JOINT CROSS SUBMISSION BY TUATAHI FIRST FIBRE LIMITED AND ENABLE NETWORKS LIMITED IN RESPONSE TO SUBMISSIONS ON THE NEW ZEALAND COMMERCE COMMISION FRAMEWORK PAPER ON FIBRE FIXED LINE ACCESS SERVICE DEREGULATION REVIEW UNDER SECTION 201 OF THE TELECOMMUNICATIONS ACT

PUBLIC VERSION

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PART 1 – PUBLIC CROSS SUBMISSION

1. Introduction

1.1 This cross-submission is made jointly by Tuatahi First Fibre Limited (**Tuatahi**) and Enable Networks Limited (**Enable**) in response to submissions on *the Fibre fixed line access service reregulation review under section 210 of the Telecommunications Act – draft assessment framework paper* issued by the Commerce Commission on 7 December 2023 (**Framework Paper**).

1.2 We have not commented on every issue raised in the submissions; where we have not commented we rely on our Joint Submission dated 16 February 2024.

2. Benefits of regulation

2.1 At [2.34] of the Framework Paper the Commission states that "*as well as considering changes in competitive conditions, the costs and benefits that may result from deregulation will be relevant considerations".*

2.2 We note that none of the submissions on the Framework Paper other than our own make any reference to the purpose of Part 6 regulation or the benefits which regulation is delivering to end-users that would be lost in the event of deregulation. Our submission at [7.2] was that "*regulation does not result in any long-term benefit for end-users, as competition is delivering the outcomes encapsulated in s 162*".

3. Timing of Deregulation Review

3.1 2degrees, Mercury and One NZ submit that since 1 January 2022 (the start of the current regulatory period) there has been no "*change in circumstances such that continued regulation is no longer needed*",[1] "*no substantial change …to suggest that competition has matured to the point where regulation is no longer necessary*",[2] and "*no material change of circumstances …that would support a deregulation review being carried out at this stage."*[3]

3.2 As set out in our submission:

(a) 1 January 2022 is not the appropriate comparison date for the reasonable grounds assessment; and

(b) an increase in competition is sufficient to trigger a deregulation review, with that review determining the impact of that increase in competition on regulated fibre providers such that the purpose of Part 6 would be better served if 1 or more FFLAS were no longer regulated under the Act.

3.3 However, even if 1 January 2022 were the comparison date, and the Commission were correct that for reasonable grounds to exist there must be *"evidence that circumstances* ***may*** *have changed to such an extent that continued regulation …is no longer necessary to best promote the long-term benefit of end-users in markets for FFLAS*",[4] that threshold has been meet.

3.4 According to Vector there are provisions in the Act which indicate that 2024 is too early for the Commission to consider deregulating certain types of FFLAS such as PONFAS and other unbundled

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[1] 2degrees public submission (February 2024) at 2

[2] Mercury submission (16 February 2024) at 1

[3] One NZ public submission (16 February 2024) at [4]

[4] Framework Paper [2.11] (own emphasis)

PON services.[5] Vector's issue with Chorus re PONFAS is not a basis for deferring a regulatory review which is not limited to Chorus alone. As noted at [9.16] of our submission, no RSP has requested a PONFAS service from either Enable or Tuatahi.

3.5 As Chorus notes,[6] one of the Final Policy Decisions for Fixed Line Services made by Cabinet in 2016 was that there would be regular reviews by the Commission on whether competition had emerged, and suppliers should be deregulated. There have been regular reassessments of the regulatory regime for telecommunications since the Act was passed in 2001, with amendments in 2006, 2011 and 2018 and a further review is now due.

4. Change in circumstances

4.1 The Commission says it requires evidence the "*circumstances may have changed*" since the comparison date; the relevant "circumstances" are specified in s 210(4)(a) as an increase or decrease in competition to 1 or more fibre fixed line access services in a relevant market.

4.2 Even using a comparison date of 1 January 2022, the evidence of an increase in competition to the entire range of FFLAS in the Commission's seven service categories, but particularly the increase in competition to fibre broadband services from fixed wireless broadband services, is overwhelming. For instance:

(a) 2degrees launched 5G services in February 2022.

(b) 2degrees was 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.

(c) One NZ and Spark launched wholesale FWA plans in 2023.

(d) 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.

(e) in May 2023, the government announced that contracts had been signed with the three MNOs to accelerate the roll-out of 5G services to small towns across New Zealand.[7]

4.3 The attached Industry Update from Jarden released on 18 March 2024 *NZ Telco: Review of network and retail competition in the broadband market* illustrates the increase in competition to PON bitstream fibre services in the residential broadband market from FWA over this period.

5. Impact of increase in competition

5.1 The Commission requires evidence not only that competition has increased, but evidence that the increase in competition represents a competitive constraint on regulated fibre services.

