

# One NZ submission on fibre fixed line access service deregulation review

16 February 2024

## Introduction

1. We welcome the opportunity to comment on the Commerce Commission's (**the Commission**) consultation on fibre fixed line access service (**FFLAS**) deregulation review. We recognise that the Commission is required to assess whether reasonable grounds exist to carry out a deregulation review before the start of each price-quality (**PQ**) regulatory period under section 210 of the Telecommunications Act (**the Act**). Our view is that there is no basis for a deregulation review at this stage and we have set out our reasons for this in this submission.

## One NZ position

2. The Commission considers that reasonable grounds to investigate whether a service should no longer be regulated 'exist where there is evidence that circumstances may have changed to such an extent that continued regulation, or the regulation in its current form, as the case

may be, is no longer necessary to best promote the long-term benefit of end-users in markets for FFLAS.<sup>1</sup>

3. The Commission has determined 1 January 2022 as the date from which to assess whether there may have been a change in circumstances that would provide reasonable grounds for a deregulation review to be carried out.
4. Our view is that there has been no material change in circumstances that would support a deregulation review being carried out at this stage. Many of the conditions that exist today are unchanged from 1 January 2022 (e.g. the availability of One NZ HFC networks in Wellington and Christchurch). The relevant question is whether relevant changes since that date cumulatively support proceeding with a deregulation review. For reasons set out below, One NZ submits that they do not.
5. As part of any deregulation review, the Act guides the Commission to consider whether the regulated provider continues to exercise substantial market power (**SMP**).<sup>2</sup> There is no credible prospect of Chorus relinquishing SMP in the foreseeable future. It remains an inevitable trading partner for retailers in those areas where it operates, including those areas where Chorus' wholesale services and other access technologies are both present.
6. Chorus retains a monopoly in the provision of fibre services in most parts of New Zealand, supplying 73% of end users in those areas where Chorus' fibre is available. There is no realistic prospect of any other party replicating fibre connections to residential end users in Chorus' FFLAS areas. 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 (e.g. by developing new products at price points that are specifically designed to target and deter

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<sup>1</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/336822/Fibre-fixed-line-access-service-deregulation-draft-assessment-framework-December-2023.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/336822/Fibre-fixed-line-access-service-deregulation-draft-assessment-framework-December-2023.pdf), p. 9

<sup>2</sup> Section 210(4)(b).

uptake of these options, as was the case with new entry level fibre products targeting fixed wireless access (FWA) services).

7. While MNOs have ambitions to continue to attract end-users to alternative access technologies such as FWA, Chorus and other Local Fibre Companies (LFCs) have conditioned consumers to think of fibre as an inherently superior technology. Chorus has suggested that fibre is the ‘gold standard for your internet’<sup>3</sup> and the optimal ‘medium of delivery’ for consumers that value higher speed in their broadband services.<sup>4</sup> It has also said that ‘[i]n general, consumers know what they want to buy and understand that fibre is the best available type of broadband.’<sup>5</sup> It characterises fibre as functionally and qualitatively distinct from other access technologies regardless of the specific circumstances of end users, and whether they might value factors such as ease of installation more highly than speed. It has used direct to end user marketing and incentives to encourage switching to fibre.<sup>6</sup> Through this positioning, by encouraging the migration of fibre consumers to higher specification plans and by characterising other access types as inferior, Chorus has in effect reduced the size of the addressable market for alternative access technologies and worked to maintain its SMP.
8. Chorus’ FY23 Annual Results note that through the reporting period it has grown fibre share and ARPU while simultaneously increasing its prices by more than 7% for some services. Indeed, since 1 January 2022 Chorus has increased its wholesale charges for some services by up to nearly 12% (including an 11.8% rise in the wholesale input cost of the most popular fibre plan, Fibre300). The fact that no significant number of customers have switched to alternative technologies despite this scale of increases indicates that alternative access technologies such as FWA are not seen by a sufficient number of customers as substitutes for fibre (such that diversion of customers to these alternatives could not be expected to

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<sup>3</sup> [Get the best home broadband: compare your options | Chorus NZ](#)

<sup>4</sup> [What is the Big Fibre Boost? | Chorus](#)

<sup>5</sup> *Commerce Commission v Vodafone New Zealand Limited* [2023] NZHC 2149, [142]

<sup>6</sup> See for example [Chorus Prezzy Card offer | Chorus](#)

constrain Chorus in the event it took advantage of market power). Support for deregulation based on the assumption that Chorus faces sufficient competition from alternative access technologies:

