

**Chorus cross submission on  
FFLAS deregulation review: Reasonable grounds  
assessment draft decision**

**15 October 2024**

**C H ● R U S**

## Introduction

### There are reasonable grounds for a deregulation review

1. This is Chorus' cross submission in response to submissions regarding the Commerce Commission's (Commission) reasonable grounds assessment draft decision (draft decision) for a deregulation review of fibre fixed line access services (FFLAS).
2. As set out in our submission, Chorus strongly disagrees with the Commission's draft decision that no reasonable grounds exist to start a deregulation review for FFLAS services.

### Broadband market competition

3. We do not agree with One NZ, 2degrees and Spark's statements regarding the level of competition in the market for Bitstream PON services. One NZ repeats the Commission's comment regarding the level of market share of fibre broadband within each of the regulated providers' network boundaries. High market shares – in and of themselves – do not necessarily indicate a firm has market power.
4. The Commission's own market power guidelines provide further guidance as to the proper consideration of market power:

*'46 Market share is not, however, the sole indicator of market power. While substantial market power is frequently accompanied by a substantial market share, other relevant factors must be considered. The most important of these will be the conditions for entry and expansion in the market:*

*46.1 If the barriers to entry and expansion are low, a high market share does not necessarily indicate substantial market power;*

*46.2 If the barriers to entry and expansion are high, a persistently high market share is likely to indicate substantial market power.*

*47 Market power is a question to be determined on a case-by-case basis. There is no market share threshold above which a firm will be considered to have substantial market power.<sup>1</sup>*

5. One NZ suggests:

*'...it would not be justifiable to start a deregulation review based solely on the potential competitive constraint that 5G FWA might have on providers of fibre services in the future.'<sup>2</sup>*

6. The question of whether to initiate a deregulation review doesn't turn solely on the potential competitive constraint 5G might have on providers of fibre services in the future. Our submission presented a broad range of analysis and evidence demonstrating that reasonable grounds exist. However, the future prospects of 5G are

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<sup>1</sup> Commerce Commission, *Misuse of Market Power Guidelines*, March 2023.

<sup>2</sup> One NZ, *One NZ submission on fibre fixed line access service deregulation review – reasonable grounds assessment draft decision*, 24 September 2024.

a relevant factor. The likely future state of competition is a critical consideration for potential deregulation. The Commission is only required to carry out an assessment of whether reasonable grounds exist once per (four-year) regulatory period, so a review must necessarily be forward-looking.

7. We note One NZ's statement:

*'Chorus' position as an inevitable trading partner for retailers means that even if it's 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.*<sup>3</sup>

8. It is difficult to envisage how the existence of 'genuine competition' could do anything other than prevent a firm from exercising substantial market power (SMP). However, it appears One NZ is suggesting there could never be reasonable grounds to start a deregulation review while Chorus provides wholesale services, regardless of the level of competition those services are subject to. This is an incorrect interpretation of s 210(4) of Part 6 of the Telecommunications Act 2001 (the Act). Section 210(4)(a) stipulates the Commission may consider whether competition to one or more FFLAS has increased or decreased in a relevant market.

9. Whether Chorus faces competition -and our ability or willingness to respond to competition are separate questions. Chorus' ability to develop services in response to competition is not relevant to the decision as to whether reasonable grounds exist to initiate a deregulation review.

10. It would be detrimental to consumers if Chorus – or any other existing or potential supplier of FFLAS or any other regulated service – were penalised merely because they provided regulated services (or had provided them in the past).

11. In a similar vein, Spark suggests:

*'As noted in the draft, we operate in a dynamic sector and there is some uncertainty relating to whether future services enabled by 5G technologies, for example, will provide an effective competitive constraint on FFLAS. However, the Commission is not required to solve for this uncertainty when considering whether reasonable grounds exist for a deregulation review.*<sup>4</sup>

12. While the Commission is unable to 'solve for this uncertainty', it is required to carefully consider whether and, if so, the extent to which fixed wireless access (FWA) technologies (whether 4G or 5G) compete with Bitstream PON services. This is a fundamental requirement of both the initial reasonable grounds assessment, and the subsequent, substantive deregulation review.

