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

1. Introduction

1.1 This cross-submission is made by Tuatahi First Fibre Limited (**Tuatahi**) in response to submissions on the Commission's *Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act: Reasonable grounds assessment draft decision* published on 27 August 2024 (**Draft Decision**).

1.2 We have not commented on every issue raised in the submissions; where we have not commented we rely on our Submission dated 24 September 2024.

2. Lack of evidence

2.1 Spark submits that "*there is no evidence to warrant deregulation*"[1] and that "*the lack of evidence of competitive constraints across a broad range of FFLAS services meant that a deregulation review is unlikely to be warranted*."[2] This submission is unsurprising given none of the evidence that we had provided to the Commission in our submission and cross-submission on the Framework Paper is referred to in the Draft Decision.

2.2 However, it was not necessary for us to provide evidence "*to warrant deregulation*" but simply to show there are reasonable grounds for the Commission to investigate whether this was the case. The evidence we have provided clearly establishes reasonable grounds for the Commission to start a deregulation review of our Fixed Fibre Line Access Services (**FFLAS**).

2.3 In addition, the Local Fibre Companies (**LFCs'**) LFCs' ID disclosures contain relevant information which was not analysed as part of the Draft Decision. For example, Tuatahi's sch 25 ID disclosure shows that for the month ending January 2024, its total Layer 1 FFLAS monthly charges amounted to $178,941,[3] while Chorus' sum Layer 1 FFLAS monthly charges in the Tuatahi region (set out in its sch 24(i) disclosure) over the same period amounted to $247,084.23.[4] This directly contradicts the Commission's view on point-to-point services that while it expected some competition to exist where the Chorus network overlaps the other LFC networks, "*this is a weak competitive constraint due to the small number of situations where it occurs*".[5] We submit that the Commission would not have come to this conclusion had it considered the ID disclosures in its Draft Decision.

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[1] Spark submission (24 September 2024) at [8]

[2] Spark submission (24 September 2024) at [21]

[3] Tuatahi ID Schedule 25 Aggregated Pricing Information, disclosed on 30 April 2024

[4] Chorus ID Schedule 24(i) Aggregated Pricing Information, disclosed on 31 July 2024

[5] Draft Decision [3.130]

2.4 We agree with Chorus that if such information is not informative for the deregulation review, it calls into question the value of the existing ID regulations.[6]

2.5 2degrees submits that the Commission's analysis has been very thorough given the Draft Decision is over 80 pages.[7] However, the size of a document is not an actual measure of thoroughness if the decision overlooks relevant evidence that has been provided or is otherwise available as the Draft Decision does.

3. Substantial market power

3.1 One NZ, in its discussion of Chorus' ability to exercise substantial market power (**SMP**), uses as an example "*developing services specifically addressed at countering competitive technologies*".[8] As we said in our submission, responding to competition is the antithesis of an exercise of SMP,[9] and as noted by Frontier Economics "*[t]hat Chorus and other [LFCs] can and have responded to competition by other technologies appears to demonstrate the opposite of what the Commission intends – the essence of market power is the ability to hold prices high without regard to the efforts of competitors".*[10]

3.2 Spark's submission that there are a "material group of customers who demand a wired service and are resistant to wireless landline options and, for these customers, Chorus and LFCs have the ability and incentive to hold prices above competitive levels" is inconsistent with the evidence already provided or otherwise available to the Commission.[11] As the Commission will be aware from our ID disclosure, there is not a material group of customers who demand a fibre voice service. Column M of 'S25(i) 03.2024' tab shows there were **[Confidential]** voice connections as at 31 March 2024, including Baseband and Bitstream 2 Ultra 0/0 2.5/2.5 sec) services, representing 0.28% of total connections. This means that 99.72% of Tuatahi end-users acquire voice services from another provider.