- a. wouldn't be in line with Chorus' own prior arguments and campaigns claiming superiority of fibre compared to these alternatives;<sup>7</sup>
  - b. wouldn't be consistent with end user demand as demonstrated by their reluctance to switch even when faced with significant increases in access costs for fibre services;
  - c. wouldn't recognise the limits on availability and scalability of some services. []
9. There are two ways that 'substitution to FFLAS' could be interpreted for the purpose of an assessment into whether a competitive constraint on the supply of FFLAS-based retail services exists:
- a. The only substitute to FFLAS is another fibre service. FFLAS are subject to PQ regulation '...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.'<sup>8</sup> The Commission's own interpretation of Part 6 of the Act appears to be aligned with a view that for the purposes of PQ regulations application, only other fibre services can offer a true substitute: 'The underlying purpose of reg 6 is to exempt Chorus from PQ regulation where it is subject to competitive constraints from other LFCs in respect of end-users.'<sup>9</sup> The Commission has also argued in other contexts that 'fibre' means a fibre-to-the-home (FTTH) product, and that other types of access

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<sup>7</sup> For example, in July 2021 Chorus ran an advertising campaign which implied that a customer will experience buffering and glitches with broadband if they are not using fibre technology. This was misleading and defamatory to other access options, such as FWA and HFC which are sufficient for activities such as streaming video and TV. Refer to our past submission for more detail (Annex 1): [https://comcom.govt.nz/\\_\\_data/assets/pdf\\_file/0023/267512/Vodafone-NZ-Submission-on-Marketing-telecommunications-services-letter-27-August-2021.pdf](https://comcom.govt.nz/__data/assets/pdf_file/0023/267512/Vodafone-NZ-Submission-on-Marketing-telecommunications-services-letter-27-August-2021.pdf)

<sup>8</sup> The Telecommunications (Regulated Fibre Service Providers) Regulations 2019, r6.

<sup>9</sup> [Geographically-consistent-pricing-Guidance-on-our-approach-to-section-201-of-the-Telecommunications-Act-30-September-2021.pdf \(comcom.govt.nz\)](https://comcom.govt.nz/__data/assets/pdf_file/0023/267512/Vodafone-NZ-Submission-on-Marketing-telecommunications-services-letter-27-August-2021.pdf), p. 7

technologies cannot be considered substitutable from an end user point of view.<sup>10</sup> Under this interpretation, none of the alternative access services have fibre features that allow them to be considered a genuine functional substitute.

- b. The alternative view is that there is a chain of substitution across different access technologies with different attributes. For some consumers and in some applications, these other technologies might be considered a ‘close economic substitute’ to FFLAS in terms of key price and non-price features. However, for other consumers or in the context of different applications they are not. At this stage, the extent of substitution between fibre and other access technologies is limited in those areas where FFLAS is available. For example, a Hyperfibre user will not be willing to switch to 4G FWA due to the different performance of the two services. Chorus’ strategy over time has been to increase the uptake of Hyperfibre through the use of marketing and incentives<sup>11</sup>. Pushing end users further up into the premium FFLAS space increases the likelihood that they will not see other technologies as substitutable, particularly as Chorus continues to spend \$millions in each year to condition consumers to see fibre as the gold standard and other access types as inferior.

10. We have considered the types of evidence that the Commission proposes to assess when doing the reasonable grounds assessment and provided our view on each below.

**11. The availability of alternative networks and whether they are physically present in areas covered by FFLAS-based services, and whether those alternative networks rely on access to FFLAS to deliver services.**

- a. To the extent there is any competition between FFLAS and alternative access technologies, this varies across different regions and depends on availability and capacity in many cases. One NZ offers alternative broadband access technologies to its customers, including FWA and HFC. However, these are not available in all locations

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<sup>10</sup> *Commerce Commission v Vodafone NZ Limited* [2021] NZDC 7381; *Commerce Commission v Vodafone New Zealand Limited* [2023] NZHC 2149

<sup>11</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/334239/04.-Chorus-Our-Fibre-Assets.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/334239/04.-Chorus-Our-Fibre-Assets.pdf)

where FFLAS-based services exist. HFC is limited to parts of Christchurch, Wellington and Kapiti (as noted above, this is unchanged since 1 January 2022). FWA services are available in more areas but share capacity with mobile users. In areas of high existing demand on mobile networks, FWA may not be offered.

- b. In respect of FWA services, these are provided using mobile networks that rely on Chorus' FFLAS in many locations (for example, in relation to the provision of backhaul to mobile sites). [] The reliance of these services on Chorus' regulated FFLAS inputs means that Chorus would be able to affect the provision of FWA services in a way that has real impact on any competitive constraint that they offer. This means that if Chorus sought to extract excessive profits through unregulated FFLAS, it is not possible to rely on FWA to prevent or constrain this, and this outcome would be inconsistent with the purpose of Part 6 of the Act.<sup>12</sup>

**12. The capacity of alternative networks to serve new demand (in the event that end-users wanted to switch away from FFLAS-based services).**

- a. As noted above, FWA is a capacity-based service, we sell it where we know we have sufficient available capacity to deliver services to the advertised standards. This will not be in all FFLAS areas, and in these locations, FWA will not be available for new end users.

