



**ENABLE NETWORKS LIMITED, NORTHPOWER FIBRE
LIMITED AND ULTRAFASST FIBRE LIMITED**

**SUBMISSION ON MARKETING OF ALTERNATIVE SERVICES TO
CONSUMERS DURING COPPER/PSTN WITHDRAWAL OPEN LETTER**

26 August 2021

PUBLIC VERSION

1. Introduction

- 1.1 This submission is made by Enable Networks Limited, Northpower Fibre Limited and Ultrafast Fibre Limited (collectively referred to in this submission as **LFCs**) in response to the Commerce Commission's (**Commission**) Marketing of Alternative Services to Consumers during Copper/PSTN Withdrawal Open Letter (**Open Letter**).
- 1.2 Subject to some specific clarifications below, we agree with the proposed principles and outcomes outlined in the Open Letter and support these being incorporated into a new regulated code.

2. Background

- 2.1 In the Open Letter, the Commission acknowledges that:
- (a) as part of New Zealand transitioning away from copper-based services, including those delivered by Spark's public switched telephone network (**PSTN**), consumers will be required to switch to alternative access technologies such as fibre, hybrid fibre-coaxial cable, wireless broadband and mobile, in order to retain a telecommunications services; and
 - (b) it has received complaints, communication from consumers, TUANZ and several providers, that some of the information being provided to consumers by retailers facing this switch-off decision may be incomplete, confusing or potentially misleading
- 2.2 These complaints received by the Commission include that consumers are:
- (a) not being informed about the full range of options available when being presented with offers by retailers to move to alternative services;
 - (b) being pressured by retailers to move quickly to alternative services even when copper or PSTN services are not currently being (or imminently scheduled to be) withdrawn; and
 - (c) not being given appropriate information by retailers or are being misled by retailers about the performance characteristics (for example connection speed) of alternative services.
- 2.3 We have also received queries and complaints directly from consumers who have been told by a mobile and fibre retailer that either:
- (a) the customer's fibre order is either being delayed or happening on a specific date even though the retailer has not submitted that customer's fibre order to us;
 - (b) the customer's copper service is about to be switched-off, even though Chorus has not even started (nor have they even scheduled or notified us or retailers about) the withdrawal of copper from any of our fibre coverage areas
 - (c) the customer "*has fibre*" when they have actually received a fixed wireless service, or that fixed wireless is "*just the same as or faster than fibre*".
- 2.4 We remain concerned that this behaviour continues to breach consumer law, including misleading statements, comparative advertising and fine print, despite the Commission sending warning letters about this behaviour to Spark (10 Aug 2017, 12 Apr 2019, 23 May 2019) and Vodafone (10 Aug 2018, 17 Dec 2019) and the recent FibreX decision.
- 2.5 This type of behaviour is damaging the reputation of the telecommunications industry and consumer confidence.

3. What is the Commission suggesting be done?

3.1 The Commission is wanting urgent action to better protect consumers who are still on copper, and it has proposed outcomes and conduct principles it thinks are necessary to implement now to ensure that consumers receive the level of retail service quality (**RSQ**) they require. The Commission has also shared its views on how retailers should deliver these outcomes as soon as possible for consumers. The Commission has identified the need to improve this situation urgently because the copper and PSTN withdrawal process is underway and retailers are actively marketing alternative telecommunications services to consumers on copper-based services.

3.2 The Commission has released a set of conduct principles (see section 4 below) with the intention being to ensure:

- (a) consumers are given **appropriate notice** of any change to their copper-based telecommunications services and should not have to make decisions under pressure of time;
- (b) consumers are given **sufficient information** to decide what alternative telecommunications service is best for them as they transition off copper-based services; and
- (c) consumers are given **clear and accurate information** about the technical and performance characteristics of alternative telecommunications services.

3.3 The Commission has also give the industry three (3) options:

- (a) **Option 1:** The Commission issues a set of non-binding voluntary principles and outcomes to retailers.
- (b) **Option 2:** The industry drafts a new self-regulated code incorporating the Commission's guidelines within 60 days of guidelines being issued (due 30 August).
- (c) **Option 3:** The Commission drafts its own RSQ Code.

4. LFC submissions in response to the Options and Principles

4.1 The LFCs support:

- (a) Initiatives that ensure consumers are well informed of the different technology options available that best suits their needs, and that they understand their rights to access telecommunications services.
- (b) The principles and outcomes described in the Commission's Open Letter (**principles**); however, we submit that the principles should apply to all retailer marketing in general and form part of the Commission's RSQ outcomes. This is because of the number of examples of retailers using copper or PSTN withdrawal as grounds to circulate marketing material and contact consumers directly to sell alternative services to those customers irrespective of the fact that their copper or PSTN service is not scheduled to be switched-off by Chorus or Spark respectively.
- (c) A new code that reflects the principles and achieve the Commission's goal to bring retailer "*marketing conduct into line*"¹ within a reasonable timeframe.

