

Proposed expenditure, revenue and quality-related amendments to the Fibre input methodologies ahead of the price-quality path for Chorus' second regulatory period (2025-2028)

Draft reasons paper

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Associated documents

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Commerce Commission
Wellington, New Zealand

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Glossary

Acronyms	Definition
Act	Telecommunications Act 2001
FFLAS	Fibre Fixed Line Access Services
Framework	Input Methodologies decision-making framework
ICDP	Individual capex design proposal
ID	Information disclosure
Fibre IMs	Fibre Input Methodologies
LFC	Local Fibre Company
PQ	Price-quality
PQP1	Chorus' first price-quality path (from 1 January 2022 to 31 December 2024)
PQP2	Chorus' second price-quality path (from 1 January 2025 to 31 December 2028)
RSP	Retail Service Provider
TAMRP	Tax-adjusted market risk premium

Chapter 1 Introduction

Purpose of this paper

- 1.1 This paper provides our draft decision on and supporting reasons for the proposed expenditure, revenue and quality-related amendments to the Fibre Input Methodologies Determination 2020 [2020] NZCC 21 ("Fibre IMs").
- 1.2 This draft decision is made ahead of our determination of the price-quality (PQ) path for Chorus Limited's ('Chorus') second regulatory period between 2025 and 2028.
- 1.3 The draft decision also proposes IM amendments that would apply for the purposes of information disclosure ('ID') regulation.
- 1.4 Our draft decision on the application dates for the proposed IM amendments is as follows:
 - 1.4.1 the amendments to the definition of 'outage' and to Part 3 of the Fibre IMs would apply as amended from 1 January 2025; and
 - 1.4.2 the amendments to Part 2 of the IMs would apply from the commencement of disclosure year 2026.
- 1.5 We seek submissions from stakeholders in response to this draft decision.
- 1.6 This paper forms part of a package of decision papers on PQ matters and amendments to the Fibre IMs, including:
 - 1.6.1 draft IM amendment determinations – to give effect to the amendments discussed in this paper, we have published a draft IM amendment determination;¹ and
 - 1.6.2 expenditure-related PQ decisions and determinations, as well as quality and revenue-related PQ decisions and determinations.

Structure of this paper

- 1.7 The paper's chapters are as follows:
 - 1.7.1 Chapter 1 is an introduction to the scope and approach for this work and the proposed amendments to the Fibre IMs;

¹ Commerce Commission, 'Chorus' 2025-2028 fibre price-quality path', available at: <https://comcom.govt.nz/regulated-industries/fibre/projects/chorus-fibre-price-quality-path-from-2025>.

- 1.7.2 Chapter 2 summarises the statutory context and key aspects of the decision-making framework we have applied in proposing the specific Fibre IM amendments set out in this paper;² and
- 1.7.3 Chapter 3 sets out the proposed amendments to the Fibre IMs, and our reasons for proposing them in terms of the framework summarised in Chapter 2.

Our role

- 1.8 The Commerce Commission ('Commission') regulates services provided over fibre networks in New Zealand. These networks are critical to social and economic life in New Zealand.
- 1.9 Since 1 January 2022, PQ and information disclosure ('ID') regulation has applied to providers of fibre fixed line access services ('FFLAS') that are regulated under Part 6 of the Telecommunications Act 2001 ('Act'):
 - 1.9.1 PQ regulation applies to certain fibre services provided by Chorus;³ and
 - 1.9.2 ID regulation applies to all providers of fibre services regulated under Part 6: Chorus, Enable Networks, Northpower Fibre and Tuatahi First Fibre.⁴
- 1.10 PQ paths are intended to create incentives for Chorus to act in ways that are consistent with the long-term benefit of end-users, such as creating incentives to invest in its network, to innovate and improve efficiency, and to deliver services at a level that meet end-user demands.⁵ The Commission sets PQ paths to limit the total revenue that Chorus can recover from providing regulated fibre services, and regulate the quality at which those services are provided.
- 1.11 We also require providers of FFLAS in New Zealand to disclose information detailing their performance. This includes data on pricing, current and future expenditure, quality performance and financial statements.

² Our decision-making framework is set out in full at paras B7 to B25 of Attachment B of our [Fibre price-quality regulation proposed process and approach for the 2025-2028 regulatory period](#) and substantially reflects the framework we applied for our most recent fibre IM amendments, [Amendments to Fibre Input Methodologies: final decision \(28 June 2023\)](#).

³ Regulation 6 of the Telecommunications (Regulated Service Providers) Regulations 2019 ("the Regulations") provides that Chorus is subject to PQ regulation in respect of all fibre fixed line access services, except to the extent that a service is provided in a geographical area where a regulated fibre service provider (other than Chorus Limited) has installed a fibre network as part of the UFB initiative, available at: <https://legislation.govt.nz/regulation/public/2019/0275/latest/LMS185122.html>.

⁴ Regulation 5 of the Regulations, available at: <https://legislation.govt.nz/regulation/public/2019/0275/latest/LMS185122.html>.

⁵ See section 162 for the purpose of Part 6 under the Telecommunications Act 2001 ("the Act"), available at: <https://www.legislation.govt.nz/act/public/2001/0103/latest/whole.html#LMS131960>.

- 1.12 This regime for fibre services works alongside our work to ensure fixed line (broadband) and mobile markets are competitive through regulation of wholesale telecommunication services and our monitoring of the retail telecommunications market.

