ENABLE NETWORKS LIMITED AND ULTRAFAST FIBRE LIMITED **PUBLIC VERSION**

CROSS SUBMISSION ON NZCC DRAFT GUIDANCE ON ITS INTENDED APPROACH TO APPLYING S 201 OF THE TELECOMMUNICATIONS ACT 2001

1. This cross-submission responds to Chorus' submission dated 24 June 2021 (**Chorus Submission**) in response to the Commission's draft guidance on its intended approach to applying s 201 of the Telecommunications Act 2001 (**Act**) dated 27 May 2021 (**Draft Guidance).**

2. As we have previously submitted, consistent pricing across Ultrafast Broadband (**UFB**) providers was a feature of the UFB fibre regime from the outset[1] and was from our perspective an important feature of the regime[2]. That policy has been carried over into Part 6 of the Act as is clear from the Officials' Report[3] and the unambiguous wording on s 201. Nothing in the Chorus Submission changes that outcome.

3. We respond only to the relevant parts of the Chorus Submission high-lighted below.

s201 is "primarily aimed at ensuring that rural residential users pay the same for access services as their rural counterparts."[4]

4. This is not correct. It is clear from the Officials Report to the Select Committee that there were two distinct policy objectives for mandating geographically consistent pricing (**GCP**):

> *The legislation provides that Chorus must charge the same price for a fibre service regardless of the location of the customer. This is to ensure comparable pricing for all customers,* ***and to discourage "pocket pricing****", where a regulated fibre provider could strategically drop prices in geographic areas to undermine competition.*[5]

"The Commission has indicated that one of the purposes of s201 is to prevent pocket pricing. Chorus disagrees with the idea that price drops are used to deter competition. Rather, price drops are usually made in response to market dynamics. It would be a perverse outcome if s201 was used to constrain otherwise workable competition". [6]

5. Pocket pricing is a well-recognised form of predatory pricing: "*the ability of incumbents to offer differential pricing to certain customer groups - either geographical or by segment*".[7] As the Commission has noted "*entry or expansion into a market could be constrained by an incumbent's differential customer pricing.*"[8]

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[1] MBIE *Telecommunications Act Review: Options Paper* July 2016 [7.2.5].

[2] *"As proposed in the Options Paper, geographic averaging would prevent Chorus from pocket pricing its services in LFC areas, and we support this."* Enable, Ultrafast Fibre and Northpower *LFC submission on MBIE Options Paper 2 September 2016* [77].

[3] Telecommunications (New Regulatory Framework) Amendment Bill, Department Report to the Economic Development, Science and Innovation Committee 10 April 2018 (**Officials' Report**).

[4] Chorus Submission, second bullet point of Executive Summary.

[5] Officials' Report [71] (own emphasis).

[6] Chorus Submission [3].

[7] NZCC *A Review of Cellular Mobile Market Entry Issues* 10 October 2006 (**Mobile Review**) [77].

[8] Mobile Review [76].

6. It is because Chorus has the ability and incentive to cherry-pick low cost to serve growth areas (including areas adjoining LFC areas) and provide those services below the price Chorus charges in its own UFB area where GCP is required.

7. Chorus' proposed price drop is not "a response to market dynamics" and the market is not "otherwise workably competitive". LFCs remain shackled by UFB regulatory restrictions and obligations that in practice prevent them from responding to Chorus' proposed strategic price cutting in LFC urban areas.

"Geographically Consistent Pricing (GCP) does not apply to services offered by Chorus in other LFC areas. This reflects the wording of the legislation, and recognises that in other LFC areas, the presence of those other providers of FFLAS means that there is sufficient competitive constraint on Chorus, such that PQ regulation (and GCP) is not required".[9]

8. This is incorrect. Section 201 provides that a fibre provider subject to price quality regulation must charge the same price for providing FFLAS "*regardless of the geographic location of the …end-user*". There is no ambiguity in this wording – once an FFLAS provider is declared to be subject to price-quality regulation in any location, it has an obligation to offer the same price for FFLAS in all end user locations.

"We consider that as a matter of principle if we can establish that FFLAS is provided substantially for the benefit of end-users in an LFC area, it should be ID-only FFLAS. This may occur if we expand our services in other LFC areas which could include the use of our existing UFB exchanges."[10] "Chorus wants to be able to expand its network"[11]… "Averaging prices across our whole FFLAS portfolio could result in artificially high urban prices".[12]

9. It is clear from its submission that Chorus wishes to expand its fibre network into other LFC areas and growth areas adjoining LFC areas using its existing exchanges to provide fibre services in our denser and therefore cheaper to serve urban areas at prices less than it charges in urban areas in its own UFB areas.

10. Chorus could only profitably charge less in our UFB areas than its own UFB areas if its services in our areas were cross-subsidised by services in its UFB area.

11. If Chorus were able to cherry-pick LFC urban areas with prices below their own UFB area prices, we would be left to supply the more expensive non-urban areas without the revenue we would have earned for urban services. We could not increase our prices to compensate for that loss of revenue because of the competitive constraint imposed on us by fixed wireless access (**FWA**) competition.

12. The UFB framework has always required that we charge the same price for our services irrespective of where the end-customer is located and our Reference Offers under Part 4AA of the Act do not allow for differential pricing.

13. It is clear that there were strong policy reasons for imposing the GCP obligation on Chorus.

8 July 2021

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[9] Chorus Submission [7]

[10] Chorus Submission [10]

[11] Chorus Submission [29]

[12] Chorus Submission [30]