¹ Commerce Commission's Open Letter 4 August 2021, cl. 5

Options

- 4.2 We do not support **Option 1** because it is a voluntary scheme does not address the urgency of this matter and will likely be ineffective as a deterrent to retailers.
- 4.3 Time is of the essence for correcting retailer marketing and sales behaviours and improving the experience for our customers. The Commission has indicated that its preference is **Option 2**, and we also support this option with the caveat that this will only be possible if the entire industry (via the Telecommunications Forum (**TCF**)) can agree on the contents of the code to capture the principles and outcomes required by the Commission.
- 4.4 We believe **Option 2** can be achieved, with the support of the Commission and provided that the Commission adopts this Code as a Commission RSQ Code. However, if it is not possible, or if the TCF takes too long to agree any part of the content of the Code (for any reason), or if the TCF indicates a timeframe that the Commission considers to be too long, then we support **Option 3** and believe that will have the greatest impact on retailers and therefore consumers.
- 4.5 This process, and the issue of a new Code, is consistent with the policy objectives behind Part 7 and the views expressed by the Minister regarding the complacency of telecommunications retailers leading to poor customer experiences and outcomes. We also support the Commission continuing to use its other enforcement powers under the Fair Trading Act following the implementation of the new Code.

Principles

- 4.6 The following table confirms our submission in response to each of the principles proposed by the Commission:

No.	Outcome	Conduct Principle	LFC Submission
1.	Consumers are given appropriate notice of any change to their copper-based telecommunications services and should not have to make decisions under pressure of time.	(a) retailers should provide consumers with as much notice as possible, and not less than four months' notice, of any change to their copper service.	Support. This will help remove pressure on the customer to make an <i>on the spot</i> decision.
		(b) retailers should explain clearly to consumers the reasons why they need to move off their copper service and onto an alternative service.	Support. This supports the principle of keeping customers informed and is consistent with the Fair Trading Act.
		(c) retailers should not give copper withdrawal as a reason for moving unless they can point to a formal notification from Chorus relating to that consumer's premises.	Support. We are concerned that copper withdrawal is being used as an excuse by some retailers to circulate marketing material and contact customers directly to get them to move to a different service when Chorus has not issued any notice of the withdrawal of copper services for that customer (or their area).
		(d) retailers should not give PSTN withdrawal as a reason for moving unless they can point to a formal notification from Spark relating to that consumer's premises.	Support, for the reasons stated above but replace references to "copper" with "PSTN".
		(e) retailers should be open with consumers about any commercial decisions they make to cease supplying copper services ahead of formal copper withdrawal by Chorus or PSTN withdrawal by Spark.	Support.
		(f) retailers should avoid creating the impression that copper services (including re-sold PSTN services) are not available to consumers just because that retailer has decided to cease supplying them ahead of formal withdrawal by Chorus or Spark.	Support.

No.	Outcome	Conduct Principle	LFC Submission
		(g) retailers should respond in a timely and accurate manner to all requests for clarification or further information from consumers.	Support, but a definition of 'timely' must be included in the Code guidelines.
2.	Consumers are given sufficient information to decide what alternative telecommunications service is best for them as they transition off copper-based services.	(a) retailers should remind consumers that they are likely to have the choice of several competing options depending on their location – including different technologies, services and service providers.	Support, with a requirement for retailers to provide the customer with easy to understand, accurate and easily accessible information (with any service comparisons and claims to be substantiated by an independent source such as the Commission's Measuring Broadband New Zealand reports prepared by SamKnows ²). We are aware of some retailers making it difficult for consumers to find out information about service types and options available to that customer – which their retailer provides but is not promoting or recommending to the customer.
		(b) retailers should encourage consumers to use independent information, such as Internet New Zealand's www.broadbandmap.nz, to see what alternative services are available at their location.	Support, but this should also include access (links) to independent service (comparison) reports that are written in consumer-friendly plain English.
		(c) retailers should ensure that consumers have information on their usage and spend profile so that they can meaningfully compare different services and service providers.	Support.
		(d) retailers should prompt consumers to use the information available to them to decide what technology, service and service provider is best for meeting their requirements.	Support, and recommend that any Code guidelines should define what "information available to the customer" means.
		(e) When promoting a particular service to a consumer retailers must not create the impression that this is the only option available to that consumer.	Support.
		(f) When promoting a particular service to a consumer retailers must not create the impression that the consumer will lose their telecommunications service unless they move to the promoted service.	Support.
3.	Consumers are given clear and accurate information about the technical and performance characteristics of alternative telecommunications services.	(a) retailers should set appropriate expectations about what their alternative telecommunications services are likely to deliver for consumers.	Support.
		(b) retailers should ensure consumers are given upfront information about the factors known to affect the service performance of alternative telecommunications services.	Support, provided that the Code requires retailers to clearly and simply explain to consumers that there is a very broad range of factors that may affect the performance of different service types – and this should also be reflected in the Commission's RSQ outcomes.
		(c) retailers should avoid making "up to" speed claims or using maximum theoretical speeds in advertising.	Support, because for certain services there are too many variables that make theoretical maximums inconsistent for each customer. For services that consistently deliver to their advertised speeds, the use of "up to" should be allowed.
		(d) retailers should use likely actual peak time download speeds when advertising alternative telecommunications services so that consumers understand what they can expect before making their purchasing decision.	Support, provided that the Code requires retailers to clearly and simply explain to consumers that there is a very broad range of factors that may affect the performance of different service types – and this should also be reflected in the Commission's RSQ outcomes.
		(e) Likely actual speed indications should be objectively justifiable, and independently verifiable, such	Support, provided that the Code requires retailers to clearly and simply explain to consumers that there is a very broad range of factors that may affect the