Our process

- 1.13 We are currently in the process of setting Chorus' second PQ path that runs from 1 January 2025 to 31 December 2028 ('PQP2').
- 1.14 Alongside our consideration of the PQ path for Chorus', we have been assessing discrete potential Fibre IM amendments in three tranches:
- 1.14.1 tranche 1a: related to the tax-adjusted market risk premium ('TAMRP') for the weighted average cost of capital;
 - 1.14.2 tranche 1b: relating to expenditure proposals; and
 - 1.14.3 tranche 2: relating to revenue and quality proposals.
- 1.15 Our draft decision is aligned to our decision-making framework, and proposes amendments that we consider are:
- 1.15.1 necessary to make now in advance of the second PQ path for Chorus; and
 - 1.15.2 address discrete issues that are appropriate to resolve now, rather than waiting for the statutory IM review (that must be complete by October 2027).
- 1.16 To date, we have followed the proposed approach and timeline as set out in the relevant notices of intention, or the relevant re-issued notices, that the Commission has published stating we would begin work to consider amendments to the Fibre IMs:⁶
- 1.16.1 a notice of intention published on 14 February 2024 (and re-issued on 25 March 2024 and 20 June 2024) to begin work on potential amendments to Fibre IMs related to expenditure-related proposals; and

⁶ Commerce Commission, 'Re-issued Notice of intention: Potential amendment to Input Methodologies for Fibre Fixed Line Access Services' (expenditure-related proposals), 20 June 2024, available at: https://comcom.govt.nz/_data/assets/pdf_file/0025/355174/Fibre-IM-Amendments-Reissued-notice-of-intention-Expenditure-related-20-June-2024.pdf; Commerce Commission, 'Re-issued Notice of intention: Potential amendment to Input Methodologies for Fibre Fixed Line Access Services' (quality and revenue-related proposals), 20 June 2024, available at: https://comcom.govt.nz/_data/assets/pdf_file/0026/355175/Fibre-IM-Amendments-Reissued-notice-of-intention-Revenue-and-quality-related-20-June-2024.pdf.

- 1.16.2 a notice of intention published on 2 May 2024 and re-issued on 20 June 2024 to begin work on potential amendments to Fibre IMs related to quality and revenue-related proposals.
- 1.17 The draft PQ decisions have incorporated (where relevant) the draft Fibre IM decisions, as set out in this paper.
- 1.18 After taking relevant points from submissions and cross submissions (see paragraph 1.7 for due dates), we will publish our final decision in the fourth quarter of 2024, ahead of PQP2.

Matters in scope

- 1.19 In this paper, we are proposing specific amendments to expenditure, revenue and quality-related amendments to the Fibre IMs for the purposes of PQ regulation and ID regulation.

Matters out-of-scope

- 1.20 Stakeholders proposed several IM amendments⁷ in response to our *Process and Approach* paper that we are not proposing to consider further at this point. We likewise do not propose to further consider at this point the potential IM amendment we noted in our Notice of Intention of 14 February 2024 relating to expenditure proposals and processes, to enable us to ensure the revenue Chorus recovers under an individual capex allowance that we determine under clause 3.7.28 of the fibre IMs is consistent with that determination, including any conditions we set in that determination.⁸ In both cases, this reflects our view of the proposed IM amendments that are appropriate to prioritise at this point under our decision-making framework, and those that may be better suited to further consideration in the upcoming statutory IM review.

How you can provide your views

Scope of submissions

- 1.21 We are interested in your views on the proposed expenditure, revenue and quality-related Fibre IM amendments set out in this paper.

⁷ Chorus, 'PQP2 Process and Approach', 28 September 2023, at 37, 41-54, available at: https://comcom.govt.nz/__data/assets/pdf_file/0023/330890/Chorus-submission-on-the-Process-and-approach-paper-for-the-2025-2028-regulatory-period.pdf.

⁸ Commerce Commission, 'Re-issued Notice of intention: Potential amendment to Input Methodologies for Fibre Fixed Line Access Services' (expenditure-related proposals), 20 June 2024, available at: https://comcom.govt.nz/__data/assets/pdf_file/0025/355174/Fibre-IM-Amendments-Reissued-notice-of-intention-Expenditure-related-20-June-2024.pdf, at [6.b].

Process and timeline for making submissions

- 1.22 You are invited to provide your written views on this paper no later than **13 August 2024** at 5pm.
- 1.22.1** Cross submissions are due no later than **3 September 2024** at 5pm.
- 1.23 You should address your responses to:
- 1.23.1 Keston Ruxton, Manager of Fibre PQ Regulation
- 1.23.2 c/o infrastructure.regulation@comcom.govt.nz
- 1.24 Please include the following in the subject line: “Fibre IMs: proposed expenditure, revenue and quality-related amendments”.
- 1.25 We prefer responses to be provided in a file format suitable for word processing in addition to PDF file format.

Confidentiality

- 1.26 Please note that we intend to publish all submissions (and cross submissions) received on this paper.
- 1.27 The protection of confidential information is an area the Commission takes seriously. The process requires you to provide (if necessary) both a confidential and non-confidential/public version of your submission and to clearly identify which versions are confidential/public versions. This also applies to cross submissions.
- 1.28 When including commercially sensitive or confidential information in your submission (or cross submission):
- 1.28.1 please provide clearly labelled confidential and public versions. We intend to publish all public versions on our website.
- 1.28.2 the responsibility for ensuring that confidential information is not included in a public version of a submission rests entirely with the party making the submission. Where a confidential version of your submission is provided, please clearly identify and highlight all information you consider to be confidential. This also applies to cross submissions.
- 1.28.3 please note that all submissions (and cross submissions) we receive, including any parts that we do not publish, can be requested under the Official Information Act 1982. This means we would be required to release material that we do not publish unless good reason existed under the Official Information Act to withhold it. We would normally consult with the party that provided the information before any disclosure is made.

