Select Committee that "*[d]eregulation reviews may need to occur reasonably frequently given the fast-changing nature of telecommunications technologies*"[29] and is consistent with the statement by the Telecommunications Commissioner on the release of the Commission's Rural Connectivity Study[30] about "*the importance of regulation in keeping pace with changes in the market and remaining fit for purpose*".

2.7 Parliament established a process for regular deregulation reviews if competitive conditions changed to ensure the regime remained fit for purpose. The Commission's reasonable grounds assessment must be undertaken in a manner that is consistent with this purpose.

---

[25] Draft Decision [2.15.3]

[26] Select Committee report, Telecommunications (New Regulatory Framework) Amendment Bill (own emphasis)

[27] Explanatory note at 2: "*The Review examined whether the current regulatory framework for telecommunications in New Zealand is the optimal one for competition, investment, and innovation after 2020. It concluded that there was a need for change given the evolution of the telecommunications environment, the growth in fibre networks and services, and changes in the market structure of the industry. These changes require a new approach to telecommunications regulation to ensure that— • excessive profits arising from natural monopoly services are limited: • regulation is stable and predictable: • regulation is only applied to the extent necessary to address a lack of competition: • regulation can respond rapidly to a changing environment: • market participants are responsive to consumer demands for service quality*".

[28] https://www.mbie.govt.nz/dmsdocument/10439-telecommunications-regulated-fibre-service-providers-regulations-2019-proactiverelease-pdf

[29] At pg. 5.

[30] https://www.linkedin.com/feed/update/urn:li:activity:7234322129444335616/

3. Change of circumstances and comparison date

3.1 The Commission concludes that it "*does not need to focus on whether circumstances may have changed as a trigger for reasonable grounds*".[31] This is contrary to the purpose of s 210 discussed above, and the plain wording of s 210(4)(i) and (ii).

3.2 The Commission disagrees with our view that the comparison date should be December 2016 (which was the actual date the decision to regulate was made by Cabinet following a competition assessment by MBIE) because regulation occurred in the form of statutory amendments and regulatory instruments that were issued after that date.[32]

3.3 While we disagree, we have in this submission used the date of the latest relevant regulatory instrument, November 2019, as the comparison date for our analysis. This was the date of promulgation of the Telecommunications Regulated Fibre Service Providers Regulations 2019.

3.4 More than 18 months prior to that date, in a submission to the Select Committee on the Amendment Bill, the Commission recognised it was foreseeable that alternative technologies would become possible substitutes to fibre, noting that:[33]

(a) it was possible that competition for fibre would emerge from new technologies, that this was "*already occurring*" and that "*emergence of effective substitutes for fibre (for example, fixed wireless connections to homes and businesses) seems likely to affect many parts of New Zealand*";[34]

(b) it was "*foreseeable today that the provision of wireless services may constitute a near substitute for the provision of fibre services for certain market segments of end-users (for example, those with lower bandwidth demand requirements)*";[35] and

(c) it was "*reasonably foreseeable that other access technologies which may also be substitutes for fibre services for certain market segments of end users will become available in the future*".[36]

3.5 Today, six years later, the changes to the competitive landscape are even greater than the Commission described in 2018. The most significant changes to the landscape since November 2019 include:

(a) The rollout of mobile and fixed 5G wireless broadband services in 2021 and 2022 by the three Mobile Network Operators (**MNOs**).

(b) The continued reduction in the retail price of FWA services.

(c) The acquisition by the three MNOs of independent "fibre champion" retail service providers (**RSPs**).

(d) MNO wholesale FWA agreements with Mobile Virtual Network Operators in 2022.

(e) The emergence of satellite broadband as an alternative network.

---

[31] Draft Decision [A11.1]

[32] Draft Decision [A24]

[33] Commerce Commission *Submission on the Telecommunications (New Regulatory Framework) Amendment Bill* (2 February 2018).

[34] At [27.3].

[35] At [29].

[36] At [29].

While Starlink launched in 2021, it has only been included in the Commission's Measuring Broadband reports since June 2023. In 2024, Starlink launched a lower speed discounted plan available New Zealand wide, at a monthly price of $79 compared to $159 for its standard plan; it also reduced its hardware fee to $399, compared to the original price of $1,040.

(f) 2degrees being acquired by Vocus (at that time the largest fibre broadband retailer which did not also offer a competing FWA service with a 12% market share) in June 2022.

One of the stated purposes of that acquisition was to enable the merged entity to compete with Spark and Vodafone more effectively for the provision of fixed wireless broadband services.

(g) One NZ and Spark launching wholesale FWA plans in 2023.

(h) In May 2023, the government announcing that contracts had been signed with the three MNOs to accelerate the roll-out of 5G services to small towns across New Zealand.[37]

(i) OneNZ's announcement that it will launch a dedicated wholesale fibre business by the end of 2024 called "EonFibre" which will offer wholesale access to One NZ's fibre infrastructure, including its 11,000km of domestic terrestrial fibre. The newly appointed General Manager of EonFibre has stated that "*[o]nce operational, we want EonFibre to be NZ's leading fibre provider for the technology and wholesale business sector*".[38]

(j) The emergence of new DMR technology as an alternative broadband service.

Full Flavour's "AirFiber" DMR service (referred to the Commission's Draft Decision) is advertised as being significantly more cost-effective than traditional DMR and is marketed directly to consumers as "*very high performance with characteristics such as low latency (outperforming traditional fibre), high bandwidth and high reliability (no risk of underground cable damage!)*."[39]

Evidence of competitive constraint

3.6 The evidence that the competitive constraints imposed by FWA and other technologies are significant is cogent and compelling:

(a) The responses to FWA competition by fibre providers discussed by the Commission under the heading "*ability to exercise substantial market power*" are, to the contrary, evidence of the competitive constraint imposed on fibre providers;[40]

(b) Our Get Fibre Ready (GFR) policy of proactively connecting end-users' premises before an RSP has ordered a wholesale service is a direct response to FWA competition;

(c) as discussed in the Joint Submission[41] (and in Section 7 below) the reluctance of consumers to pay the current retail premium for fibre broadband means the retail price of higher speed services is constrained by the retailer-controlled retail market price of alternative broadband services, with the retail FWA price playing the role of anchor price in this chain of substitution; and

[37] https://www.rsm.govt.nz/projects-and-auctions/current-projects/preparing-for-5g-in-new-zealand

[38] Comms Day 26 July 2024 *One NZ to establish dedicated wholesale fibre business.*

[39] https://fullflavour.nz/rural-broadband/airfiber

[40] Draft Decision [3.107] – [3.112]

[41] Joint Submission [9.14]

(d) the fibre disconnection data set out in our graphs for "reasonable grounds" deregulation assessment (Confidential) which was attached to the Joint Submission and covered the period from September 2023 and January 2024, and the updated data for the period February 2024 to August 2024 attached to this submission.

3.7 The increase in competition since 2018 is also described in the Commission's Annual Market Monitoring Reports from 2018 to 2024. That these emerging technologies have significantly changed the competitive landscape since 2018, and imposed significant competitive constraint on fibre services, is undeniable.

3.8 The explosive growth of, and improvement in, FWA, and the emergence of satellite and DMR as broadband access technologies since 2019 comfortably exceeds the "*possible substitute for fibre*" threshold which Parliament intended sufficient to trigger a deregulation review, and also exceeds the "*significant change in circumstances*" in the Commission's revised approach.

4. Reasonable grounds threshold

The Commission has set an unreasonably high evidential threshold

4.1 The Commission describes several different formulations of the evidential threshold which must be met for it to start a s 210 deregulation review:

(a) "*We may start a review of FFLAS where the information before us is **objectively sufficient** to **leave us with a view that it is likely** that the services should no longer be regulated*";[42]

(b) "*Under our revised framework, to start a review we must have reasonable grounds to consider it **likely** that the FFLAS should no longer be regulated*"[43]; and

(c) "*[T]he threshold for finding reasonable grounds exist is that deregulation must be a **sufficiently likely** outcome to justify the considerable expense and uncertainty that will accompany a review*".[44]

4.2 "Sufficiently likely" is a **higher** threshold than that which applies to the subsequent deregulation review, where the standard is that the Commission must make a recommendation it considers is **likely** to best give effect to the purpose in s 162.[45] However, it is clear from the legislative background that both the Commission in 2018 and Parliament intended a **lower** threshold should apply to the reasonable grounds assessment, and that a review should take place if the evidence established that changing technologies had emerged which were **possible** substitutes for fibre.

4.3 The "**possible** substitute" threshold was the threshold the Commission recommended in its submission to the Select Committee that "*[d]eregulation reviews may need to occur reasonably frequently given the fast-**changing nature of telecommunications technologies that are possible substitutes for fibre***".[46]

[42] Draft Decision [A16] (own emphasis)

[43] Draft Decision [A17] (original emphasis)

[44] Draft Decision [2.15.4] (own emphasis)

[45] Telecommunications Act s166(2)

[46] At pg. 5.

4.4 The Select Committee adopted the Commission's wording in its report which said that s 210:[47]

> *[…] provides for the Commission to review whether fibre fixed line access services should be deregulated. This is designed to take into account the* ***changing nature of telecommunications technologies that are possible substitutes for fibre****.*

4.5 Why the Commission now departs from the wording it used in 2018 is both unclear and unjustified. Logic suggests the evidential threshold for finding there are reasonable grounds to start a review must be lower than for the review itself. Otherwise, the evidential burden on parties to satisfy the Commission that reasonable grounds exist will be as high as that for the subsequent review or even higher if the Commission considers that reasonable grounds can only exist if deregulation is a "*sufficiently likely*" outcome.