3.3 Spark further submits that despite the Commission reporting that the number of fibre voice anchor service connections remains low, Spark expects this "material" group of customers will "*increase as the copper network is retired*".[12] However, the Copper Withdrawal Code requires Chorus to inform copper customers about all of their available alternative options prior to copper withdrawal, not just fibre.

3.4 Spark's claim that the number of customers who require fixed voice services is material and will increase with copper withdrawal is contrary to the evidence and its submission that we have the ability and incentive to hold voice prices above competitive levels is not credible.

4. 5G FWA uncertainty

4.1 According to Spark "*there is some uncertainty relating to whether future services enabled by 5G technologies, for example, will provide an effective competitive constraint on FFLAS*"[13], while One NZ submits "*it is at this stage unclear what impact this service will have on the market and so 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*".[14]

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[6] Chorus' submission (24 September 2024) at [59]

[7] 2degrees submission (24 September 2024) at 2

[8] One NZ submission (24 September 2024) at [7]

[9] Tuatahi submission (24 September 2024) at [9.41]

[10] Frontier Economics *Reasonable grounds analysis* (23 September 2024) at [4.1]

[11] Spark submission (24 September 2024) at [12]

[12] Spark submission (24 September 2024) at [11]

[13] Spark submission (24 September 2024) at [7]

[14] One NZ submission (24 September 2024) at [6]

4.2 As outlined in our submission, there are sufficient public statements from both Spark and One NZ that conflict with that view sufficient for the Commission to conclude, for the purposes of its reasonable grounds assessment, that those providers each have a clear objective and allocated capital to accelerate and substantially invest in increasing their 5G fixed wireless access (**FWA**) services (and influence the retail price and incentives (like reduced mobile charges and streaming services) consumers pay and receive) which will place even greater constraint on fibre services in the foreseeable near future.

4.3 One NZ incorrectly suggests that our submission on the competitive constraints we face from FWA services was "*based solely on the potential competitive constraint that 5G FWA might have on providers of fibre services in the future*".[15] To the contrary, we have provided a significant amount of evidence to the Commission on the past and current churn impact of FWA competition on fibre services, as has Chorus and Enable; the reasonably foreseeable growth in 5G FWA competition is in addition to that historic evidence.

5. Purpose of s 210

5.1 Spark submits that, in its view, "*section 210 is a reminder that the Commission should periodically check whether a deregulation review is warranted, it is no more than that*."[16] This view is inconsistent with:

(a) the purpose and legislative history of s 210 as set out in our submission, which was to enable regular reviews of the Part 6 regime;[17] and

(b) the Commission's own submission to the Select Committee during the legislative process, that "*[d]eregulation reviews may need to occur reasonably frequently given the fast-changing nature of telecommunications technologies*".[18]

6. Reasonable grounds threshold

6.1 According to Spark, "*[t]he Commission should require a compelling case before starting a deregulation review*"[19]. This would create an even higher threshold than the Commission has proposed.

6.2 In discussing the uncertainty about how effectively future 5G enabled services would provide a competitive constraint on FFLAS, Spark says that "*the Commission is not required to solve for this uncertainty when considering whether reasonable grounds exist for a deregulation review*."[20]

6.3 We agree the deregulation review is the place for that question to be fully considered and it does not need to be resolved at the reasonable grounds stage (although we do not think, from the context, that that is what Spark meant). The legislative history shows it is sufficient that it is possible that current and future 5G enabled services do and will increasingly constrain on FFLAS to undertake a deregulation review, and the evidence before the Commission clearly establishes this is the case.

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[15] One NZ submission (24 September 2024) at [6]

[16] Spark submission (24 September 2024) at [7]

[17] Tuatahi submission (24 September 2024) at Section 2.

[18] Commerce Commission *Submission on the Telecommunications (New Regulatory Framework) Amendment Bill* (2 February 2018) at pg. 5 cited in Tuatahi submission (24 September 2024) at [1.6.3].

[19] Spark submission (24 September 2024) at [3]

[20] Spark submission (24 September 2024) at [7]