Chapter 2 Decision-making framework

Purpose and structure

- 2.1 This chapter summarises the statutory context and key aspects of our decision-making framework for considering amendments to the Fibre IMs.⁹

Background

- 2.2 Before the end of the current regulatory period, the Commission must make a determination under section 170 of the Act specifying how PQ regulation applies to Chorus during the following regulatory period.
- 2.3 A relevant input methodology relating to the supply of FFLAS must be applied by each relevant regulated fibre service provider in accordance with the relevant section 170 determination.¹⁰
- 2.4 Additionally, a relevant IM must be applied by the Commission in recommending, deciding or determining how regulation under Part 6 of the Act should apply to FFLAS, or the prices or quality standards applying to FFLAS.¹¹
- 2.5 The Commission is currently setting the PQ path this year for the second regulatory period for Chorus.
- 2.6 We included the decision-making framework for the Fibre IMs in our *Proposed process and approach for the 2025-2028 regulatory period* paper.¹² We considered it may be necessary for us to consider amendments to the Fibre IMs as part of our process to set Chorus' price-quality path for the second regulatory period ("PQP2").
- 2.7 The next section describes the (limited) circumstances in which we consider IM amendments, and the framework we apply to such amendments.

⁹ As noted above, our decision-making framework is set out in full at paras B7 to B25 of Attachment B of our [Fibre price-quality regulation proposed process and approach for the 2025-2028 regulatory period](#) and substantially reflects the framework we applied for our most recent fibre IM amendments, [Amendments to Fibre Input Methodologies: final decision \(28 June 2023\)](#).

¹⁰ Section 175 of the Act, available at: <https://www.legislation.govt.nz/act/public/2001/0103/latest/whole.html#LMS131960>

¹¹ Section 175 of the Act, available at: <https://www.legislation.govt.nz/act/public/2001/0103/latest/whole.html#LMS131960>

¹² Commerce Commission, "*Fibre Price-Quality Process and Approach Paper for the 2025 – 2028 regulatory period*", 31 August 2023, https://comcom.govt.nz/_data/assets/pdf_file/0017/327014/Fibre-price-quality-regulation-Process-and-approach-paper-for-the-2025-2028-regulatory-period.pdf

Summary of decision-making framework

Statutory context

- 2.8 The purpose of the input methodologies under section 174 of the Act is to promote certainty for regulated fibre service providers, access seekers and end-users in relation to the rules, requirements, and processes applying to the regulation, or proposed regulation, of fibre fixed line access services under Part 6 of the Act.¹³
- 2.9 We are cautious about making amendments to the Fibre IMs outside of the periodic statutory IM review process given the importance of certainty and predictability in the regime. However, as recognised in sections 181 and 182, these rules, processes and requirements may change. We must follow the process under section 179 – including publishing a notice of intention with our proposed timeframes.¹⁴
- 2.10 We recognise that there may be a tension between making changes to improve the regime and promoting the purpose of sections 162 (the Part 6 purpose) and 166 and promoting certainty under section 174.
- 2.11 While we have regard to the section 174 purpose, and other indications of the importance of promoting certainty, ultimately, under section 166(2), we must make recommendations, determinations and decisions that we consider best give, or is likely to best give effect to:
- 2.11.1 the Part 6 purpose in section 162 of the Act,¹⁵ as set out in section 166(2)(a); and
- 2.11.2 to the extent that we (or the Minister) consider it relevant, the promotion of workable competition in telecommunications markets for the long-term benefit of end-users of telecommunications services, as set out in section 166(2)(b).

¹³ See section 174 of the Act, available at:

<https://www.legislation.govt.nz/act/public/2001/0103/latest/whole.html#LMS131960>

¹⁴ [Notice of Intention – 18 January 2024 - Potential amendment to input methodologies for Fibre Fixed Line Access Services.](#)

¹⁵ Section 162 provides that the purpose of Part 6 of the Act 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 so that regulated fibre service providers:

(a) have incentives to innovate and to invest, including in replacement, upgraded, and new assets; and
 (b) have incentives to improve efficiency and supply FFLAS of a quality that reflects end-user demands; and
 and
 (c) allow end-users to share benefits of efficiency gains in the supply of FFLAS, including through lower prices; and
 (d) are limited in their ability to extract excessive profits.

- 2.12 Section 166(2) governs our decision-making process for all recommendations, determinations and decisions under Part 6 of the Act. The other purpose statements within Part 6 are relevant matters, but they should be applied consistently with section 166(2).¹⁶

Amendments outside the IM review cycle

- 2.13 All Fibre IMs must be reviewed at least once every seven years, as mandated by section 182.
- 2.14 Given the certainty purpose of the Fibre IMs under section 174, we must carefully assess what amendments are appropriate to consider outside of the Fibre IM review cycle. Additionally, the predictability that the Fibre IMs provide are key to promoting the section 162 purpose (as required under section 166(2)(a)) and, in particular, the incentives to invest.
- 2.15 It will not generally be appropriate to consider changes to ‘fundamental IMs’ outside of the periodic Fibre IM review cycle, which takes place every seven years. Fundamental IMs are generally those that define the fundamental building blocks used to set PQ paths under section 176(1)(a) and that are central to defining the balance of risk and benefits between regulated providers and end-users.
- 2.16 This distinction is not absolute. We can, and have, reconsidered fundamental IMs outside of the IM review. However, there needs to be an especially compelling and urgent rationale for doing so.