4.6 As we said in our Joint Submission with Enable "the Commission's description of the "reasonable grounds" assessment as a "pre-review"[48] is inappropriate. The Commission's obligation is to determine whether reasonable grounds to start a review exist, not to conduct a shadow review covering the subject matter of the deregulation review itself.[49]

4.7 There is also judicial authority pointing to a lower threshold for "reasonable grounds". The Supreme Court of Canada, in another context, agreed that "*the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities.*"[50]

4.8 The reasons given for adopting a higher threshold do not justify its adoption:

(a) The cost of undertaking the review is not a relevant consideration under s 210.

(b) The review process does not create regulatory uncertainty. Regulatory certainty is the principle that regulated entities have certainty as to their legal obligations, and the regulatory regime provides predictability over time.[51] There is no regulatory uncertainty where the regulated entities themselves are advocating for the regulatory review, and the review is focussed on whether those entities should be deregulated (as opposed to how regulation should be applied to those entities).

(c) To the extent that the outcome of any review process is uncertain that is simply a natural consequence of carrying out a review. Pre-determining the outcome of a review would be inconsistent with administrative law principles and cannot be what Parliament intended.

4.9 The reasons are also inconsistent with the Commission's previous position on FFLAS deregulation reviews. In its submission to the Select Committee on the Telecommunications (New Regulatory Framework) Amendment Bill, the Commission acknowledged that "*[d]eregulation reviews may need to occur reasonably frequently given the fast-changing nature of telecommunications technologies that are possible substitutes for fibre*".[52] Unlike now, the Commission did not suggest then that frequent reviews would create regulatory uncertainty, or that Parliament should consider imposing limits under s 210 because of the cost to the Commission of carrying out such reviews.

---

[47] Select Committee report, Telecommunications (New Regulatory Framework) Amendment Bill (own emphasis)

[48] Framework Paper [1.4]

[49] Enable Fibre Broadband and Tuatahi First Fibre *Joint Submission on NZCC Framework Paper on fibre fixed line access service deregulation review under section 210 of the Telecommunications Act* 10 February 2024 (**Joint Submission**) [3.6]

[50] Mugesera v. Canada (Minister of Citizenship and Immigration), [2005] 2 RCS 100, 2005 SCC 40, par. 114.

[51] See discussion of Best Practice Regulation principles from the Treasury "Best Practice Regulation: Principles and Assessments" (February 2015).

[52] At pg. 5.

Failure to rely on information provided or seek further information from stakeholders

4.10 In effect, a partial/shadow deregulation review has been carried out, without the benefit of all the evidence the Commission would receive or obtain as part of a formal review. The Commission has now invited submissions on areas where it has identified it has "*limited data*" but failed to have regard to probative and compelling evidence we provided in the Joint Submission, instead relying on evidence primarily sourced from "*existing Commission data sources*".[53]

4.11 The Commission has placed particular weight on some of the results of its Customer Satisfaction Monitoring survey. However there are limitations with the survey results and alternative interpretations of the results. For example, the Commission noted that 35% of consumer respondents who switched broadband plans (staying with the same provider) indicated a key reason for doing so was for faster speed, 24% indicated a key reason was to move to a lower priced plan with *less* plan inclusions (i.e., suggesting lower speed and/or less benefits).[54] In addition, consumers were not asked how much more they would be willing to pay for faster speed and the comments from consumers included in the report suggest speed is only one of the considerations in the purchase decision. For example, one respondent is noted as having switched from fibre to FWA as, in their words, they "*didn't need to pay a lot extra for what didn't seem like that much more speed*". The survey also notes that for consumers who switched providers, 44% indicated a key reason they left their previous provider was because they wanted to pay less (a statistic not referred to in the Draft Decision) while only 19% indicated a key reason they left was as they wanted higher speeds.[55]

4.12 The Commission's draft decision that no reasonable grounds exist to start a deregulation review in relation to FFLAS services we supply:

(a) does not apply the principles described in [1.2];

(b) contains errors of law and mistakes of fact;

(c) has not properly considered information we provided in this consultation process; and

(d) taken into account matters which are not relevant to the s 210(4) assessment.

5. Relevant Markets for Tuatahi FFLAS

5.1 Market definition is a critical element of the s 210(4) analysis; under (a) the Commission must assess changes in competition in "*a relevant market*" while (b) requires the Commission to assess the ability of service providers to exercise substantial power in a market.

5.2 The Commission has proposed to identify the area in which each service is supplied,[56] and stated that:

(a) The potential geographic area of FFLAS is anywhere **a regulated provider** has installed a fibre network.[57]

(b) The roll-out of the UFB network means there are differing levels of competition across different parts of New Zealand.[58]

---

[53] At [2.57].

[54] Customer Satisfaction Monitoring Report (July – December 2023) at 17

[55] Customer Satisfaction Monitoring Report (July – December 2023) at 21.

[56] Draft Decision [2.27]

[57] Draft Decision [3.16]

[58] Draft Decision footnote 38, referring to [4.5] of the Draft assessment Framework Paper

(c) Describing the geographic areas in which competition for FFLAS differs allows the Commission to assess FFLAS markets more accurately for the existence of reasonable grounds.[59]

(d) Markets will be assessed on a service-by-service basis at the start of the analysis of each category of services.[60]

5.3 While we agree with the Commission's description of the role of geographic markets under s 210, the Commission has not applied this regarding the regional LFCs. It has instead considered six of the seven FFLAS categories as national markets and focused on Chorus' conduct in those national markets.

5.4 As a result of this, the fact that regional LFCs face a different, and materially stronger, level of competition in their respective geographic markets than Chorus faces in the national market has been ignored. In addition, the Commission has not taken into account that other than for Bitstream PON services, Chorus is the major (and typically dominant) alternative supplier in the regional LFCs' FFLAS areas. Where the Commission has concluded that Chorus can exercise SMP in relation to a FFLAS service category, it has incorrectly assumed (without analysis) that the three regional LFCs could do likewise which fails to acknowledge the alternative fibre and fixed wireless options retail providers could switch customers to.

5.5 In addition, there are mistakes of fact the Commission has made in other parts of the Draft Decision. For example, as discussed in **Section 6** below, the Commission has made a mistake of fact in concluding that there are only a small number of situations where the Chorus point-to-point network overlaps with the other LFCs' networks.[61] In reality, the Chorus network overlaps 100% with our point-to-point network. This mistake occurred because the overlap referred to by the Commission ("*only 0.27% of NZ addresses can get a fibre connection from two LFCs*"[62]) related to fibre-to-the premises fibre networks, not point-to-point fibre networks. This could have been avoided if the appropriate regional market definition was applied.

5.6 To remedy this error, the Commission must carry out separate "reasonable grounds" assessments for each of the regional LFCs. This will require the Commission to adopt in each case a geographic market corresponding to the footprint of their respective FFLAS networks.

5.7 The Commission states that LFCs' uniform pricing suggest that competitive conditions are sufficiently similar that a broad geographic market is appropriate.[63] While it acknowledges uniform pricing may be due to a degree of countervailing market power from RSPs (who push the LFCs to have near-alignment on wholesale prices to support the RSPs' national retail pricing objective), it concludes that LFCs "*could still vary prices to respond to localised competition where it existed, but do not do so*".[64] It is unclear on what evidence the Commission based this comment, as we provided information regarding our Digital Equity Product in the Joint Cross-Submission.

5.8 RSPs prefer uniform, national pricing and consistent offerings across fibre providers. To the extent we offer lower-cost fibre products, the benefit of our lower wholesale pricing is ultimately absorbed through retailer margins due to their desire for nationally consistent retail pricing. Since July 2022, we have offered a "Digital Equity Offer" at a wholesale price of $19.50 for a 200/100 service for qualifying connections. **[Confidential]**.

---

[59] Draft Decision [3.16]

[60] Draft Decision [2.40]

[61] Draft Decision [3.130], [3.139.2].

[62] Draft Decision [3.130]

[63] At [3.70].

[64] At [3.70].

5.9 The information we previously provided, together with the additional information contained in this submission is objectively sufficient to leave the Commission with a view that all FFLAS services we supply should no longer be regulated in order to promote the purpose in s 162 of the Act and, where relevant, workable competition under s 166(b).

6. Material mistakes of fact

6.1 The Draft Decision contains material factual errors about the regulated fibre services. By way of example, in its discussion on point-to-point services, the Commission observed:[65]

(a) "*Where FFLAS networks exist alongside each other (e.g. where the Chorus network overlaps with the other LFCs networks) we expect some competition does exist*."

(b) "*However, for the purposes of this reasonable grounds assessment, our view is that this is a weak competitive constraint due to the small number of situations it occurs (as stated in paragraph 3.82) only 0.27% of NZ addresses can get a fibre connection from two LFCs)*."