5.2 That evidence can be found in material provided to the Commission by One NZ in relation to its proposed acquisition of Dense Air spectrum. An economic report from NERA on behalf of One NZ filed with the Commission on 5 March 2024 describes the relevant product market as "*broadband services (including wireless broadband services)"*[8] and observes:

[5] Vector public submission (16 February 2024) at [6]

[6] Chorus public submission (16 February 2024) at [8]

[7] https://www.rsm.govt.nz/projects-and-auctions/preparing-for-5G-in-New-Zealand

[8] NERA Economic report in response to Statement of Issues (5 March 2024) at [52a] (**NERA report**)

(a) "*aside from 2degrees, Spark and One NZ are competing with their mobile networks against Chorus' fibre regulated network*";[9]

(b) "*Chorus faces stranding risk and is therefore incentivized not to lose customers to FWA*";[10] and

(c) *"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*."[11]

5.3 The refence to Chorus in these passages applies equally to Enable and Tuatahi. Stranding risk can only arise where the infrastructure owner is unable to recover a normal economic return on and of its invested capital. In this case the reason for the risk of under-recovery is conceded by NERA to be competition from FWA.

5.4 One NZ's cross-submission in the same matter is consistent with NERA's observations. It defines the relevant market as residential broadband services,[12] describes the chain of substitution between FWA, fibre, VDSL and satellite services,[13] and acknowledges that "*fibre is clearly a constraint on the provision of FWA services"*.[14] That constraint works in both directions, as set out in our submission.

5.5 The intense competition between services delivered over fixed fibre and fixed wireless technologies is described in an economic report from Brattle Group prepared for Dense Air and filed with the Commission on 4 March 2024 in relation to the same transaction, noting:[15]

> *[…] 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.*
>
> *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.*

5.6 Spark submits that "*the existence of fast 5G capacity in a particular fibre area will not constitute evidence of a meaningful competitive constraint of the kind that warrants deregulation of an LFC in that area. Although wireless services …do provide a degree of demand-side substitutability to fibre, the fundamental supply side features of the fibre network are materially different*".[16] Spark does not explain why supply side features have any relevance to the demand-side substitutability of fibre and FWA services.

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[9] NERA Report at [55]

[10] NERA Report at [55(b)]

[11] NERA Report [55(c)]

[12] One NZ public submission at [3.2]

[13] One NZ public submission at [3.2(b) and (c)]

[14] One NZ public submission at [5.18]

[15] Brattle Group *Economic Analysis of Dense Air and One New Zealand's Spectrum Acquisition* 4 March 2024 [p33/34]

[16] Spark public submission (16 February 2024) at [8]

5.7 Spark also acknowledges that "*wireless is increasingly a viable substitute to fibre for some customer segments that do not use broadband for low-latency gaming or that have lower data requirements*"[17].

5.8 The fact that Spark acknowledges that there is a degree of demand-side substitutability between fibre and wireless broadband services, One NZ acknowledges that both technologies fall within a single residential broadband market, Brattle for Dense Air describes fixed wireless and fixed fibre technologies as substitutes and the expert report from NERA for One NZ describes aggressive competition from fixed wireless operators Spark and One NZ to lure customers away from fixed fibre cannot be ignored.

5.9 One NZ observes that there are two ways that "substitution of FFLAS" could be interpreted:

(a) the only substitute to FFLAS is another fibre service, or

(b) there is a chain of substitution across different access technologies with different attributes[18].

5.10 This is a question that was answered long ago in telecommunications, where 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:[19]

> *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.*

5.11 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 broadband services should, as a matter of fact and commercial common sense, be included within a broader residential broadband market".*[20]

5.12 In discussing these two alternative approaches however, One NZ downplays the capability of FWA as a competitive constraint on fibre, highlighting capacity coverage and performance issues and suggests the only substitute for FFLAS is another fibre service.[21]. This is surprising, as in its Dense Air clearance notice it said:[22]

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[17] Spark public submission at [22]

[18] One NZ public submission at [9]

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

[20] *Spark New Zealand Trading Limited and Craig Wireless New Zealand Spectrum Operations Limited and Woosh Wireless Holdings Limited* [2016] NZCC 7 [55]

[21] One NZ public submission at [13]

[22] One NZ *Notice seeking clearance to acquire 100% of the shares in Dense Ait New Zealand Limited* 2 November 2023 at [16.1], [16.2]

> *Previously, the Commission has concluded that FWA broadband services should, as a matter of fact and commercial common sense, be included within a broader residential broadband market. FWA broadband services are typically provided to a set location reflecting the spectrum and network capacity and the position of sites relative to the location. The demand and capacity at sites will influence where FWA broadband is offered. The Commission has noted that the New Zealand market allows for a greater offer of FWA broadband than many other countries due to lower population densities, and that FWA is offered in urban and rural areas.*
>
> *Measuring Broadband New Zealand notes that even in areas where other fixed network options (copper and fibre) are available, consumers may choose FWA broadband. This functional similarity between FWA broadband and fixed network options, coupled with the improved performance and increasing availability of 5G FWA broadband, suggests that it should be seen as closer competitors to fibre and (especially) copper-based broadband products.*