Other considerations

- 2.17 Section 186 of the Act provides the purpose of information disclosure regulation. That is, to ensure that sufficient information is readily available to interested persons to assess whether the purpose of Part 6 is being met.¹⁷
- 2.18 We consider the Fibre Information Disclosure Determination (“ID Determination”) in our proposals related to ID and PQ.¹⁸

¹⁶ We note that the High Court in *Wellington International Airport Ltd & Ors v Commerce Commission* considered that the purpose of IMs, set out in section 52R of the Commerce Act, is “conceptually subordinate to the purpose of Part 4 as set out in section 52A. See *Wellington International Airport Ltd v Commerce Commission* [2013] NZHC 3289, at [165].

¹⁷ Section 186 of the Act, available at: <https://www.legislation.govt.nz/act/public/2001/0103/latest/whole.html#LMS131960>.

¹⁸ Fibre Information Disclosure Determination (“ID Determination”), available at: https://comcom.govt.nz/_data/assets/pdf_file/0029/288722/Fibre-Information-Disclosure-Determination-2021-Consolidated-Version-1-May-2024.pdf.

Chapter 3 Draft decisions on amendments to Fibre IMs

Purpose and structure

- 3.1 This chapter sets out our draft decision on and supporting reasons for proposed IM amendments related to expenditure, revenue and quality in the Fibre IMs.
- 3.2 For each of our proposed amendments, we provide:
 - 3.2.1 the current requirement under the Fibre IMs;
 - 3.2.2 the problem definition and proposed amendment; and
 - 3.2.3 reasons why the proposed amendment promotes the IM amendments decision-making framework.

Draft decision

- 3.3 Our draft decision is to amend the Fibre IMs as follows:
 - 3.3.1 to extend the timeframe under clause 3.7.24 of the Fibre IMs to assess an individual capex design proposal from ‘within one month’ to ‘within three months’ once the Commission has received the proposal;
 - 3.3.2 to amend the definition of "outage" under clause 1.1.4 of the Fibre IMs to insert an alternative notification mechanism to overcome technological limitations of the systems which make the definition unworkable for certain ID-regulated providers when an outage occurs; and
 - 3.3.3 to amend clauses 2.4.10, 2.4.11 and 3.5.11 to calculate the benefits of Crown financing daily and then sum the daily benefits to arrive at the annual benefit, rather than calculating the benefit annually based on the Crown finance balance on the first day of the disclosure year for ID or on the first day of the regulatory year for PQ. We consider the proposed change will ensure these calculations better reflect the actual benefits of Crown financing.

Proposed amendment to extend the timeframe for approving an individual capex design proposal

Current requirements

- 3.4 Clause 3.7.24 of the Fibre IMs sets out that, within one month of the Commission receiving the individual capex design proposal (“ICDP”) from Chorus, the Commission must either:
 - 3.4.1 approve the ICDP;

3.4.2 approve the ICDP with conditions; or

3.4.3 decline the ICDP.¹⁹

Problem definition and proposed amendment

- 3.5 We propose to extend the timeframe for the Commission to approve (or decline) the ICDP under clause 3.7.24 from 'within one month' to 'within three months'.
- 3.6 The Commission requires sufficient time and flexibility balanced with efficiency to ensure timely approval of an ICDP. The nature of ICDPs is potentially diverse, therefore we see benefit in allowing for a longer timeframe to assess such proposals. A longer timeframe is particularly necessary when the proposals are substantial, complex and frequent.²⁰
- 3.7 This issue would be further exacerbated if the number of ICDPs received increases over time as the Commission may need to undertake assessment of multiple ICDPs in parallel, which could make the requirement to assess an ICDP 'within one month' unduly challenging.
- 3.8 We anticipate that assessing an ICDP may not require the full three-month period in each case, and we would endeavour to be as responsive as possible in the assessment to approve an ICDP, taking account of the nature and circumstances of an ICDP and other related considerations.
- 3.9 The proposed amendment makes a small change to the existing provision to help ensure clear and certain requirements.

Reasons why the proposed amendment promotes the decision-making framework

- 3.10 We have arrived at the proposed amendment with a view to best promote the purpose of Part 6 and help to deliver on the benefits of the individual capex regime.

¹⁹ Commerce Commission, Fibre Input Methodologies 2020, 6 March 2024, https://comcom.govt.nz/_data/assets/pdf_file/0028/273655/fibre-input-methodologies-determination-2020-consolidated-as-of-6-march-2024.pdf.

²⁰ Commission, Fibre input methodologies: Main final decision – reasons paper, 13 October 2020, available at: https://comcom.govt.nz/_data/assets/pdf_file/0022/226507/Fibre-Input-Methodologies-Main-final-decisions-reasons-paper-13-October-2020.pdf.