6.2 Paragraph 3.82 relates to competition for Bitstream PON service and reads:

> *Chorus supplies 73% of the 1.3m wholesale fibre connections across the country with Tuatahi (14%) Enable (11%) and Northpower providing the rest. We note that 6,248 addresses in New Zealand (0.27% of total addresses) have access to a fibre network from more than one LFC.*

6.3 The 1.3m wholesale fibre connections referred to in paragraph 3.82 are fibre-to-the-premises connections used as an input to the Bitstream PON service. The figure of 0.27% refers to the overlap of fibre-to-the-premises connections. The two numbers do not describe the overlap of the Chorus and regional LFC FFLAS footprints. As the Commission has previously observed, the difference between the UFB and FFLAS networks:

> *Our approach does not use the UFB initiative as a basis, instead focusing on the presence of regulated FFLAS, rather than whether it is built as part of the UFB initiative or not. We note we use the term LFC which was created as part of the UFB Initiative.* ***The key point is that the UFB footprint is not used as part of our framework****.*[66]

6.4 The regulated provider FFLAS networks do in fact significantly overlap. For Chorus the overlap is approximately 30% of its national fibre network, in Northland (Northpower Fibre), the Central North Island (Tuatahi) and Christchurch (Enable) where the three regional LFCs have built UFB fibre-to-the-premises networks.

6.5 The overlap with Chorus for the three regional LFCs is 100%. Telecom was the incumbent network when the regional LFCs won UFB contracts in 2011. The Part 6 regime recognised that the Chorus network had national coverage and overlapped the fibre networks of the regional LFCs. It was for this reason Chorus is subject to ID regulation only in the other LFC's areas, but PQ regulation elsewhere, and it is because of competition from Chorus that the LFCs are not subject to PQ regulation.

6.6 As noted in 5.5 above, in our view, the Commission's finding that "*the regulated provider networks do not overlap significantly*"[67] is unlikely to have occurred had the Commission adopted the appropriate regional market definition.

---

[65] Draft Decision [3.130]

[66] Draft Decision [A45 and footnote 173] (own emphasis)

[67] Draft Decision [3.139.2]

7. Failure to have regard to submissions made and evidence produced

7.1 It appears that Commission staff have not meaningfully considered the evidence we provided in the Joint Submission, and we discuss four examples of that below.

Point-to-point services

7.2 The finding that "*Chorus is the only LFC who faces small pockets of limited competition from non-regulated providers*"[68] for point-to-point services is contrary to the information before the Commission. As explained in the Joint Submission,[69] Tuatahi and Enable faced competition for point-to-point services from both Chorus and other non-regulated providers, although Chorus was the dominant supplier. Additional information which was confidential was provided in Part B (Tuatahi) and Part C (Enable) of the Joint Submission.

Transport services

7.3 In relation to Transport Services, the Commission concludes "*Chorus faces no competition for the supply of inter-regional backhaul*" but "*we are not aware of the state of competition in other LFC areas*".[70] The Joint Submission explained that Chorus was the major provider of these services in the Enable and Tuatahi regions.[71]

Co-location services

7.4 In relation to Co-location services the Commission analysed "*network equipment accommodation and management services, allowing RSPs to install equipment in Chorus exchanges*"[72], observed there was no competition for these services as they are location specific[73] and concluded that "*were regulation to be removed, LFCs could exercise SMP over the Co-location services*".[74] However, the information provided to the Commission in the Joint Submission shows it would be impossible for us to exercise SMP over Co-location services if regulation were removed. We do not own any exchanges; and we are instead a co-locator, renting space for our equipment in Chorus and Spark exchanges.[75]

Information regarding switching between FWA and fibre

7.5 The Commission states that "*we do not have any detailed information regarding the switching of consumers between FWA and fibre plans*". [76] However, we summarised the results of the termination survey we send to customers when they terminate a fibre service in the confidential section of the Joint Submission[77], and also attached a power point presentation with the detailed survey data entitled *Tuatahi graphs for "reasonable grounds" deregulation assessment* (Confidential).

---

[68] Draft Decision [3.139.3]

[69] Joint Submission [9.19] – [9.22]

[70] Draft Decision [3.179]

[71] Joint Submission [9.23] –[9.24]

[72] Draft Decision [3.208]

[73] Draft Decision [3.209]

[74] Draft Decision [3.215]

[75] Joint Submission [9.25]

[76] Draft Decision [3.102]

[77] Joint Submission Part 2 [4.3] –[4.8]

7.6 Slides 9 – 16 of the presentation set out the responses of almost 600 end-users who disconnected their fibre service between September 2023 and January 2024 and responded to the survey. The presentation sets out the data in numerical and graph formats. It analyses the data and identifies:

(a) the reasons they disconnected;

(b) what technology they moved to;

(c) trends in alternatives post fibre disconnection;

(d) trends in top disconnect reasons; and

(e) disconnect trends by RSP.

7.7 Far from lacking any detailed information regarding the switching of consumers between FWA and fibre plans, we have provided the Commission with comprehensive rolling consumer insight data, which is compelling. We subsequently updated the graphs attached to the Joint Submission with the results from our disconnection survey from February 2024 to August 2024. This updated presentation is attached to this submission.

7.8 The Commission also states[78] that "*we disagree with Enable and Tuatahi's claim that FWA has steadily increased its share of broadband connections at the expense of fibre services*", referring to [8.4] of the Joint Submission. However, in [8.4] we asserted that wireless networks had proved to be far more competitive that had been anticipated in the September 2015 review and pointed to the increase in FWA connections from 3% in 2016 to 17% in 2022, which is undeniable.

7.9 We did state elsewhere that a significant part of the growth in FWA has been at the expense of fibre services, substantiating the claim with evidence, including an analysis of the reasons end-users gave us for leaving fibre in Slides 9 -16 of our graphs for "reasonable grounds" deregulation assessment (Confidential) annexed to the Joint Submission), the inactive ONT data in Slide 2 and 3, and the commentary in [4.3] to [4.10] of Part 2 of the Joint Submission. That data showed that **[Confidential]**% of respondents who disconnected and moved to a new premise or new service moved to FWA.

7.10 The Commission's conclusion that "*fibre and FWA connections are both rising, seemingly at the expense of copper and HFC connections*" is incorrect.[79] The UFB build has been completed. The most significant growth for new fibre connections is in new developments/new MDUs or new connections from copper end-users (where possible, given FWA competition). Accordingly, a rise in fibre connections alone provides no evidence of the churn off fibre to FWA services. That evidence is to be found in the end-user termination surveys, and inactive ONT and churn data we have already provided, and updated in this submission, which proves that FWA is increasing its share of broadband connections at the expense of fibre services.

7.11 Our updated disconnection survey attached to this submission shows that for respondents which disconnect fibre to either move to new premises or a new service that **[Confidential]**. These statistics are consistent with recent analysis of macro trends across RSPs including the "*shift to focusing on fixed wireless broadband rather than fibre to capitalise on the lower levels of regulation and higher*

[78] Draft Decision [3.85]

[79] Draft Decision [3.85]

margins it offers."[80] As noted by a Jarden analyst, Spark "*has done a good job so far in converting customers from fibre to fixed wireless*".[81]

7.12 The updated data we have provided in this submission, in addition to the data provided in the Joint Submission, clearly demonstrates the continuing and increasingly significant churn off fibre to alternative technologies, predominantly FWA services. This evidence supports our earlier statement that a significant part of FWA growth has been at the expense of fibre services, despite the Commission's dismissal of this claim in its Draft Decision. It must follow that this evidence is objectively sufficient to establish there are reasonable grounds to start a deregulation review.

8. Voice Services

8.1 We agree with the Commission that "*it is probable that workable competition exists in the market for retail voice services and that it is probable that regulated providers are sufficiently constrained such that they do not have SMP in relation to the regulated Voice services*".[82] Indeed, that is the case beyond all reasonable doubt.

8.2 As the Commission's annual monitoring reports disclose, voice services over fixed-line infrastructure have been declining steadily for several years as more and more households rely on mobile networks or internet apps for voice calls rather than a home phone. The Commission identified in its Draft Decision that consumers are switching away from landline to mobile services, which largely offer better value for money than all other voice services, with "*much cheaper minutes to a wider range of devices*".[83] While voice technology is available on the fibre network, the demand for voice services has been miniscule, accounting for 0.1% of our revenue in 2023.

8.3 The Commission concluded there were no reasonable grounds to start a deregulation review of Voice services as (in its view):

(a) "*net compliance costs are likely to increase*",[84] if Voice services are deregulated while other FFLAS services remain subject to regulation; and

(b) deregulation would provide little (if any) incentives for regulated providers to innovate and invest or improve efficiency.[85]

8.4 However, the primary purpose behind s 162 is "*to promote the long-term benefit of end-users in markets for fibre fixed line access services by promoting outcomes that are consistent with outcomes produced in workably competitive markets*", where there is a lack of competition to deliver these outcomes. Where the relevant markets are workably competitive, or a service provider faces strong competitive constraint (particularly from unregulated services), continued regulation:

(a) no longer promotes the "*long-term benefit of end-users*";

(b) disincentivises regulated providers to innovate, invest or improve efficiencies; and

---

[80] Business Desk *What to watch for in Spark's full-year financials* (12 August 2024) https://businessdesk.co.nz/article/markets/what-to-watch-for-in-sparks-full-year-financials

[81] Business Desk *What to watch for in Spark's full-year financials* (12 August 2024) https://businessdesk.co.nz/article/markets/what-to-watch-for-in-sparks-full-year-financials

[82] Draft Decision [3.47]

[83] Draft Decision [3.38]

[84] Draft Decision [3.53]

[85] Draft Decision [3.54.1] and [3.54.2]

(c) is contrary to the driving principle underpinning the enactment of Part 6 that "*regulation is only applied to the extent necessary to address a lack of competition*".[86]

8.5 Even if partial deregulation were to increase net compliance costs the benefit of deregulation would outweigh any such costs. There is also no benefit to retaining unnecessary regulation which has no impact on behaviour in the market. Accordingly, the removal of unnecessary regulation is a benefit in and of itself for both the regulated entity and the regulator. In any event, any change in compliance cost would be insignificant. Accordingly, the fact there are reasonable grounds to start a deregulation review for Voice services is undeniable.