13. Spark goes on to suggest:

*'As set out earlier, we believe a practical way to navigate this complexity for the purposes of a reasonable grounds review is to only consider undertaking a*

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<sup>3</sup> One NZ, *One NZ submission on fibre fixed line access service deregulation review – reasonable grounds assessment draft decision*, 24 September 2024.

<sup>4</sup> Spark, *Fibre de-regulation review: reasonable grounds assessment draft decision*, 24 September 2024.

*deregulation review where, as a pre-condition, competitive constraints are vividly observable across a range of FFLAS services today.*<sup>5</sup>

14. Spark appears to confuse the standard of reasonable grounds with the standard of the test required by the subsequent review it is designed to trigger. In order to determine whether competitive constraints are 'vividly observable', the Commission must carry out a review to properly observe and analyse such constraints. Such constraints do not need to apply to a 'range' of FFLAS, rather '1 or more' (s 210 (1) of the Act).
15. We note the mobile network operators (MNOs) are both retailers/providers of FFLAS, and providers of services that *compete with* FFLAS. Accordingly, their views must be construed in that context and should only be accepted with strong supporting evidence. We note the lack of evidence provided by the MNOs in support of their views. At Appendix A we illustrate the prioritisation of FWA services over FFLAS, where both services are available at a particular address.
16. Competition in broadband markets is increasing. We note MNOs' significant price differential between fibre and wireless services including recent price reductions for 5G FWA (also shown in Appendix A). The market impact of these reductions is yet to be fully observed but they are likely to drive further competition between 5G and fibre products. Further, the MNOs have the ability to influence the uptake and retention of FWA and fibre services, given they set the retail prices for those services.
17. We endorse the points Enable and Tuatahi First Fibre (TFF) make in their submissions regarding the rapid evolution of competition since November 2019, including:
  - 17.1 The rollout of mobile and fixed 5G wireless broadband services since 2021 and 2022 by the three MNOs.
  - 17.2 One NZ's statement that it intended to migrate 25% of its customers to FWA by 2024.
  - 17.3 Spark's statement that it plans to move 30 – 40% of its fixed line broadband customers to FWA, and that it had achieved around 30% of its broadband customer base on FWA in 2024.
  - 17.4 The continuing fall in the price of FWA services.
  - 17.5 2degrees' acquisition of independent 'fibre champion' retail service providers (RSPs) including Orcon, MyRepublic and Stuff Fibre.
  - 17.6 MNO wholesale FWA agreements with mobile virtual network operators (MVNOs) in 2022.
  - 17.7 The rapid emergence of satellite broadband as an alternative network. Starlink recently launched a lower speed plan - that is available New Zealand-wide – at a monthly price of \$79.
  - 17.8 2degrees being acquired by Vocus – the latter of which was the largest fibre broadband retailer which did not also offer a competing FWA service prior to its acquisition in June 2022.

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<sup>5</sup> Spark, *Fibre de-regulation review: reasonable grounds assessment draft decision*, 24 September 2024.

17.9 One NZ and Spark launching wholesale FWA plans in 2023.

17.10 In May 2023, the government announcing that it had signed contracts with the three MNOs to accelerate the rollout of 5G services.

17.11 One NZ's announcement that it will launch a dedicated wholesale fibre business by the end of 2024.

17.12 The emergence of novel Digital Mobile Radio technology as an alternative broadband service.

18. BTG believes:

*'... in the best case 4G FWA is capable of supporting around 20-30% of all users in an urban area.'*<sup>6</sup>

19. We believe BTG materially understates the ability of FWA services to act as a constraint, both directly and via a chain of substitution. Even if it is accurate, a 20 – 30% fixed wireless market share is more than sufficient to call into question whether monopoly regulation – as set out in Part 6 of the Act – is still appropriate. As explained in the Frontier report in response to the draft decision, FWA services do not need to be available to the entire broadband market to create a competitive constraint on that market.

20. We strongly support TFF's point that 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 a demonstrable chain of substitution.