**13. Whether retail services offered over the alternative networks represent a 'close economic substitute' to FFLAS-based services (in terms of key price and non-price features).**

- a. The Commission's typical approach to determining services that consumers regard as close substitutes, and would switch to in sufficient numbers to constrain the exercise of market power by an entity with SMP (i.e. Chorus), is to consider factors such as:
  - the extent to which consumer have previously switched between services in response to changes in price;
  - the service's characteristics;

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<sup>12</sup> s 162, Telecommunications Act 2001

- customer preferences.
- b. As noted above, Chorus wholesale prices have increased by up to 12% since 1 January 22 (with pass through resulting in a similar increase in retail prices paid by end users).  
[] This indicates that consumers are unlikely to switch away from fibre when faced with a significant price increase.
  - c. As noted above, Chorus and LFCs have continually claimed through their marketing strategies that the characteristics of fibre are inherently superior to all other types of connectivity. While this view does not account for different drivers of consumer demand or different use cases, it is correct that fibre delivers highest consistent peak speeds and is not prone to congestion. Consumers therefore view fibre as having different characteristics to other access technologies. Of these alternatives, HFC performance is most comparable to retail fibre services.<sup>13</sup> However, Chorus has continuously argued that HFC is not a fibre-like service.
  - d. For some end users, 4G FWA could offer a ‘close economic substitute’ to lower value fibre plans (e.g. Chorus’ Fibre 50), including for consumers who are price conscious and consider service dimensions other than speed. However, this will not be true for all fibre services, for example 4G FWA’s performance is not equivalent to the most popular fibre plan (i.e. Fibre 300), as shown in Measuring Broadband New Zealand (MBNZ) reporting.<sup>14</sup>
  - e. Chorus’ own arguments appear to support the view that other alternative technologies do not represent a ‘close economic substitute’ to fibre services: ‘So let’s be clear: There’s no “fibre-like” performance when comparing technologies. It’s either fibre, or it’s not.’<sup>15</sup>

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<sup>13</sup> [https://comcom.govt.nz/\\_\\_\\_data/assets/pdf\\_file/0023/341807/MBNZ-Spring-Report-30-January-2024.pdf](https://comcom.govt.nz/___data/assets/pdf_file/0023/341807/MBNZ-Spring-Report-30-January-2024.pdf)

<sup>14</sup> [https://comcom.govt.nz/\\_\\_\\_data/assets/pdf\\_file/0023/341807/MBNZ-Spring-Report-30-January-2024.pdf](https://comcom.govt.nz/___data/assets/pdf_file/0023/341807/MBNZ-Spring-Report-30-January-2024.pdf)

<sup>15</sup> CEO’s Address, Chorus Annual Meeting, 8 November 2023, [https://assets.ctfassets.net/7urik9yedtqc/nzx-doc-406648/be3e05a8a9204b674a880f0a13b0db87/Chorus\\_ASM\\_-\\_CEO\\_s\\_Speech.pdf](https://assets.ctfassets.net/7urik9yedtqc/nzx-doc-406648/be3e05a8a9204b674a880f0a13b0db87/Chorus_ASM_-_CEO_s_Speech.pdf)

- f. Finally, even if alternative technologies can be considered close economic substitutes for a segment of customers that have specific use cases, the distribution of these customers across geographic areas [] means that even if some switching from fibre to alternative services did occur, this switching is unlikely to occur at a scale that would constrain the exercise of market power by Chorus. Absent PQ regulation, Chorus would be able to act independently of customers and consumers.

14. **Actual uptake (market shares) of FFLAS-based services and services on alternative networks.**

- a. [
- b. ]

- 15. Section 210(2) allows the Commission to describe services under review with reference to different specific characteristics, including the geographic area in which the service is supplied, the service's end-users and technical specifications of the service<sup>16</sup>. By looking at competition at granular level, there is a risk that the Commission will get false positives in regards to the level of competition that FFLAS face. There are around 100 different Retail Service Providers (RSPs) who sell fibre services to end users, and the majority do not offer services enabled by alternative access technologies. Where alternative technologies exist from some RSPs, they do not act as a genuine competitive constraint on FFLAS, [].
- 16. Given the lack of any material market changes since 1 January 2022 and no prospect of Chorus relinquishing SMP in the foreseeable future, we do not believe that carrying out a deregulation review at this time would be a good use of regulatory resources.
- 17. The PQ regulations were only finalised last year, and it took the Commission five years to get to this point. One NZ would oppose any amendment to the existing scope of regulation that Chorus and other LFCs are subject to.
- 18. Please contact the following regarding any aspect of this submission.

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<sup>16</sup> [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0024/336822/Fibre-fixed-line-access-service-deregulation-draft-assessment-framework-December-2023.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0024/336822/Fibre-fixed-line-access-service-deregulation-draft-assessment-framework-December-2023.pdf)



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