9. Bitstream PON services

9.1 The information provided to the Commission in the Joint Submission and updated in this submission comfortably exceeds any threshold for finding reasonable grounds is start a deregulation review of our Bitstream PON services.

9.2 As we explain in this section of the submission:

(a) the growth and improvement in quality of alternative broadband technologies since 2018 has resulted in significant and increasing competitive constraint on fibre broadband services, to the extent that today **[Confidential]**% of our end-users disconnecting their fibre services to move to new premises or a new service are moving to FWA, mobile only or satellite alternatives and **[Confidential]**% of fibre connections within our regions (excluding the GFR connections referred to at [3.6]) are inactive;

(b) this constraint applies across all Bitstream speed tiers, as end-users are prepared to pay only a small premium for faster speed, and the evidence shows each speed tier is constrained by the price of the tier below, with the fibre started service introduced in response to FWA competition playing an anchor service role;

(c) our response to FWA competition is evidence of a lack of SMP, not, as the Commission contends, and ability to exercise SMP;

(d) future expansion and increasing quality of alternative broadband technologies is reasonably foreseeable, not uncertain; and

(e) the totality of the information before the Commission is objectively sufficient to establish reasonable grounds for the Commission to start a deregulation review of Bitstream PON services.

Competitive constraint from alternative technologies

Competition from Fixed Wireless Access (FWA)

9.3 The September 2015 review of the Act concluded that competition from wireless broadband was "*unlikely to be sufficient to act as a competitive constraint on future wholesale pricing of the UFB network in 2020*"[87]. At that time FWA accounted for 3% of broadband connections. Wireless networks have in fact proved to be far more competitive than was then anticipated. As the table below taken

[86] Telecommunications (New Regulatory Framework) Amendment Bill (explanatory note) at 2

[87] 2015 Review document [38]

from the Commission's Annual Monitoring Reports show, the FWA share of broadband connections increased from 3% in 2016 to 17% in 2022:

Fixed Broadband by Technology (%)

	2016	2017	2018	2019	2020	2021	2022
Fibre	368	460	669	880	1,145	1,180	1,259
Copper	1,132	1,000	775	581	441	308	230
Fibre/Copper	1,500	1,460	1,444	1,464	1,486	1,488	1,489
F/C %	**97%**	**93%**	**90%**	**89%**	**87%**	**85%**	**83%**
FWA	40	117	165	188	221	276	315
FWA %	**3%**	**7%**	**10%**	**11%**	**13%**	**15%**	**17%**
Total	1,540	1,577	1,610	1,649	1,707	1,760	1,804

9.4 According to the Commission, this table highlights "*that fibre and FWA connections are both rising, seemingly at the expense of copper and HFC connections*".[88] Why the Commission is of the view that fibre services are immune from FWA competition is not stated, but it is not supported by the evidence:

(a) Our disconnection survey shows that close to **[Confidential]**.

(b) We previously outlined the significant investment made by MNOs to increase 4G availability, the national launch of 5G services in 2021[89], and the strong marketing and incentive push by FWA providers to move customers to their FWA retail service (as opposed to a fibre service using LFC wholesale inputs).

(c) Following the launch of their 5G networks, the MNOs all made public statements regarding the fibre-like characteristics of 5G FWA and their intention to migrate their customers onto FWA: Spark referred to 5G's "*fibre-like speeds*",[90] One NZ noted 5G download speeds "*[compare] well with other broadband technologies including fibre*" [91] and 2degrees advised that 5G would "*enable a new generation of services which require more speed, lower latency, higher reliability and continued security*".[92]

---

[88] Draft Decision [3.85]

[89] According to TUANZ, 5G is up to 100 times faster and has lower latency by a factor of five compared to 4G services (Tech Users Association of New Zealand An introduction to 5G http://tuanz.org.nz). One NZ states that "*4G FWA has a relatively limited lifespan and will soon be replaced by 5G FWA"* (One NZ Preliminary response of One NZ to the submission by 2degrees to the Commerce Commission regarding the clearance application by One NZ relating to the proposed acquisition of Dense Air 18 December 2023 (One NZ Cross-Submission) [2.4]).

[90] Spark delivers New Zealand's first 5G commercial wireless broadband into five heartland communities (28 November 2019) https://www.sparknz.co.nz/news/Spark_delivers_NZ_first_5G_commercial_wireless_broadband/ "The much higher data cap on 5G wireless broadband opens up an attractive proposition for a lot more customers, as it can offer fibre-like speeds in places with no or limited fibre coverage."

[91] One *Fast without the fuss: Vodafone NZ launches 5G Broadband for easy and reliable internet in homes and businesses* (22 February 2021) https://media.ome.nz/5gbroadband "Vodafone 5G Broadband is a future-proofed broadband technology with a simple plug-in-and-go setup and unlimited data delivered via the mobile network, providing fast internet access without the fuss of coordinating a technician or getting a fixed line installed or connected […] Our testing shows 5G Broadband download speeds on the Vodafone network could reach up to 750 Mbps – with 5G surpassing 1 Gbps speeds in optimum conditions. This compares well with other broadband technologies including fibre."

[92] 2degrees 5G is here! (28 February 2022) https://www.2degrees.nz/media-release-archives "This is the start of a new journey for 2degrees and our customers. 5G is more efficient, more flexible, provides much more capacity and is much faster. 5G is the platform to enable a new generation of services which require more speed, lower latency, higher reliability, and continued security. 2degrees is continuing to invest to enhance our world class network".

(d) One NZ has publicly announced its intention to migrate 25% of its customers to FWA by 2024[93] while Spark plans to move 30% to 40% of its then fixed line broadband customers to FWA.[94]

(e) Spark also announced in 2023 that ~30% of its broadband customers were on wireless broadband, and that its 5G investments were maturing and would underpin future growth in consumer and B2B markets.[95]

(f) One of the stated purposes of Vocus' acquisition of 2degrees in June 2022 was to convert Vocus' retail customers to FWA to allow the merged entity to better compete with Spark and One NZ:

> *The combination of fixed and mobile infrastructure assets should also enable the merged entity to compete with Spark and Vodafone more effectively for the provision of fixed wireless broadband services. An increased customer base, through combining the migration opportunity of 2degrees' and Vocus NZ's customers from copper to a fixed wireless solution, will offer the merged entity economies of scale, allowing it to provide more competitive services to customers. Fixed wireless broadband increases the overall utilisation of the mobile network, improves return on investment and supports future capital investment. A larger customer base will also reduce the forecasting risk with fixed wireless broadband, which is important for network planning.".*[96]

9.5 In addition, the significant fall in the retail price of fixed wireless broadband services over a period when the MNOs were investing heavily in upgrading their networks to 4G and then 5G capability, and with no corresponding fall in the retail price of mobile wireless broadband services suggests a degree of cross subsidisation of FWA fixed services by mobile services.

9.6 The Commission's conclusion that despite this continued investment, marketing, and repeated public announcements, MNOs have not been able to attract fibre end-users to their FWA services is inconceivable and does not align with the consumer switching data that we have collected.

9.7 While it may be the case that FWA services perform best in densely populated urban areas and are not yet available throughout New Zealand, the constraint FWA imposes on fibre services has national reach because RSPs price on a national basis and require wholesalers to price on the same basis. As a consequence, end-users in areas where competition is less intense receive the benefits of price reductions responding to intense competition in urban areas.

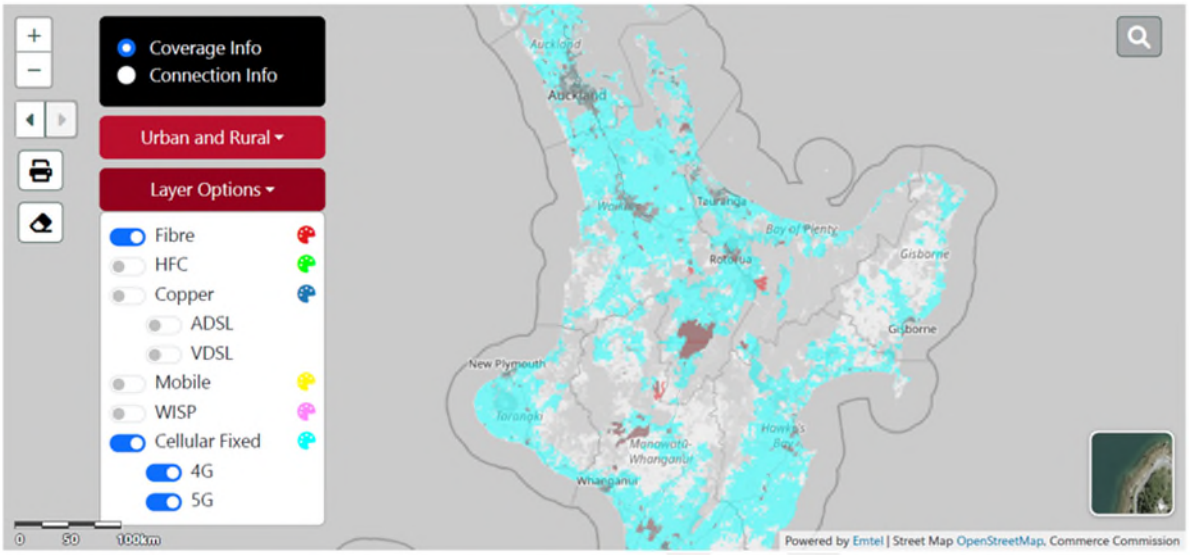
9.8 The reach of FWA (and overlap with the fibre footprint) in Tuatahi areas of operation is clearly illustrated by the Commission's Telecommunications Connectivity Map:

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

[94] 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

[95] Spark *FY23 Results Summary* p5

[96] Vocus and 2degrees *Merger clearance application* 15 February 2022



9.9 There is ample evidence that FWA represents a significant competitive constraint on regulated fibre services and is a substitute to FFLAS. This includes the acknowledgement from Spark that there is a degree of demand-side substitutability between fibre and wireless broadband services,[97] One NZ's acknowledgment that both technologies fall within a single residential broadband market,[98] and the economic reports filed in relation to the Dense Air clearance application:

(a) NERA's economic report concluded that "*One NZ's FWA connection data shows strong competition in both fibre and non-fibre areas"*[99] and observed in relation to Chorus (these observations applying equally to us) that:[100]

(i) "*aside from 2degrees, Spark and One NZ are competing with their mobile networks against Chorus' fibre regulated network*";

(ii) "*Chorus faces stranding risk and is therefore incentivized not to lose customers to FWA*";

(iii) "*MNOs are incentivised to have broadband customers on their mobile network (which is largely a fixed cost) as opposed to on the fibre network (which is a variable cost) So we would expect Spark and One NZ to already be competing aggressively to lure customers away from the Chorus network*".

(b) Brattle Group's economic report noted the intense competition between services delivered over fixed fibre and FWA technologies, and that:[101]

> *[…] in areas where fibre is prohibitively expensive to deploy, FWA often emerges as the next-best alternative. However, in NZ with fibre available to a large part of the population, FWA appears to be a service that competes with a fixed wired broadband service.*

[97] Spark public submission (16 February 2024) at [8] and [22].

[98] One NZ cross-submission on Dense Air application at [3.2(b) and (c)].

[99] NERA Economic report in response to Statement of Issues (5 March 2024) at [58].

[100] NERA Economic report in response to Statement of Issues (5 March 2024) at [55].

[101] Brattle Group *Economic Analysis of Dense Air and One New Zealand's Spectrum Acquisition* 4 March 2024 [p 33/34].

> *Intermodal competition in the fixed broadband market refers to competition between different types or modes of broadband technologies and infrastructure that can deliver highspeed internet access to consumers – such as fixed wired broadband services and FWA broadband services. From a consumer's perspective, they are primarily choosing a speed price-data quota bundle, rather than the specific mode of technology. Hence, along these dimensions (speed-price-data quota) any fixed broadband services that is available to the consumer are substitutes. For example, if an FWA broadband provider increases prices, customers could switch to a wired service that offers lower prices and/or better or worse quality.*

9.10 In the Joint Submission we suggested the Bitstream PON service category, which accounts for more than 90% of our revenue, should be further divided into fast (up to and including 300Mbps download), faster (301Mbps to1Gbps), and fastest (above 1Gbps) PON bitstream services which allows for analysis of the specific competitive constraints on each separate product group. The Commission disagreed with this approach because, in its view, "*any difference in competitive conditions is likely to be felt only at the low end of the retail market where the Fibre 50 service is offered*",[102] and the "*potential cost of deregulation of a potential low-speed broadband service …would include the increased complexity of the regulatory regime, where deregulation remains in place for higher speed services*".[103]

9.11 We were not advocating for deregulation of low-speed broadband service. Our submission was that analysing Bitstream PON services in different speed tiers would isolate the competitive constraints at each tier and best demonstrate how, via the chain of substitution, the price of the fibre starter service, introduced in response to FWA competition, acted as an anchor service constraining the price of all bitstream speed tiers.

9.12 Bitstream PON services with download speeds above 300Mbps (the majority of end- users in this segment are on the 1Gbps plan) are subject to significant constraint from FWA because end-users are not prepared to pay a significant premium for higher download speeds.

9.13 This was observed by the Commission's 2012 study of demand for high-speed broadband, for which Roy Morgan was engaged to survey consumers' willingness to pay for higher broadband speed:[104]

> *The survey found that while 4% of consumers said that they were willing to pay more than $20 extra per month, 37% said that they were willing to pay between $5 and $10 extra per month. A further 40% of consumers (640,000 households) said that they were willing to pay up to $5 extra per month.*

9.14 This characteristic of telecommunications markets continues today. As noted by technology commentator Peter Griffin:[105]

> *"5G was touted back in 2019 as the next generation of mobile networks that would transform both consumer and industrial applications running over mobile networks. We were expected to happily pay a premium for 5G, receiving lightning-fast connections in return, while telcos would step up the value chain to offer high-capacity, low-latency services in everything from factories to stadiums. We got the first iteration of 5G, at least in parts of the country, but it's been greeted with a collective shrug of the shoulders by consumers and businesses alike, who prioritise better coverage over faster data speeds."*

---

[102] Draft Decision [A41]

[103] Draft Decision [A38}

[104] NZCC High speed broadband services demand side study Final Report 29 June 2012 [149]

[105] One Fast without the fuss: Vodafone NZ launches 5G Broadband for easy and reliable internet in homes and businesses (22 February 2021) https://media.ome.nz/5gbroadband

9.15 Griffin notes that "*the only real area of expansion of late has been in fixed wireless broadband services, which the mobile operators favour as it allows them to avoid paying wholesale network access costs to Chorus and other fibre optic network operators*".

9.16 Because of the reluctance of end-users to pay a significant premium for faster broadband speeds, the price of higher-speed broadband services is constrained by the market price of lower speed services. As a consequence of the reduction in price of fibre broadband services with our Fibre Starter service in response to FWA competition discussed below at [9.47], there is no significant price premium for faster broadband speeds. As the table at [9.18] shows, our wholesale price of the 1Gbps service is $10.38 more than the wholesale price for the 300Mbps service.

9.17 The pricing relativity between speed tiers discussed above also applies to the fastest speed services. For example, we released our Hyperfibre suite of products in 2020. The building block price for each Hyperfibre product using the UFB price caps in the CIP contracts (which were unilaterally extended a further 2 years to 31 December 2021 to allow the Commission to develop the FFLAS input methodologies) was $852; however, we had to price our 2Gbps service at $75 to offer a compelling wholesale price point to fibre retailers and ensure relativity with the wholesale price of the 1Gbps service, which was in turn priced to ensure relatively with the 300 Mbps service.

9.18 The relativity in price across speed tiers is anchored by the entry level 50/10 service which is priced to match the retail price of FWA as demonstrated in our current pricing:

	Bitstream 2 Ultra *50/10 2.5/2.5*	**Bitstream 2 Ultra** *300/100 2.5/2.5*	**Bitstream 2 Ultra** *1,000/10 2.5/2.5*	**Hyperfibre Home** *2000/2000*
Tuatahi	38.00	53.02	63.40	88.61

9.19 It is well established that a product does not need to be a direct economic substitute to impose a competitive constraint on another product. As the OECD explained in 2016:[106]

> *Consider a situation where end-users may choose between two extremely different broadband services in terms of speed: on the one hand, they can use a service with almost symmetrical uploading and downloading speed of 100 Mbps provided over fibre-to-the-home (FTTH) network while on the other hand they can use a basic asymmetrical ADSL service with downloading and uploading speeds of 2Mbps and 256Kbps respectively. Even those these two services are not direct substitutes they can belong in the same market as long as there is a chain of substitution between them. Such chain of substitution exists where the price of a broadband access service provided over ADSL is constrained by the price of the service provided over FTTH network. Such constraint, in turn, exists if substitution exists, for example, between ADSL and VDSL, on the one hand, and VDSL and FTTH on the other.*
>
> *This means that the relevant market may comprise products that may differ substantially in terms of characteristics (such as speed) and price. Such broadly defined markets reflect the economic purpose of market definition since the boundaries of the market are defined by the extent to which products and services, even if provided over different networks, exercise competitive constraint on each other's prices.*

9.20 This was recognised by the Commission in its 2016 determination of Spark's clearance application to acquire spectrum management rights from Craig Wireless and Woosh, when it concluded that "*FWA*

[106] https://www.oecd.org/daf/competition/Defining_Relevant_Market_in_Telecommunications_web.pdf

broadband services should, as a matter of fact and commercial common sense, be included within a broader residential broadband market".

9.21 In addition, we provided the Commission with objective evidence of consumers switching from its fibre services to FWA and other technologies in Part 2 of the Joint Submission. We summarised the results of the termination survey we send to customers when they terminate a fibre service in the confidential section of the Joint Submission[107], and we also attached a power point presentation with the detailed survey data entitled *Tuatahi graphs for "reasonable grounds" deregulation assessment (Confidential)*.

9.22 Slides 9 – 16 of the presentation set out in great detail the responses of almost 600 end-users who disconnected their fibre service between September 2023 and January 2024 and responded to the survey. The presentation sets out the data in numerical and graph formats. It analyses the data and identifies:

(a) the reasons they disconnected;

(b) what technology they moved to;

(c) trends in alternatives post fibre disconnection;

(d) trends in top disconnect reasons; and

(e) disconnect trends by RSP.

9.23 We have updated the graphs in our previous presentation to include the survey results from February 2024 to August 2024. This updated document is attached to this submission and shows that for respondents who disconnect fibre to either move to new premises or a new service that **[Confidential]**.