21. We further agree with TFF's point regarding the extent to which the review process creates, or does not create, uncertainty. Regulatory certainty is the principle that regulated entities and other interested parties have clarity and confidence as to the development and operation of the regulatory framework. This in turn gives us confidence to innovate and invest on behalf of our customers and investors. A flawed or inconsistent regulatory review process – far from creating certainty – damages certainty. Chorus, as the largest regulated FFLAS entity, strongly supports regular and comprehensive review processes to promote certainty in the regulatory regime.

## Reasonable grounds threshold

22. TFF highlights the unreasonableness of the Commission's suggestion that *'deregulation must be a sufficiently likely outcome'*<sup>7</sup> (of the reasonable grounds assessment) in order for the threshold to be met for it to start a deregulation review. This suggests the threshold for the reasonable grounds – or screening – exercise would be as high or higher than that of the review which it is intended to inform. This is illogical.

23. Parliament intended for the review process to remove regulation where it is no longer warranted, and to periodically confirm that regulation is still warranted. The screening exercise is intended to avoid the need for a review where there is no reasonable basis for proceeding with a review – i.e. it is demonstrably pointless or unnecessary – rather

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<sup>6</sup> BTG, *Fibre deregulation review – Submissions on draft decision due, 2024*.

<sup>7</sup> Draft decision, paragraph 2.15.4.




than to proceed with a review only where the sufficiently likely outcome is deregulation.

## Retail service bundling

24. Enable highlights a key issue that should be assessed as part of a deregulation review – namely that, often, consumers select retail services such as energy, broadband and mobile as packages, via bundles offered by service providers (including both MNOs and other resellers) operating across multiple markets. For example, Mercury currently offers ‘free’ entitlements including Samsung products, initial free contract periods, and account credits as incentives for consumers to take up more than one service. Examples are shown in Appendix B.
25. The Commission has identified and addressed this issue as part of its work from 2018 onwards as part of the implementation of Part 7 of the Act. This resulted in the issuance of the *Product Disclosure – Retail Service Bundling Guidelines (Energy and Telecommunications Bundles)* to the telecommunications industry under section 234 of the Act in November 2023.
26. In these cases, although the markets for energy, broadband and mobile services (for example) appear to be separate, numerous firms participate in all three of them. These firms provide links between the three markets. Such overlapping activities create indirect competition from one market to the other since the actions of such firms reflect competitive conditions in *all three* markets. Indirect competition may make a market significantly more competitive than the number of market participants would indicate. This overlapping market structure has a material impact on the market for Bitstream PON services (in particular) and should be carefully considered as part of a deregulation review.

