

16 February 2024

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Dear Keston

Fibre fixed line access service (FFLAS) deregulation review: Draft assessment framework

1. This is Vector's submission on the Commerce Commission's (Commission) draft assessment framework for the FFLAS deregulation review.
2. Vector acknowledges that under s 210(3) of the Telecommunications Act 2001 (Act), the Commission is required to consider whether there are reasonable grounds to start a FFLAS deregulation review before the start of each regulatory period. However, Vector's view is that for PONFAS, the relevant question under the Act is how further regulation should be imposed.
3. As the Commission is aware, Vector has significant concerns around Chorus's Layer 1 FFLAS provisioning, particularly PONFAS. We urge the Commission to focus its attention on regulating PONFAS at the earliest opportunity under the Act, as the equivalence and non-discrimination provisions in the Fibre Deed have not been sufficient to promote competition.
4. The Commission's paper states that reasonable grounds for a deregulation review can exist where there is evidence that circumstances may have changed to such an extent that continued regulation, or the regulation in its current form, is no longer necessary to best promote the long-term benefit of end-users in markets for FFLAS. The Commission notes that the relevant date from which to assess whether there may have been a change of circumstances is the date from which the PQ regulation of FFLAS came into effect, being 1 January 2022 (Relevant Period).
5. Vector's view is that there are no reasonable grounds to start a FFLAS deregulation review for PONFAS on the basis that:
 - a. There are provisions in the Act which indicate that 2024 is too early for the Commission to consider deregulation of PONFAS; and
 - b. Complaints from access seekers provide evidence relevant to the Commission's assessment, and this evidence indicates that de-regulation of PONFAS would not be in the long-term benefit of end-users.

(a) It is too early for the Commission to consider deregulation of PONFAS

6. Vector considers that the provisions of the Telecommunications Act indicate that it is too early for the Commission to consider deregulating certain types of FFLAS, such as PONFAS and other unbundled PON services.
7. Under s 209 of the Act, from 1 January 2025 the Commission can commence a review of whether PONFAS (or other unbundled layer 1 services) should be declared. This restriction

was implemented to provide a regulatory grace period (other than the Fibre Deed obligations) for unbundled layer 1 services in line with the expectations of UFB investors.

8. This suggests that the next step for the Commission to consider is whether services such as PONFAS should be subject to more regulation at the expiry of the grace period (rather than whether there should be less regulation before it expires).
9. Vector's view is that there is an urgent need for PONFAS to be subject to greater regulation now, and that if the status quo were to continue, there will certainly be a need for such regulation once the grace period expires. Vector therefore considers that, to prevent detrimental harm to competition and consumers in the interim, rather than considering deregulation of PONFAS, the Commission should instead be considering the ways that it can regulate PONFAS more closely now within the legal framework available.
10. In particular, Vector has previously recommended that the Commission include a provisioning quality standard in Chorus's 2025-2028 regulatory period. The current review into the second price-quality regulatory period provides another opportunity for the Commission to address Chorus's provisioning of PONFAS. Our submission to the Commission's Process and Issues paper further sets out our views on the need for a provisioning quality standard.¹

(b) Relevant evidence to consider includes complaints from access seekers

11. In its draft assessment framework, the Commission states that it is proposing to consider evidence that allows it to take a "reasonable grounds" assessment that is consistent with its legal and economic framework. The Commission's legal framework focuses on the importance of ensuring that decisions are made in line with the Part's purpose, which is to promote the long-term benefit of end-users in markets for FFLAS by promoting outcomes that are consistent with outcomes produced in workably competitive markets. Therefore, any evidence which enhances the Commission's ability to assess this should be considered relevant.
12. During the Relevant Period, the Commission has received a number of letters from access seekers (including Vector) expressing their concerns about the anti-competitive way in which Chorus provisions layer 1 FFLAS (particularly PONFAS) to third-party access seekers. This includes concerns that the equivalence and non-discrimination provisions in the Fibre Deed have failed to promote competition.
13. Our experience has been that Chorus provisions layer 1 services to its own downstream layer 2 business much more quickly than it provisions to access seekers. This provides Chorus with a material competitive advantage and has hindered access seekers from delivering innovative products to the market.
14. In response to these concerns, the Commission opened an investigation into whether the non-price terms of Chorus' PONFAS complied with the equivalence and non-discrimination obligations in the Fibre Deed. While the Commission ultimately decided not to pursue the investigation further, in its letter to Chorus advising it of the investigation's closure, the Commission stated:

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

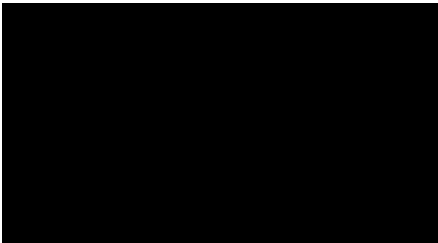
¹ Available: https://comcom.govt.nz/_data/assets/pdf_file/0027/330894/Vector-Fibre-submission-on-the-Process-and-approach-paper-for-the-2025-2028-regulatory-period.pdf

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

We note that, from 1 January 2025, the Commission may review whether an unbundled fibre service be declared in regulations.”²

15. Once again, this statement further indicates that the Commission's consideration of whether to declare certain FFLAS services, such as PONFAS, as a regulated service under s 229 of the Telecommunications Act should come before considering deregulation.
16. Our view is that the complaints received by the Commission, and the statements made by the Commission in response to these complaints is evidence about the state of competition in relevant markets that is necessary to consider when determining whether "reasonable grounds" to start a deregulation review exists.

Yours sincerely



GM Economic Regulation and Pricing

² Commerce Commission, *Investigation of the non price terms of Chorus' PON Fibre Access Service* (28 April 2023) paras 11 – 13.