- 3.11 By amending the Fibre IMs in this way, the Commission would have more flexibility and time to assess ICDPs if proposals are substantial, complex and frequent. This flexibility would be balanced with a clear and certain timeframe required for regulated fibre service providers, access seekers and end-users in relation to the applicable rules, requirements and processes. We consider the proposed amendment still enables the individual capex regime to be responsive to Chorus' investment needs during a regulatory period.
- 3.12 During the first regulatory period (PQP1), we assessed and approved one ICDP (and an ICP). While we met the timeframes, it identified that it would be a challenge for the Commission to always ensure appropriate information requirements were set as part of the assessment of an ICDP. This is particularly the case in areas where staff were less familiar with the project subject matter in an ICDP.
- 3.13 The proposed amendment would allow the Commission more time for analysis on whether ICDPs are likely to deliver the benefits of the individual capex regime for the long-term benefit of end-users.
- 3.14 Further, if the Commission has more time to consider information requirements for complex projects, then it may reduce the amount of time the Commission takes to assess the proposal later in the evaluation phase. The overall impact on timeframes could consequently be minimal.
- 3.15 We have carefully considered this proposed out-of-cycle amendment to the Fibre IMs. We consider this amendment would provide the certainty and predictability necessary to facilitate investment and thereby better promote the purpose of the Fibre IMs and the regime under section 162.
- 3.16 We consider it is likely that we will receive more ICDPs in the next few years. The statutory IM review is scheduled to be completed in 2027 therefore we anticipate that a number of ICDPs may need to be assessed under tight timeframes. It is a discrete and necessary change therefore our decision is to make this amendment ahead of PQP2.

Proposed amendment to the definition of "outage" related to quality reporting requirements

Current requirements

- 3.17 The Fibre IMs definition of 'outage' is as follows:²¹
- 3.17.1 (a) for the purpose of Part 2, a cessation in the supply of ID FFLAS; and

²¹ Clause 1.1.4 of the Fibre IMs defines "outage", available at: https://comcom.govt.nz/_data/assets/pdf_file/0028/273655/fibre-input-methodologies-determination-2020-consolidated-as-of-6-march-2024.pdf.

- 3.17.2 (b) for the purpose of Part 3, a cessation in the supply of PQ FFLAS.
- 3.18 Quality dimensions of ‘availability’ and ‘faults’ rely on the definition of outage for both the ID and PQ parts of the Fibre IMs.²²
- 3.19 The Fibre IMs’ definition of ‘outage’ feeds into wider quality-related IM definitions of ‘planned downtime’, ‘planned outage’ and ‘unplanned outage’.²³
- 3.20 As well as the definition of outage in the Fibre IMs, fibre providers are also subject to ID regulation as a result of regulations made by the Governor-General under section 226 of the Act. Under the ID Determination, Chorus and each ID-only regulated provider must complete and publicly disclose no later than five months after the end of the disclosure year, a Report on Quality in Schedules 19 and 20 in respect of each month of the relevant disclosure year and must apply Schedule 22.²⁴ These reports include specific reports on the dimensions of faults and availability, which include notification of planned and unplanned outages and the percentage of planned and unplanned outages which rely on the definition of outage in the Fibre IMs.²⁵
- 3.21 We note that:
- 3.21.1 Chorus’ quality standards in the PQP1 determination also rely on the definition of outage; and
- 3.21.2 the proposed quality standards for the draft PQP2 determination would also rely on the definition of outage, including the proposed IM amendment, if we decide to finalise it.

²² Clause 2.5.1(1)(a)(iii) and 3.6.1(1)(a)(iii) of the Fibre IMs, https://comcom.govt.nz/data/assets/pdf_file/0028/273655/fibre-input-methodologies-determination-2020-consolidated-as-of-6-march-2024.pdf.

²³ Clause 1.1.4 of the Fibre IMs, https://comcom.govt.nz/data/assets/pdf_file/0028/273655/fibre-input-methodologies-determination-2020-consolidated-as-of-6-march-2024.pdf.

²⁴ Clause 2.3.3(1) and 2.4.4(1) of the Fibre ID Determination, available at: https://comcom.govt.nz/data/assets/pdf_file/0029/288722/Fibre-Information-Disclosure-Determination-2021-Consolidated-Version-1-May-2024.pdf; See also Schedule 20 of the Fibre ID Determination, available at: <https://comcom.govt.nz/regulated-industries/fibre/information-disclosure-requirements-for-fibre/current-information-disclosure-requirements-for-fibre>.

²⁵ See Schedule 19(ii)-(iii) and Schedule 20(ii)-(iii), available at: <https://comcom.govt.nz/regulated-industries/fibre/information-disclosure-requirements-for-fibre/current-information-disclosure-requirements-for-fibre>. Schedule 23 sets out the Quality Report definitions for ‘faults’, ‘planned outage’ and ‘unplanned outage’ amongst others which rely on the definition of ‘outage in the Fibre IMs’.

Problem definition and proposed amendment

Background

- 3.22 An ID-regulated provider, Enable, raised an issue with the Commission about the definition of outage in the Fibre IMs in relation to their requirements to complete the Quality Report under clause 2.4.4 of the ID Determination.²⁶
- 3.23 We reviewed Enable’s enquiry and explored practices undertaken in the industry by engaging with other ID-regulated providers to determine how they measured outages for ID purposes.²⁷
- 3.24 In doing so, it became apparent that it was a challenge for Enable and other providers to pinpoint the ‘cessation in supply’ aspect of the definition for outage. This is mainly because the technology is not currently available that notifies ID-regulated providers directly of the details of the outages when they occur in real time.²⁸
- 3.25 Using the exemption powers under clause 2.10.1(1) of the ID Determination, the Commission issued a conditional exemption (and further amendment) to Enable on 17 November 2023 with respect to any information that relies on the term ‘outage’ in its disclosures due by 30 November 2023.²⁹

²⁶ Commerce Commission, ‘Notice of conditional exemption to Enable Networks Limited in relation to reporting on quality under the Fibre ID Determination’, 17 and 29 November 2023, https://comcom.govt.nz/_data/assets/pdf_file/0029/336674/Fibre-ID-Exemption-Amendment-Notice-Enable-Networks-Limited-Measuring-27Cessation-of-Supply27-for-Outages-29-November-2023.pdf.