9.24 The Commission's statement in its Draft Decision that "*we do not have any detailed information regarding the switching of consumers between FWA and fibre plans*" [108] is wrong. As noted above, we have provided the Commission with comprehensive rolling consumer insight data, which is valuable for Commission usage.

Future constraint from FWA

9.25 In its submission to the Select Committee in February 2018 in relation to the Telecommunications (New Regulatory Framework) Amendment Bill, the Commission said that:[109]

(a) it was possible that competition for fibre would emerge from new technologies, that this was "*already occurring*" and that "*emergence of effective substitutes for fibre (for example, fixed wireless connections to homes and businesses) seems likely to affect many parts of New Zealand*";[110]

(b) it was "*foreseeable today that the provision of wireless services may constitute a near substitute for the provision of fibre services for certain market segments of end-users (for example, those with lower bandwidth demand requirements)*";[111]

---

[107] Joint Submission Part 2 [4.3] – [4.8]

[108] Draft Decision [3.102]

[109] Commerce Commission *Submission on the Telecommunications (New Regulatory Framework) Amendment Bill* (2 February 2018)

[110] At [27.3]

[111] At [29]

(c) it was "*reasonably foreseeable that other access technologies which may also be substitutes for fibre services for certain market segments of end users will become available in the future*".[112]

9.26 At that time, FWA's share of broadband connections in New Zealand was approximately 7% based on Commission data.[113] As the evidence shows, the Commission's predictions in 2018 were correct. Today FWA broadband connections are close to 20% and New Zealand has the third highest FWA uptake in the OECD,[114] and mobile-only data plans and satellite technologies have become viable alternatives to fibre.[115]

9.27 The Commission says that its revised approach will be forward looking,[116] with the Commission considering "*how much competition each FFLAS faces and could be expected to face in the foreseeable future*",[117] and taking "*expected future developments into account in assessing competition and the ability of the regulated providers to exercise SMP*".[118] We agree that a forward-looking approach is essential, due to the pace of change in the Broadband market.

9.28 However, we disagree with the Commissions conclusion regarding it's "forward looking" assessment of the competition Bitstream PON services could be expected to face in the foreseeable future that "*the roll out of 5G FWA may increase the competitive constraint on PON Bitstream services, although the deployment remains at its early stages and the future competitive effect remains uncertain at this stage*".[119]

9.29 The Commission's conclusion is surprising given the detailed information it has already been provided regarding the MNOs' forward planning. This includes:

(a) The information contained in the Joint Cross-Submission,[120] including Spark, One NZ and 2degrees' public statements about their future intentions for 5G rollout, and the market shares they aimed to reach, together with independent reports of 5G growth (repeated and summarised above at [3.6] and [9.4] – [9.9]).

(b) The Industry Update from Jarden released on 18 March 2024 NZ Telco: Review of network and retail competition in the broadband market which illustrated the increase in competition to Bitstream PON fibre services in the residential broadband market from FWA over time and its projected future growth. This was provided to the Commission as an attachment to the Joint Cross-Submission.

(c) Spark's December 2023 submission on Chorus' PQR2 expenditure proposal that "Spark has committed to accelerating deployment of its 5G network, aiming to expand 5G connectivity to all towns with a population of more than 1,500 people by the end of June 2026 using the recent allocated C-band spectrum." [121]

---

[112] At [29]

[113] Commission's Annual Monitoring report 2017

[114] Comms Day 26 July 2024 *OECD: NZ ranks 9th for fibre, 3rd for fixed wireless*

[115] Tuatahi disconnection survey results attached to the Joint Submission; updated results attached to this submission

[116] Draft Decision [2.17]

[117] Draft Decision [2.47]

[118] Draft Decision [2.50]

[119] Draft Decision [3.101]

[120] Joint Cross-Submission [5.19]

[121] Spark, *Fibre price-quality regulation: process and approach for the 2025 -2028 regulatory period* 14 December 2023 (**Spark 2023**) 5c.

9.30 Given the Commission concluded in 2018, when FWA was only 7% of broadband connections and 5G deployment was still three years in the future that increased competition was reasonably foreseeable, it is difficult to understand how the Commission in 2024, with the historical data and information regarding MNOs' future roll out intentions before it, could dismiss future FWA competition as being uncertain, and therefore unforeseeable.

9.31 One reason the Commission cites for concluding the future of 5G is uncertain is that an increase in users would result in capacity issues,[122] although it does not regard this as a "*hard limitation*" because "*5G providers do have the ability to invest in capacity if they choose*."[123] This is an understatement. All MNOs have advised the market of their 5G investment commitments and market share objectives; upgrade of 5G capacity is a planned strategic policy, not a possible reaction to capacity constraints.

9.32 There are economic incentives for MNOs to convert fibre end-users to FWA, thereby avoiding the payment of a wholesale access fee to an LFC. This was explained in an economic report by NERA prepared for One NZ in relation to the Dense Air acquisition and filed with the Commission on 5 March 2024[124], which we referred the Commission to in the Joint Cross-Submission:[125]

> *"MNOs are incentivised to have broadband customers on their mobile network (which is largely a fixed cost) as opposed to on the fibre network (which is a variable cost) So we would expect Spark and One NZ to already be competing aggressively to lure customers away from the Chorus network."*

9.33 As Chorus observed in its submission on the Vocus-2degrees merger application, wholesale markets for fixed-line broadband and voice services currently contain multiple operators competing on an uneven playing field where large vertically integrated unregulated fixed/mobile operators had a strong incentive to move customers onto their own networks.[126]

9.34 MNOs have a competitive advantage over fibre providers arising from the regulatory separation between wholesale and retail activities. They have the relationship with the end-user and can therefore influence their customers technology choice to maximize the growth of their on-net business. This is clear from the trends since 2018 and the MNOs' public statements. There should be no uncertainty about expected future developments or the future competitive effects of 5G FWA in light of the facts before the Commission.

9.35 Further, the Commission appears to have placed little weight on the control MNOs have over consumer choice and their ability to directly reach out to their existing and potential customers to offer them retail price incentives to move from fibre to another service. It has also placed little weight on the increased cost of living (which is unlikely to reduce in the near future). These costs have and continue to place pressure on discretionary spending, including utilities plans for telecommunications and fibre, and have led to a significant movement of fibre end-users to lower priced fibre plans or alternative technologies.

9.36 Since February when the Joint Submission was lodged, there have been further public statements by the MNOs, and independent reports which we refer to in this submission. The totality of this information demonstrates beyond doubt the expected future development of 5G and the increasing constraints it will bring to bear in the foreseeable future. For example:

(a) Spark's most recent Annual Report (2024) records that it invested $350m into its network and digital infrastructure in FY24, increased its mobile capacity 28% from FY23, and recorded that 5G was now live in 103 locations with Spark having plans to extended connectivity to all towns

---

[122] Draft Decision [3.105]

[123] Draft Decision [3.101]

[124] NERA Economic report in response to Statement of Issues (5 March 2024) [55(c)]

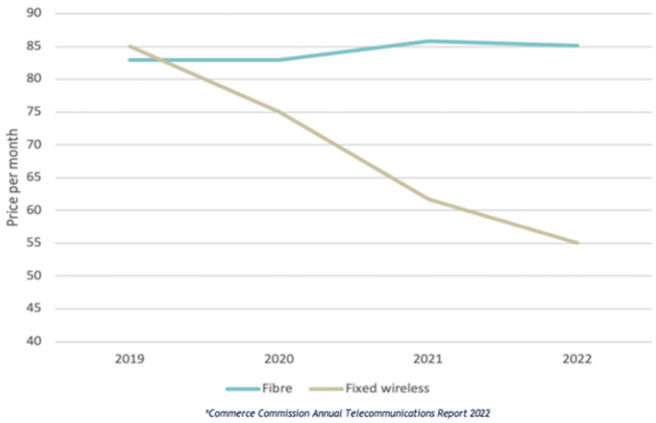
[125] Joint Cross Submission [5.2(c)]

[126] Chorus *Submission on Vocus and 2degrees merger clearance application* 15 February 2022 at [29]

with a population exceeding 1,500 by 2026.[127] Spark is deploying a 5G core network to deliver a "*true end-to-end 5G experience*" called 5G standalone which will allow Spark to "*create different service slices of the network that can be tailored for different purposes, referred to as network slicing*" which means it can "*optimise the network to suit the specific needs of different customers and industries*".[128]

(b) The OECD has recently reported that New Zealand is one of the biggest adopters of FWA in the OECD per capita, noting that technology accounts for 19% of connections compared to just 5% OECD-wide. While New Zealand was ranked ninth amongst 38 members for full fibre penetration, it was ranked third for FWA penetration.[129]

9.37 Unsurprisingly therefore, growth of FWA is predicted to continue. According to GlobalData[130], fixed wireless currently accounts for 19.5% of broadband connections early in 2024 and is predicted to grow to 26.3% by 2028. In tandem with the increase in 5G FWA performance and coverage, the retail price of FWA services has fallen significantly since 2019 as shown in the Commission's data:



Inability to exercise SMP

9.38 The Commission has moved away from considering a change in circumstance "*to make it clearer (amongst other reasons) that the inquiry is economic in nature and focused on the degree of competitive constraint at the time of the reasonable grounds assessment*". The key economic analysis the Commission undertakes is to assess "*the ability of the regulated providers to exercise SMP*", which it describes as existing "*when [the business'] actions are not effectively constrained by competition. For example, a business with SMP can profitably hold prices above competitive levels for a sustained period of time*". In its consideration of Bitstream PON services the Commission concludes "*there is little competitive constraint on the ability of regulated providers to exercise SMP*".