Appendix A – MNO price schedules

2degrees broadband pricing schedule

|   |  |   |
|---|--|---|
| <p><b>\$55</b> /month</p> <p><b>300GB Wireless 4G</b></p> <ul style="list-style-type: none"> <li>✓ Our 4G network</li> <li>✓ No installation required</li> <li>✓ Free 4G modem rental (\$15 shipping fee)</li> <li>✓ 12 month term only</li> <li>✓ 30-day risk free guarantee</li> </ul> <p><a href="#">Get this plan</a></p>   | <p><b>\$60</b> /month</p> <p><b>Unlimited Wireless 4G</b></p> <ul style="list-style-type: none"> <li>✓ Our 4G network</li> <li>✓ Fair Use Policy applies</li> <li>✓ No installation required</li> <li>✓ Free 4G modem rental (\$15 shipping fee)</li> <li>✓ 12 month term only</li> <li>✓ 30-day risk free guarantee</li> </ul> <p><a href="#">Get this plan</a></p>   | <p><del>\$79</del> <b>\$69</b> /month</p> <p><b>Sale</b> \$10/m off for 12 months on a 12-month plan</p> <p><b>Unlimited Wireless 5G</b></p> <ul style="list-style-type: none"> <li>✓ Our 5G network</li> <li>✓ Fair Use Policy applies</li> <li>✓ No installation required</li> <li>✓ Free 5G modem rental (\$15 shipping fee)</li> <li>✓ 12 month term only</li> <li>✓ 30-day risk free guarantee</li> </ul>  <p>Enjoy Prime Video (comes with Prime Gaming) on us for 6 months when you sign up for 12 months.</p> <p><a href="#">Get this plan</a></p> |
| <p><b>\$60</b> /month</p> <p><b>Fibre Starter</b></p> <ul style="list-style-type: none"> <li>✓ Fibre (30/10Mbps peak time average speeds**)</li> <li>✓ Unlimited data</li> <li>✓ Home phone line can be added</li> <li>✓ BYO modem or rent an Orbi Wi-Fi 6 for just \$3/month (\$15 shipping fee)</li> <li>✓ Good for basic browsing / checking email</li> </ul> <p><a href="#">Get this plan</a></p> | <p><b>\$93</b> /month</p> <p><b>Unlimited</b></p> <ul style="list-style-type: none"> <li>✓ Fibre (302/107Mbps peak time average speeds*)</li> <li>✓ Home phone line can be added</li> <li>✓ BYO modem or rent an Orbi Wi-Fi 6 for just \$3/month (\$15 shipping fee)</li> <li>✓ Orbi Wi-Fi 6 modem (Fibre only)</li> <li>✓ VDSL and ADSL (if applicable for \$2 extra)</li> </ul>  <p>Enjoy Prime Video (comes with Prime Gaming) on us for 6 months when you sign up for 12 months.</p> <p>Things to know</p> <p><a href="#">Get this plan</a></p> | <p><b>\$105</b> /month</p> <p><b>Ultimate Unlimited</b></p> <ul style="list-style-type: none"> <li>✓ Fibre (846/480Mbps peak time average speeds*)</li> <li>✓ Home phone line can be added</li> <li>✓ BYO modem or rent an Orbi Wi-Fi 6 for just \$3/month (\$15 shipping fee)</li> </ul>  <p>Enjoy Prime Video (comes with Prime Gaming) on us for 6 months when you sign up for 12 months.</p> <p>Things to know</p> <p><a href="#">Get this plan</a></p>  |