²⁷ Commerce Commission, ‘Notice of conditional exemption to Enable Networks Limited in relation to reporting on quality under the Fibre ID Determination’, 17 November 2023, https://comcom.govt.nz/_data/assets/pdf_file/0029/336674/Fibre-ID-Exemption-Amendment-Notice-Enable-Networks-Limited-Measuring-27Cessation-of-Supply27-for-Outages-29-November-2023.pdf.

²⁸ Commerce Commission, ‘Notice of conditional exemption to Enable Networks Limited in relation to reporting on quality under the Fibre ID Determination’, 17 November 2023, https://comcom.govt.nz/_data/assets/pdf_file/0029/336674/Fibre-ID-Exemption-Amendment-Notice-Enable-Networks-Limited-Measuring-27Cessation-of-Supply27-for-Outages-29-November-2023.pdf.

²⁹ Commerce Commission, ‘Notice of conditional exemption to Enable Networks Limited in relation to reporting on quality under the Fibre ID Determination’, 17 and 29 November 2023, https://comcom.govt.nz/_data/assets/pdf_file/0029/336674/Fibre-ID-Exemption-Amendment-Notice-Enable-Networks-Limited-Measuring-27Cessation-of-Supply27-for-Outages-29-November-2023.pdf; clause 2.10.1(1) of the Fibre ID Determination provides that the Commission may, by written notice in to an ID-regulated provider, exempt the ID-regulated provider from any requirement of this determination, for a period and on such terms and conditions as the Commission specifies in a notice, and may amend or revoke any such exemption.

- 3.26 The notice provided a conditional exemption to Enable from having to, for the purpose of clause 2.4.4(1) of the ID Determination, use the definition in paragraph (a) of 'outage' in clause 1.1.4(2) of the IM Determination. This is in relation to completing and publicly disclosing information in the Report on Quality, as set out in Schedule 20 of the ID Determination, for disclosure year 2023 that relies on the IMs' definition of 'outage'.
- 3.27 The Commission granted the conditional exemption because it was considered that it would be unworkable for Enable to complete and publicly disclose all of the information in the current schedules (including Schedule 20).³⁰
- 3.28 The exemption set out the way Enable must measure an outage when completing and publicly disclosing information in the Quality Report for the purpose of clause 2.4.2(1) of the ID Determination.³¹

Analysis

- 3.29 The current definition of outage under clause 1.1.4 in the Fibre IMs is relied upon for the quality standards under the Fibre IMs and quality reporting under the ID Determination.
- 3.30 The definition of outage has caused a practical issue for regulated providers as they:
- 3.30.1 do not always know when the cessation in supply occurs;
 - 3.30.2 current technology used within their monitoring systems does not always allow for instantaneous reporting of impactful outages; and
 - 3.30.3 their systems sometimes notify providers multiple times of non-impactful outages that could constitute an outage under the current definition.

³⁰ Commerce Commission, 'Notice of conditional exemption to Enable Networks Limited in relation to reporting on quality under the Fibre ID Determination', 17 November 2023, https://comcom.govt.nz/_data/assets/pdf_file/0029/336674/Fibre-ID-Exemption-Amendment-Notice-Enable-Networks-Limited-Measuring-27Cessation-of-Supply27-for-Outages-29-November-2023.pdf.

³¹ The Commission considered that granting this exemption was reasonable given that: Enable will disclose the information that it does hold in relation to the duration of outages, which we understand is largely consistent with industry practice; and the issue is outside of Enable's control in that Enable does not hold and does not appear to be reasonably capable of obtaining the information that complies with the definitions outlined in the notice for the conditional exemption: Commerce Commission, 'Notice of conditional exemption to Enable Networks Limited in relation to reporting on quality under the Fibre ID Determination', 17 and 29 November 2023, https://comcom.govt.nz/_data/assets/pdf_file/0029/336674/Fibre-ID-Exemption-Amendment-Notice-Enable-Networks-Limited-Measuring-27Cessation-of-Supply27-for-Outages-29-November-2023.pdf.

- 3.31 We understand that, in many cases, regulated providers are notified of an outage by a RSP after an end-user has notified the RSP. This means regulated providers are often dependent on the RSP to provide the information, and this can lead to a delay in reporting the outage.
- 3.32 However, we understand there is no such issue when a "major fault" is identified on a regulated providers' own network as current technology is able to notify them of a cessation in supply instantaneously when the system raises a fault ticket.
- 3.33 As outlined above, this issue currently applies to the ID and PQ requirements that rely on the definition of 'outage' under the Fibre IMs.
- 3.34 The proposed amendment is intended to enable a regulated provider to better identify when an outage occurs by enabling an outage to be recognised by the earlier of:
- 3.34.1 when it is identified by the regulated provider; or
 - 3.34.2 when the regulated provider has received a fault notification in respect of the outage (and the elements of that notification are prescribed).
- 3.35 This proposed amendment should enhance the workability of the Fibre IMs and ID regulation for those regulated providers who use technology that does not currently notify them of an outage in real time. By providing that an outage is a cessation in the supply that is recognised at the earlier of when a regulated provider identifies the outage, or when they are notified, this also ensures the definition will remain fit-for-purpose with changes in technology and it should help improve quality reporting.
- 3.36 It is also intended to avoid the requirement that a regulated provider must report under the ID Determination even if it is alerted through its system of a non-impactful outage.
- 3.37 Naturally, this proposed change would impact the 'availability' and 'faults' quality dimension Fibre IMs where the definition of 'outage' applies.