9.39 The Commission cites two examples of our alleged ability to exercise SMP:[131]

(a) In December 2021, Chorus, Tuatahi (as well as Chorus and Enable) upgraded its 30/10 broadband plan to 50/20 and 100/20 plan to the 300/100 Bitstream 2 product for no additional cost. Chorus acknowledged that this move was designed "*to ensure its UFB plans were better*

[127] 2024 Spark Annual Report pg. 7 and 66

[128] 2024 Spark Annual Report at pg. 39

[129] Comms Day 26 July 2024 *OECD: NZ ranks 9th for fibre, 3rd for fixed wireless*

[130] Revenue of New Zealand's Fixed Communication Services to Reach $1.56bn (30 October 2023) https://www.telecomlead.com/broadband/revenue-of-new-zealands-fixed-communication-services-to-reach-1-5-bn-113201

[131] Draft Decision [3.109] and footnote 115

value when compared to alternative technologies such as fixed-wireless broadband from which Chorus does not get any revenue".[132]

(b) In September 2023, we introduced a 50/10 "fibre starter" service at a wholesale price of $38 with no condition or cap on the retail price, with the intention of offering RSPs a fibre service they can offer for a retail price point equivalent to the FWA price.[133]

9.40 In light of these examples of alleged ability of regulated providers to exercise SMP, the Commission concludes "*it is likely that the purpose of s162 would be best met if regulation of Bitstream PON services were to be continued in its existing form*."[134]

9.41 It is difficult to understand how the Commission has concluded that our actions demonstrate we face "*limited competitive constraint*" and is evidence of our ability to exercise SMP, when the act of responding to competition is generally considered the antithesis of an exercise of SMP. Indeed, the Commission notes in its Misuse of Market Power Guidelines that "*[f]irms compete by providing more compelling offers to consumers than their competitors*"[135] and, as the Supreme Court has noted, SMP exists "*where a business is largely unconstrained by effective competitive pressures*".[136]

9.42 Our detailed explanation of the launch of its Fibre Starter product in the Joint Cross-Submission also demonstrates beyond doubt that this could not represent an exercise of SMP. For convenience we repeat that explanation in this submission.

9.43 **[Confidential]**

9.44 **[Confidential]**

9.45 **[Confidential]**

9.46 **[Confidential]**

9.47 **[Confidential]**

9.48 **[Confidential]**

9.49 The Commission states in the Draft Decision that "*there is little cost in changing the speeds of fibre plans to compete with services over other technologies*"[137] and cites these examples as highlighting "*how the regulated providers are able to adjust service offerings in order to compete with other technologies which already operate at full speed*."[138]

9.50 The basis for this conclusion appears to be that the Commission's view is this characteristic converts competitive conduct into an exercise of SMP, based on its view that the nature of fibre network technology means "*the network operator can thus 'dip into' parts of the market and offer different speed tiers in the knowledge that the cost to provide different tiers is minimal*".[139]

---

[132] https://www.stuff.co.nz/business/126248136/chorus-offers-to-triple-ufb-speeds-for-600000-households-and-firms-for-free

[133] There was a minor error in the Joint Submission where it recorded that both Tuatahi/Enable's Fibre Starter products were subject to the same retail price cap at [8.11(c)].Tuatahi did not require RSPs to commit to a retail price cap for Fibre Starter.

[134] Draft Decision [3.115]

[135] Guidelines [113]

[136] *Commerce Commission v Telecom Corporation of New Zealand Limited* [2010] NZSC 111

[137] Draft Decision at [3.108]

[138] Draft Decision at [3.111]

[139] Draft Decision at [3.74]

9.51 This assumption does not reflect our experience. The costs to provide the fibre starter plan were not minimal. There were other significant costs incurred by the regulated fibre providers in addition to technology costs in this response to FWA competition, including the time and complexities of introducing a new product under the UFB regime and revenue loss from existing customers downgrading from higher-speed plans, which we discussed in the Joint Cross-Submission.

9.52 **[Confidential]**

9.53 Even if it were true that "*there is little cost in changing the speed of fibre plans to compete with services offered over other technologies*", the competitive response to FWA would not be an exercise of SMP as discussed in the NERA report. The examples of response to FWA competition by the regulated fibre providers discussed by the Commission (and there are many others) are in and of themselves sufficient to show the competitive constraint imposed by FWA is significant. We have no ability to exercise SMP in the supply of Bitstream PON services, and there are accordingly reasonable grounds to start a deregulation review.

Mobile only competition

9.54 The introduction of 5G together with Wi-Fi hotspots has led to a growing segment of end-users obtaining broadband services entirely over mobile devices, without any fixed connection. Based on available market data we estimate that between 5% and 10% of New Zealand residences are mobile only services; in contrast, 16% of Australians were mobile-only for broadband in 2020, while in the United States 15% of adults are on mobile-only plans.[140] As indicated in the responses to our disconnection survey, **[Confidential]**% of respondents who disconnected fibre and moved to a new premises or new service had moved to a mobile only plan.

Satellite competition

9.55 Satellite broadband (using low-earth orbit satellites) is an emerging competitive technology that is available in both urban and rural areas. Satellite broadband is transmitted wirelessly using a satellite and ground-based satellite dish. The most well-known NZ provider, Starlink, launched its satellite broadband service in New Zealand in 2021. Starlink plans start from USD $99/month with an upfront cost for the broadband receiver equipment.

9.56 The popularity of satellite broadband has not gone unnoticed by the MNOs, with One NZ now offering a business satellite broadband package in conjunction with Starlink. Starlink broadband data has been included in the Commission's Measuring Broadband reports from June 2023, with the latest report in 2024 noting that satellite broadband currently has "[t]ypically higher download speeds than a Fibre 100 plan" but this can vary with location, and that LEO Satellite plans have seen increases in average download speeds across the past year, with consistent upload and latency performance.[141]

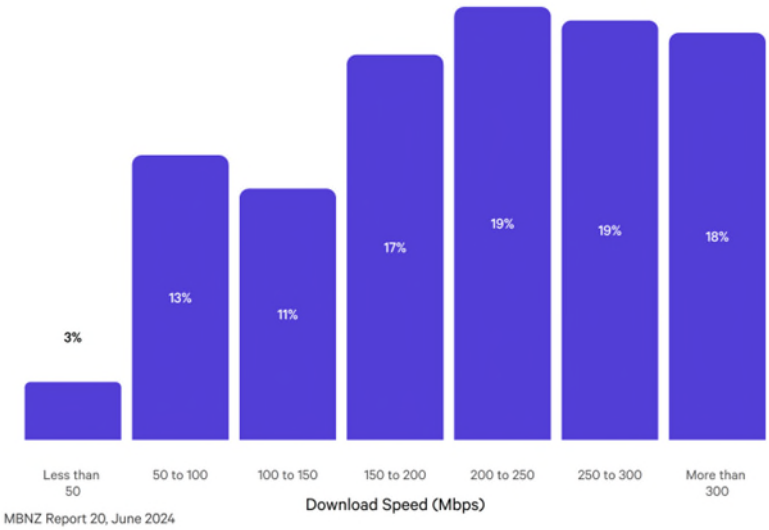
[140] Pew Research Centre Mobile Fact Sheet 31 January 2024 https://www.pewresearch.org/internet/fact-sheet/mobile

[141] Measuring Broadband (20 June 2024) at 7 and 31.

Distribution of LEO Satellite Results

Figure 17: Download Speeds on LEO Satellite Plans.

Distribution of test results across 86 Satellite units. Average (24/7) download speeds for LEO Satellite plans is 224 Mbps in non-Fibre areas; this varies over time.



9.57 As indicated in the responses to our disconnection survey, **[Confidential]**% of respondents who disconnected fibre and moved to a new premises or new service had moved to a satellite service.

Emergence of Digital Microwave Services (DMR)

9.58 DMR is a fixed wireless broadband connection delivered by high-capacity microwave radio link, which does not require any other infrastructure other than power, and a clear or near line of sight.

9.59 Full Flavour's "AirFiber" DMR service (referred to the Commission's Draft Decision) is advertised as being significantly more cost-effective than traditional DMR and is marketed as "*very high performance with characteristics such as low latency (outperforming traditional fibre), high bandwidth and high reliability (no risk of underground cable damage!)*."

9.60 The Commission has referred to DMR in its Draft Decision but notes that DMR typically has a high upfront cost; however, Full Flavour advertises its AirFiber plans as having *"[t]he performance of fibre without a hefty installation cost*".[142] AirFiber is an equipment brand that belongs to Ubiquiti Inc, an American technology company listed on the New York Stock Exchange, with US$1.928B in revenue generated in 2024.[143]

Inactive ONT and churn data

9.61 Churn is best illustrated by the trend in inactive ONTs.

9.62 **[Confidential]**

9.63 **[Confidential]**

[142] https://fullflavour.nz/rural-broadband/airfiber

[143] https://www.nasdaq.com/articles/ubiquiti-ui-q4-earnings-beat-estimates-higher-revenues

Conclusion

9.64 The totality of evidence shows that we face significant competition in the provision of Bitstream PON services from alternative technologies, demonstrated in disconnection statistics of close to **[Confidential]**% migration to FWA, **[Confidential]**% to mobile data only and **[Confidential]**% to satellite services, and inactive ONT statistics which show **[Confidential]**.