One NZ broadband pricing schedule

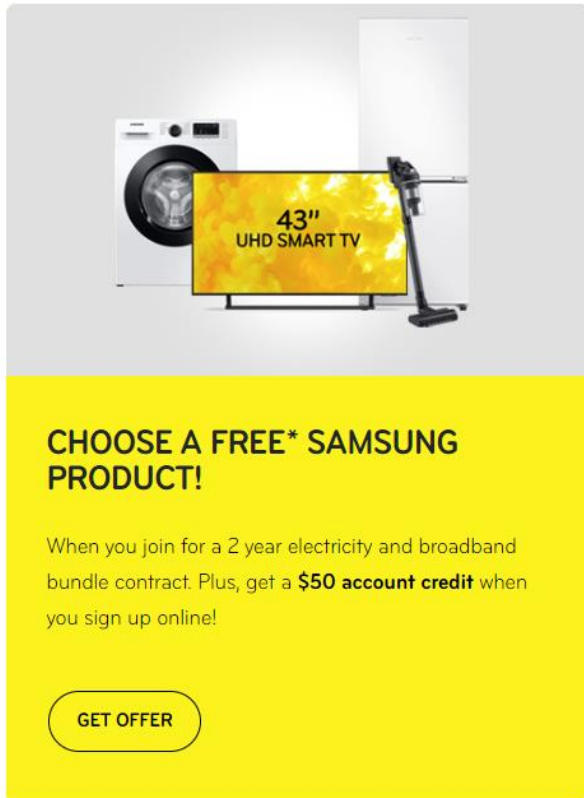
|  |  | Most Popular Wireless   | Most Popular Fibre   |
|--|--|---|--|
| <p><b>Fibre Starter</b><br/>Unlimited Broadband</p> <p>Great for medium households using services like browsing, email, and streaming.</p> <p><b>\$60</b> /month</p> <p>New SmartWifi modem available for \$5/month on a 12-month term (plus \$14.95 P&amp;H). No fixed term if you choose to bring your existing modem.</p> <p>Unlimited data</p> <p>Average peak time speeds:<br/>50 Mbps download<br/>10 Mbps upload</p> <p>No fee for standard connections</p> <p><b>Great features you can add on:</b></p> <p>SuperWifi - \$5 monthly (12-month term)</p> <p>Home phone - \$10 monthly</p> <p><b>Important things to know</b></p> <p><a href="#">Check Availability</a></p> | <p><b>4G Wireless Lite</b><br/>300GB Broadband</p> <p>Great for small to medium households, looking for good value, who like to browse and stream.</p> <p><b>\$50</b> /month</p> <p>New SmartWifi modem included for \$0/month on a 12-month term (plus \$14.95 P&amp;H)</p> <p>300GB monthly data</p> <p>No connection fee</p> <p><b>Great features you can add on:</b></p> <p>Home phone - \$10 monthly</p> <p><b>Important things to know</b></p> <p><a href="#">Check Availability</a></p> | <p><b>4G Wireless</b><br/>Unlimited Broadband</p> <p>Great for medium households who are online everyday, learning, streaming, and working from home.</p> <p><b>\$65</b> /month</p> <p>New SmartWifi modem included for \$0/month on a 12-month term (plus \$14.95 P&amp;H)</p> <p>Unlimited data (fair use applies)</p> <p>No connection fee</p> <p><b>Great features you can add on:</b></p> <p>SuperWifi - \$5 monthly (12-month term)</p> <p>Home phone - \$10 monthly</p> <p><b>Important things to know</b></p> <p><a href="#">Check Availability</a></p> | <p><b>Fibre Everyday</b><br/>Unlimited Broadband</p> <p>Great for medium to large households, suitable for 4K UHD streaming, advanced gaming, &amp; working &amp; learning from home.</p> <p><b>\$96</b> /month</p> <p>New SmartWifi modem available for \$5/month on a 12-month term (plus \$14.95 P&amp;H). No fixed term if you choose to bring your existing modem</p> <p>Unlimited data</p> <p>Average peak time speeds:<br/>322 Mbps download<br/>111 Mbps upload</p> <p>No fee for standard connections</p> <p><b>Great features you can add on:</b></p> <p>SuperWifi - \$5 monthly (12-month term)</p> <p>Home phone - \$10 monthly</p> <p><b>Important things to know</b></p> <p><a href="#">Check Availability</a></p> |



| Fastest Fibre  |   |   |
|--|---|---|
| <p><b>Fibre Max</b><br/>Unlimited Broadband</p> <p>Great for large and extra large households, especially suitable for 4K UHD streaming and pro-level gaming.</p>  | <p><b>5G Wireless</b><br/>Unlimited Broadband</p> <p>Great for medium households who are online every day, learning, streaming, and working from home.</p>  | <p><b>HFC</b><br/>Unlimited Broadband</p> <p>Great for medium to large households, suitable for 4K UHD streaming, gaming, and working and learning from home.</p>   |
| <p><b>\$111</b> / month</p> <p>New SmartWifi modem available for \$5/month on a 12-month term (plus \$14.95 P&amp;H). No fixed term if you choose to bring your existing modem.</p> <p>Unlimited data</p> <p>Average peak time speeds:<br/>892 Mbps download<br/>474 Mbps upload</p> <p>No fee for standard connections</p> <p><b>Great features you can add on:</b></p> <p>SuperWifi - \$5 monthly (12-month term)</p> <p>Home phone - \$10 monthly</p> | <p><b>\$65</b> / month</p> <p>New SmartWifi modem included for \$0/month on a 12-month term (plus \$14.95 P&amp;H)</p> <p>Unlimited data (fair use applies)</p> <p>No connection fee</p> <p><b>Great features you can add on:</b></p> <p>SuperWifi - \$5 monthly (12-month term)</p> <p>Home phone - \$10 monthly</p> | <p><b>\$73</b> / month</p> <p>New One NZ modem included for \$0/month on a 12-month term</p> <p>Unlimited data</p> <p>Average peak time speeds<br/>887 Mbps download<br/>103 Mbps upload</p> <p>No fee for standard connections</p> <p>Only available in parts of Wellington, Christchurch, and Kapiti Coast</p> <p><b>Great feature you can add on:</b></p> <p>Home phone - \$10 monthly</p> |
| <p><b>Important things to know</b></p>   | <p><b>Important things to know</b></p>  | <p><b>Important things to know</b></p>  |
| <p><a href="#">Check Availability</a></p>  | <p><a href="#">Check Availability</a></p>   | <p><a href="#">Check Availability</a></p>   |