Reasons why the proposed amendment promotes the decision-making framework

- 3.38 The proposed amendment to the definition of outage better promotes the purpose of the Fibre IMs under section 174 to promote certainty for regulated fibre service providers, access seekers and end-users in relation to the rules, requirements and processes applying to the regulation of FFLAS, as it will provide fibre providers with a more workable, clear and certain definition for the purposes of ID and PQ regulation.³²
- 3.39 The purpose of ID regulation is to ensure sufficient information is readily available to interested persons to assess whether the purpose of Part 6 is being met.³³
- 3.40 We consider this IM amendment will mean interested persons are better placed to assess whether the Part 6 purpose is being met because it will provide them with clearer information on whether services being provided reflect end-user demands consistent with the purpose of ID regulation.³⁴
- 3.41 In particular, we consider that, if fibre providers have a more workable definition to comply with reporting requirements on quality services, then the information provided under the amended definition would ensure that interested persons are able to assess if fibre providers are supplying FFLAS of a quality that reflects end-user demands consistent with section 162(b) of the Act.

Proposed application dates of proposed Fibre IM amendments

- 3.42 For the purposes of the IMs for PQ regulation, our draft decision is that this IM change will apply for Chorus's PQP2 determination that commences on 1 January 2025.
- 3.43 For the purposes of the IMs for ID regulation, our draft decision is that the application date for this proposed IM change is 1 January 2025. This would mean that the IM amendment would apply for the purposes of the provisions of the ID Determination that rely on that definition, from that date.
- 3.44 An alternative application date we considered for the purposes of the IMs for ID regulation is for the amendment to apply at the time of the first complete assessment period for each regulated provider after 1 January 2025. If so, it would affect the disclosure years for the ID-regulated providers as follows:

3.44.1 **Disclosure year 2025:** Chorus (1 January 2025 – 31 December 2025)

³² See section 174 of the Act, available at:
<https://www.legislation.govt.nz/act/public/2001/0103/latest/whole.html#LMS131919>

³³ Section 186 of the Act, available at:
<https://www.legislation.govt.nz/act/public/2001/0103/latest/whole.html#LMS131919>.

³⁴ Section 186 of the Act, available at:
<https://www.legislation.govt.nz/act/public/2001/0103/latest/whole.html#LMS131919>.

3.44.2 Disclosure year 2026:

3.44.2.1 Northpower Fibre (1 April 2025 – 31 March 2026)

3.44.2.2 Tuatahi First Fibre (1 April 2025 – 31 March 2026)

3.44.2.3 Enable Networks (1 July 2025 - 30 June 2026)

3.45 We prefer our draft decision where all providers would be required to provide disclosures in line with the proposed amendment as it ensures consistent reporting ID-regulated providers from the month of January 2025 onwards. Compared to the alternative application date, we consider the consistent reporting that our draft decision would enable would better promote the section 186 purpose of ID regulation by enabling interested persons to compare regulated providers' quality of service on the same basis and therefore assess whether the purpose of Part 6 of the Act is being met.

Proposed amendment to the timing of annual benefit of Crown financing

Current requirements

3.46 Section 171(2) of the Act provides that the Commission must ensure that the maximum revenues, or the maximum price or prices, reflect, in respect of any Crown financing, the actual financing costs incurred by the provider (or a related party) in the regulatory period to which the determination applies.³⁵

3.47 The Fibre IMs provide that, in respect of regulated fibre service providers subject to both ID and PQ regulation in regulations made under section 226 of the Act, 'annual benefit of Crown financing building block' for a disclosure year is calculated in accordance with the formula set out in clause 2.4.10.³⁶

3.48 The Fibre IMs provide that, in respect of regulated providers subject only to ID regulation in regulations made under section 226 of the Act, the 'annual benefit of Crown financing building block' for a disclosure year is calculated in accordance with the formula under clause 2.4.11.

³⁵ Under section 171(1), section 171(2) applies if a section 170 determination sets maximum revenues that may be recovered by, or the maximum price or prices that may be charged by, a regulated fibre service provider.

³⁶ Commerce Commission, Fibre IMs, clause 2.4.10, available at: https://comcom.govt.nz/_data/assets/pdf_file/0028/273655/fibre-input-methodologies-determination-2020-consolidated-as-of-6-march-2024.pdf.

- 3.49 The Fibre IMs also set out that, for the purposes of specifying a PQ path, the 'annual benefit of Crown financing building block' for a regulatory year in a regulatory period is determined in accordance with the formula under clause 3.5.11.³⁷

Problem definition and proposed amendment

- 3.50 Chorus submitted on the *Process and Approach* paper that it considers the Fibre IMs materially overstate the benefit of Crown financing in relation to repayments that occur during a regulatory year.³⁸
- 3.51 Chorus considers that the result is that the Fibre IMs will lead to an overstatement of the benefit of Crown financing and will result in a PQ determination not reflective of actual costs incurred by Chorus in respect of Crown financing during the regulatory period. It submitted that, unless this is amended, the PQ determination would be inconsistent with section 171 of the Act, which requires the maximum revenues set by the Commission to reflect the actual costs of Crown financing.³⁹
- 3.52 To overcome the issue, Chorus proposed specific amendments to how timing is calculated regarding Crown financing under clauses 2.4.10 and 3.5.11 in its submission.⁴⁰
- 3.53 The Fibre IMs require the annual benefit of Crown financing to be calculated as at the first day of the disclosure year or regulatory year. We note, however, that Chorus is due to repay debt owed to the Crown in the middle of the year (30 June) on four occasions over the period from 2025 to 2036.⁴¹ Chorus' reduced Crown financing outstanding balance will not be recognised for these years until the start of the following regulatory year.