9.65 This information is objectively sufficient to establish there are reasonable grounds to start a deregulation review of Bitstream PON services.

10. Unbundled PON services

10.1 The Commission's conclusion that "*there is potential, were there no regulation, for SMP to be exercised by regulated providers*"[144] and therefore "*there are no reasonable grounds to start a deregulation review of Unbundled PON services under section 210 of the Act*"[145] is untenable.

10.2 We assume the Commission is referring to Part 6 regulation here, as Part 4AA continues to apply, and is not subject to the deregulation review. The Part 4AA non-discrimination and equivalence obligations continue to apply to all regulated providers independently of Part 6 means that there is no ability for regulated providers to exercise SMP absent Part 6 regulation.

10.3 Additionally, no RSP has taken the unbundled PON service that we have offered since 1 January 2020 as required by the undertakings we gave in 2011 under Part 4AA of the Act, because of changes in the competitive landscape. The three MNOs have preferred to invest in their own competing fixed wireless networks, while the smaller RSPs who did not have the scale required for unbundling advocated for the reduction in the wholesale price of the 1G PON service as an alternative to unbundling.

10.4 We cannot see any basis for continued regulation of unbundled PON services under Part 6; regulation under Part 4AA of the Act will of course continue to apply.

11. Point-to-point services

11.1 The Commission's Draft Decision that "*there are no reasonable grounds to start a deregulation review of Point-to-point services under section 210 of the A*ct"[146] is, in the case of point-to-point services we provide, untenable.

11.2 We have referred already to the Commission's mistake of fact that there are only a small number of situations where the Chorus point-to-point network overlaps with the other LFCs networks.[147] In reality the Chorus network overlaps 100% with our point-to-point network. This mistake occurred because the overlap referred to by the Commission ("*only 0.27% of NZ addresses can get a fibre connection from two LFCs*")[148] related to fibre-to-the premises fibre networks, not point-to-point fibre networks. As explained in the Joint Submission[149] Chorus is the dominant provider of point-to-point services in our geographic markets, building on its pre-UFB fibre network and long-term historic supply agreements.

11.3 Accordingly, in reality the Chorus network overlaps 100% with our point-to-point network.

---

[144] Draft Decision [3.163]

[145] Draft Decision [3.146]

[146] Draft Decision [3.118]

11.4 The Commission includes in this service category Bitstream 4, HSNS, BFAS and DFAS. HSNS and BFAS are Chorus specific products which are not supplied by Tuatahi or Enable.

11.5 Bitstream 4 and DFAS are extremely competitive. Chorus is the major provider of these services, building on its pre-UFB fibre network but there are in addition an increasing number of alternative dark fibre suppliers.

11.6 The major users of point-to-point services are businesses and large enterprises, which are typically located in CBD areas, where Chorus has an extensive fibre network and is the dominant service provide on long-term historic supply terms.

11.7 While Chorus is the major competitor for installing fibre to new developments, several operators now offer embedded networks: the supplier will build the fibre network inside the boundary and take a single high bandwidth business service from one of the UFB providers and then distribute this to each premise within the development. Examples of these operators include Tenco, Infrastructure Solutions, Lit networks (owned by an ISP Fastcom), Vodafone Infrastructure partners and Frednet/Multimedia.

11.8 **[Confidential]**

11.9 The Commission's conclusion that "*Chorus is the only LFC who faces small pockets of limited competition from non-regulated providers*"[150] is therefore incorrect. As outlined above**,** we face competition from an increasing number of unregulated dark fibre suppliers.[151]

11.10 The Commission's Draft Decision that "*it is probable that there is little competitive constraint on the ability of **regulated providers** to exercise SMP in relation to Point-to-point services*"[152] is, in so far as it relates to us, unsupported by the information before the Commission. As outlined above, we face substantial competition from Chorus and non-regulated providers such that we have no ability to exercise SMP in relation to point-to-point services. That there are therefore reasonable grounds to start a deregulation review of our point-to-point services is undeniable.

12. Transport services

12.1 The Commission's Draft Decision that "*there are no reasonable grounds to start a deregulation review of Transport services under section 210 of the Act*"[153] is, in the case of Transport services we provide, untenable.

12.2 The Commission's view is "*that there is no benefit to defining multiple geographic markets for Transport services, as the regulated providers, leveraging their existing fibre footprint, are best placed to capture a significant share of the market. This limits the effectiveness of any present alternatives at providing a genuine competitive constraint*."[154]

12.3 The assumption that we can "*[leverage its] fibre footprint*" is incorrect. We lease transport fibre from Chorus, Vocus and One NZ. The Commission also does not explain how leveraging a footprint translates into capturing a significant share of the market. However, whatever the Commission had in mind does not justify the Commission's adopting a national Transport services market, rather than separate geographic markets for each regulated provider's FFLAS footprint. As the Commission recognises "*describing the geographic areas in which competition for FFLAS differs allows us to access*

[150] Draft Decision [3.139.3]

[151] Joint Submission [9.21]

[152] Draft Decision [3.140] (own emphasis)

[153] Draft Decision [3.166]

[154] Draft Decision [3.175]

FFLAS markets more accurately for the existence of reasonable grounds".[155] Its failure to apply this approach to transport services has led it into error.

12.4 We provided information in the Joint Submission that Chorus is the major provider in our FFLAS area of non-building Access Points (NBAPs) (fibre connections to non-building locations such as Wi-Fi hot spots, traffic lights and cellular towers), and that in relation to fibre to cellular towers, in addition to Chorus the MNOs provide backhaul services to some of their own towers, as well as in some cases providing backhaul for other MNOs.[156] Specific examples were provided in the confidential sections of the Joint Submission. The Commission's statement "we are not aware of the state of competition in other LFC areas"[157] should be revisited.

12.5 The Commission's Draft Decision that "*it is probable that there is little competitive constraint on the ability of **regulated providers** to exercise SMP in relation to Transport services*"[158] is therefore, in so far as it relates to us, unsupported by the information before the Commission. We face substantial competition from Chorus and MNOs such that we have no ability to exercise SMP in relation to transport services, and therefore there are reasonable grounds to start a deregulation review of our Transport services.

13. Co-location and interconnection services

13.1 In its analysis, the Commission has considered "*network equipment accommodation and management services, allowing RSPs to install equipment in **Chorus** exchanges*"[159], observed there was no competition for these services as they are location specific[160] and concluded that "*were regulation to be removed, LFCs could exercise SMP over the Co-location services*".[161]

13.2 The information provided to the Commission in the Joint Submission shows it would be impossible for us to exercise SMP if regulation were removed because we do not own our own COs, but instead we co-locate our equipment in 600mm x 600mm bays in Chorus exchanges in Hawera, Wanganui, New Plymouth, Tauranga West, Tauranga East, and Hamilton East and a Spark exchange in Hamilton West.[162]

13.3 While we have limited space available in some of these exchanges to sublet to other RSPs for co-location purposes, no RSPs currently collocate in our space because they can obtain co-location services directly from Chorus (or Spark) in those exchanges (and use our wholesale tie cable service to allow that RSP to connect to our network within that exchange).

13.4 Applying the Commission's assessment framework:

(a) there are numerous alternative services comparable to the defined regulated services;

(b) these alternative services would effectively constrain any SMP that exists; and

(c) the information before the Commission is objectively sufficient to leave the Commission with a view that, in relation to us, co-location services should no longer be regulated in order to

[155] Draft Decision [3.16]

[156] Joint Submission [9.23], [9.24]

[157] Draft Decision [3.179]

[158] Draft Decision [3.187] (own emphasis)

[159] Draft Decision [3.208]

[160] Draft Decision [3.209] (own emphasis)

[161] Draft Decision [3.215]

[162] Joint Submission [9.25]

promote the purpose in section 162 and, where relevant, workable competition under section 1662(b).

14. Connection services

14.1 The Commission's Draft Decision that "*there are no reasonable grounds to start a deregulation review of Connection services under section 210 of the Act*" is, in the case of the FFLAS we supply, untenable.[163]

14.2 The Joint Submission explained that:[164]

(a) We do not offer connection services; it outsources this service to independent third-party service providers.

(b) We do not charge RSPs a fee for connecting residential customers because this would make fibre less competitive compared to FWA where no connection fee is charged; and

(c) We commenced a Get Fibre Ready (GFR) programme to proactively connect end-user premises ahead of a wholesale order from an RSP to neutralise a claimed competitive advantage of FWA that there is no delay in getting connected.

14.3 In contrast, electricity lines companies, which do not face competition from alternative technologies, recover the connection cost from the consumer. For example, the cost to connect a dwelling to the Waipa Networks electricity lines network is currently ~$2,372.

14.4 We are incentivised to negotiate a cost to connect as low as possible, because we can only recover these costs in the monthly wholesale fee if an RSP orders a fibre broadband service for the connected premises, which, with competition from FWA and other technologies, is uncertain.

14.5 The Commission's conclusions that "*it is probable that there is little competitive constraint on the ability of regulated providers to exercise SMP in relation to Connection services*"[165] and "*there is the potential, were there no regulation, for SMP to be exercised by regulated providers*"[166] are contrary to the information before the Commission. The responses to FWA competition referred to above demonstrate that we do not have any ability to exercise SMP in relation to Connection services and therefore there are reasonable grounds to start a deregulation review.

[163] Draft Decision [3.166]

[164] Joint Submission [9.27]

[165] Draft Decision [3.166]

[166] Draft Decision [3.206]