Appendix B – Retail service bundling

Mercury retail service bundling (8 October 2024)



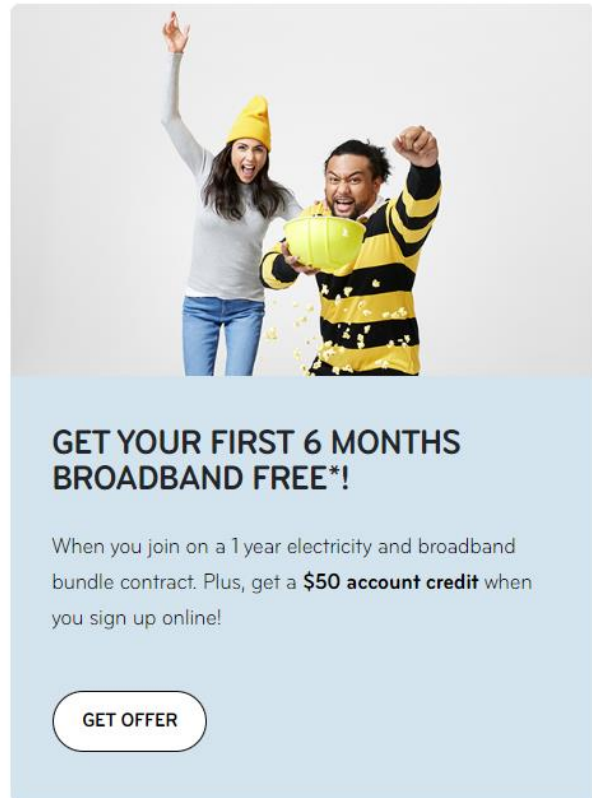
The advertisement features a photograph of a 43-inch Samsung UHD Smart TV on a stand, positioned in front of a washing machine and a dryer. The TV screen displays the text "43\"/>A promotional advertisement for a Samsung TV offer. The top half shows a 43-inch Samsung UHD Smart TV on a stand, with a washing machine and a dryer in the background. The TV screen displays the text "43\"/>

**CHOOSE A FREE\* SAMSUNG PRODUCT!**

When you join for a 2 year electricity and broadband bundle contract. Plus, get a **\$50 account credit** when you sign up online!

[GET OFFER](#)

\*Terms, eligibility and early termination fees apply. Router included, P&H \$14.95. Broadband plan availability may vary.



The advertisement features a photograph of a man and a woman celebrating. The man is wearing a yellow and black striped shirt and a yellow beanie, holding a yellow hard hat. The woman is wearing a grey long-sleeved shirt and blue jeans, also wearing a yellow beanie. They are both smiling and raising their arms in celebration. The background is a plain, light-colored wall.

**GET YOUR FIRST 6 MONTHS BROADBAND FREE\*!**

When you join on a 1 year electricity and broadband bundle contract. Plus, get a **\$50 account credit** when you sign up online!

[GET OFFER](#)

\*Terms, eligibility and early termination fees apply. Router included with wireless broadband plans only. For fibre broadband, bring your own router, or purchase for a monthly payment over 2 years. Broadband plan availability may vary.

**Pulse Energy retail service bundling (8 October 2024)**

## **BUNDLE POWER & BROADBAND**

Start typing your address

Enter your ICP manually

**Sign up online and receive a \$200 joining credit on your first power bill and two months' free broadband.\*  
Use the promo code BUNDLE200 when completing your sign up.**

\*Terms and conditions apply. Valid for new customers only.