³⁷ Commerce Commission, Fibre IMs, cl 3.5.11, available at: https://comcom.govt.nz/_data/assets/pdf_file/0028/273655/fibre-input-methodologies-determination-2020-consolidated-as-of-6-march-2024.pdf.

³⁸ Chorus, 'PQP2 Process and Approach', 28 September 2023, p. 43, available at: https://comcom.govt.nz/_data/assets/pdf_file/0023/330890/Chorus-submission-on-the-Process-and-approach-paper-for-the-2025-2028-regulatory-period.pdf.

³⁹ Chorus, 'PQP2 Process and Approach', 28 September 2023, p. 43, available at: https://comcom.govt.nz/_data/assets/pdf_file/0023/330890/Chorus-submission-on-the-Process-and-approach-paper-for-the-2025-2028-regulatory-period.pdf.

⁴⁰ Chorus, 'PQP2 Process and Approach', 28 September 2023, pp. 49-51, available at: https://comcom.govt.nz/_data/assets/pdf_file/0023/330890/Chorus-submission-on-the-Process-and-approach-paper-for-the-2025-2028-regulatory-period.pdf.

⁴¹ Chorus is scheduled to repay financing costs on 30 June in the following years: 2025, 2030, 2033 and 2036; See Incenta Economic Consulting (report on behalf of Chorus), "Chorus' actual financing cost for Crown-financed investment, July 2019", p.16, available at: https://comcom.govt.nz/_data/assets/pdf_file/0022/161923/Incenta-for-Chorus-submission-Fibre-emerging-views-Choruss-actual-financing-cost-for-Crown-financed-investment-report-July-2019.pdf

- 3.54 By way of example, as the current Fibre IMs sets out that the annual benefit is calculated as at the first day of the regulatory or disclosure year, if Chorus makes the scheduled repayment as planned on 30 June 2025, the reduction in the benefit from the lower level of outstanding Crown financing received by Chorus will not be recognised until the following calendar year (1 January 2026).⁴²
- 3.55 This, in turn, impacts our ability to ensure Chorus's maximum revenues or prices reflect the actual financing costs incurred by the provider in the regulatory period under section 171(2). We therefore consider the Fibre IMs should be amended to prevent overstatement of the Crown financing benefit with respect to repayments between 2025 and 2036.
- 3.56 While ID-only regulated providers are not subject to section 171(2), the same issue of overstatement of Crown financing benefits may still apply to them, depending on the timing of their repayments.
- 3.57 For the above reasons, we propose to amend the Fibre IMs as follows:
- 3.57.1 for those regulated providers subject to PQ and ID, we seek to amend the Fibre IMs to calculate the benefit of Crown financing as the sum of the amount for each day of the regulatory year or disclosure year; and
 - 3.57.2 for those regulated providers subject to ID-only, we seek to amend the Fibre IMs to calculate the annual benefit of Crown financing as the sum of the amounts for each day of the disclosure year.
- 3.58 By amending the Fibre IMs in this way, we will more accurately take account of the impact of regulated providers' repayments during the regulatory or disclosure year rather than only measuring it at the start of each year.

Reasons why the proposed amendment promotes the decision-making framework

- 3.59 We consider that our proposed amendment will better reflect the actual benefits of Crown financing, which will better promote the decision-making framework in the following ways:

⁴² Between 2025 and 2036, Chorus is required to redeem the debt securities that it has issued according to a prescribed schedule - see https://comcom.govt.nz/_data/assets/pdf_file/0022/161923/Incenta-for-Chorus-submission-Fibre-emerging-views-Choruss-actual-financing-cost-for-Crown-financed-investment-report-July-2019.pdf.

- 3.59.1 For PQ purposes, the proposed amendment to the Fibre IMs will ensure alignment with section 171(2) of the Act and will better promote the long-term benefit of end-users in accordance with the purpose of section 162. That is, the maximum allowable revenue we set for Chorus under PQ regulation should reflect the concessional nature of the actual financing costs incurred by Chorus in respect of Crown financing. This is consistent with providing the expectation of normal returns, in line with section 162(a) and (d).
- 3.59.2 For ID purposes, the proposed amendment to the Fibre IMs will better promote the section 186 purpose of information disclosure regulation by ensuring that sufficient information is readily available to interested persons to assess whether the section 162 purpose of Part 6 is being promoted. It will be important that the regulated providers' disclosed information appropriately reflects the actual financing costs incurred by the providers in respect of Crown financing.⁴³
- 3.60 We consider the proposed amendment is an urgent and compelling change to make as an out-of-cycle amendment to a fundamental IM (the annual benefit of Crown financing building block is deducted from the maximum allowable revenue that we set in a PQ determination) because it will enable maximum revenues to better reflect the actual benefits of Crown financing, in line with section 171(2) and section 162(a) and (d). We also consider it is worth making the amendment now as it will correct an error that will affect the implementation of the Fibre IMs for PQP2, given the identified issue is likely to occur in the first year of PQP2.

⁴³ Commerce Commission, "Fibre input methodologies: Main final decisions – reasons paper", (13 October 2020), at 163-164, available at: https://comcom.govt.nz/_data/assets/pdf_file/0022/226507/Fibre-Input-Methodologies-Main-final-decisions-reasons-paper-13-October-2020.pdf