5.13 This analysis is supported by evidence provided to the Commission by One NZ during the Dense Air proceedings: NERA (on behalf of One NZ) notes that "*One NZ's FWA connection data shows strong competition in both fibre and non-fibre areas*."[23]

5.14 It its submission One NZ uses an extreme and misleading comparison between the highest speed fibre product, Hyberfibre, (which accounted for less than 0.13% of Tuatahi revenue and 0.00005487% of Enable revenue in 2023) with the lowest speed FWA product, 4G, and concludes that most "*Hyperfibre user[s] will not be willing to switch to 4G FWA due to the different performance of the two services*"[24]. That does not however mean that the wholesale price for Hyperfibre is not constrained by the retail price of FWA: [9.6] to [9.15] in Part 1 of our earlier submission shows how FWA pricing constrains the price of Hyperfibre through the chain of substitution.

5.15 One NZ also submits that:[25]

> *Chorus' position as an inevitable trading partner for retailers means that even if its FFLAS services faced genuine competition from alternative technologies in some geographic areas, this would not operate to constrain Chorus' SMP or preclude it from developing services specifically addressed at countering competitive technologies (e.g. by developing new products at price points that are specifically designed to target and deter uptake of these options, as was the case with entry level fibre products targeting fixed wireless access (FWA) services).*
>
> *While MNOs have ambitions to continue to attract end-users to alternative access technologies such as FWA, Chorus and other LFCs have conditioned consumers to think of fibre as an inherently superior technology. Chorus has used direct to end user marketing and incentives to encourage switching to fibre. Through this positioning […] Chorus has in effect reduced the size of the addressable market for alternative access technologies and worked to maintain its SMP.*[26]

5.16 The implication in these passages is that any action by LFCs to respond to FWA competition, such as direct engagement with end-users by LFCs to educate them on the benefits of fibre and incentives to encourage end-users to take up fibre services or developing new products, is evidence of substantial market power or is otherwise improper. To the contrary, this conduct is further evidence of the

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[23] NERA Report at [58]

[24] One NZ public submission at [11(b)]

[25] One NZ public submission at [6]

[26] One NZ public submission at [7]

competitiveness of the residential broadband market. If fibre had natural monopoly characteristics, direct marketing and incentives would not be necessary.

5.17 In addition, One NZ's allegation that the introduction of entry level fibre products was *"designed to target and deter uptake*" of FWA services is a gross misrepresentation. As noted at [8.11(c)] of our submission both Enable and Tuatahi introduced a 50/10 'fibre starter' service in September 2023 at a wholesale price of $38 and a condition that the retail price could not exceed $60. The parties have prepared confidential submissions addressing this point which are set out in Part 2 (**Tuatahi Confidential Cross Submission**) and Part 3 (**Enable Confidential Cross Submission**).

5.18 The same factors can be observed in Australia. Communications Day reported on 15 March 2024:

> *Two leading RSPs downgraded an astonishing 775,000 NBN SIOs from the 100 Mbps tier to the 50Mbps tier last quarter as the wholesale telco withdrew generous capacity circuit inclusions on the higher tier….the single biggest mass speed tier change event in the history of the NBN….The net downgrade event reveals the limited extent to which many end users are prepared to pay what are relatively small premiums for higher speeds.*[27]

5.19 We agree with Spark that the Commission needs to "*to take a forward-looking perspective*."[28] There is clear evidence that the intensity of FWA competition will continue to increase over future years:

(a) according to Spark *"recent years have seen a focus on shifting customers from fibre broadband to fixed-wireless, where the margins are less regulated. …Spark now has 31% of its broadband customer base on fixed-wireless. Hodson said despite the stated push to move more customers to fixed-wireless, it was only being offered to the appropriate users. … Investment in cell towers and mobile networks will allow Spark to market the service to more customers.*[29]

(b) in March 2024 One NZ announced that "*99.5% of the population and 60% of the geography of New Zealand will be covered by our upgraded 4G/5G network in CY 2025. 3G is being retired CY 2025 and 2G retiring by CY 2026. The spectrum re-farmed for increased 4G/5G performance. These moves are increasing our FWA capacity and are improving our mobile market share*".[30]

(c) 2degrees has plans to expand its FWA services, described (but redacted) in section 8 of its submission in response to the Dense Air Statement of Preliminary Issues.

5.20 The evidence before the Commission as outlined above and in our submission shows overwhelmingly "*that circumstances **may** have changed to such an extent that continued regulation …is no longer necessary to best promote the long-term benefit of end-users in markets for FFLAS*".

5.21 The Commission must accordingly undertake a deregulation review of all fibre fixed line access services provided by Enable and Tuatahi in accordance with s 210 of the Act.

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[27] Communications Day *Optus, TPG downgrade around 775K NBN subs from 100Mbps to 50Mbps tier in last quarter* 15 March 2024

[28] Spark public submission at [15]

[29] https://businessdesk.co.nz/article/markets/spark-paving-the-way-for-margin-focused-future""

[30] One NZ Infratil Investor Day 5 March 2024, slide 7.