² <https://comcom.govt.nz/regulation/regulated-industries/telecommunications/monitoring-the-telecommunications-market/monitoring-new-zealands-broadband>

No.	Outcome	Conduct Principle	LFC Submission
		as by reference to the Measuring Broadband New Zealand programme.	performance of different service types – and this should also be reflected in the Commission’s RSQ outcomes.
		(f) retailers should allow consumers to move to a different service, or walk away from their service, without penalty, if the selected service does not meet expected requirements.	Support.
		(g) Any comparisons that retailers make to other telecommunications services should be made on a “like for like” basis and claims should be objectively justifiable and independently verifiable.	Support, provided that the Code requires retailers to clearly and simply explain to consumers that there is a very broad range of factors that may affect the performance of different service types – and this should also be reflected in the Commission’s RSQ outcomes.
		(h) Conditions, qualifications and disclaimers in advertising should not alter the nature of the service the consumer is otherwise led to expect.	Support, but there should be mandated limitations on the use of disclaimers to be consistent with the rules around the use of fine print Fair Trading Act.
4.	Consumers are given information on how moving from copper telecommunications services to alternative telecommunications services could impact the operation of their home equipment.	(a) retailers should remind consumers that in the transition to an alternative telecommunications service: (i) they may not be able to make emergency calls in a power cut without a suitable back-up; (ii) they may need to work with their medical or home alarm provider to ensure continuity of services; and (ii) they may need to make changes to their jack points to keep a home phone in the same location in their house.	Support. This is consistent with 111 Contact Code, but the Code should require retailers to do this in all forms of marketing to consumers – and this should also be reflected in the Commission’s RSQ outcomes.
		(b) retailers must comply in all other respects with their obligations under the 111 Contact Code including those vulnerable consumers are made aware of their rights under the 111 Contact Code.	Support, as above.
5.	Consumers are given clear information about the costs or fees associated with moving from copper-based telecommunications services to alternative telecommunications services.	(a) retailers should clearly communicate any costs or fees, such as termination fees, equipment fees or changes in contract price at the point of sale to allow consumers to make informed decisions.	Support. This is consistent with other obligations (e.g. Fair Trading Act; TCF Broadband Product Disclosure Code and 111 Contact Code).
6.	Consumers understand their rights to their landline number.	(a) retailers should remind consumers that they can “port” or take their number with them to a new service or another retailer.	Support. This can be applied by referring to current (and related) TCF code(s).
		(b) retailers should not create the impression that consumers will lose their number unless they stay with that retailer.	Support. This is consistent with the Fair Trading Act.
		(c) retailers should direct consumers to the Commission website’s number portability page, or to the Number Administration Deed’s page on landline numbers, for more detailed information.	Support, but request the Commission to publicise and make access to this information – and an easy to use consumer portal for submitting complaints.
7.	Consumers should know where to go to resolve any issues associated with the marketing or performance of alternative services as they move off copper.	(a) retailers should endeavour to resolve any issues associated with the sales, marketing or performance of their alternative services promptly with consumers.	Support.
		(b) retailers should remind consumers that they have access to independent dispute resolution services, including the Telecommunications Dispute Resolution service, if they cannot	Support.

No.	Outcome	Conduct Principle	LFC Submission
		reach a resolution with their retailer.	
Implementation of Principles:			
Option 1		The Commission issuing the principles and outcomes to the industry in the expectation that retailers would either voluntarily commit to, or otherwise comply with, the principles;	Do not support.
Option 2		The Commission issuing the principles and outcomes to the industry as guidelines under section 234 in the expectation that retailers would incorporate them into an industry RSQ code through the Telecommunications Forum (TCF)	Support, on that basis that the code will be adopted by the Commission as a Commission RSQ Code and include the Commission issuing guidelines to explain what the Code means and how it will be enforced by the Commission.
Option 3		The Commission incorporating the principles and outcomes into a Commission RSQ code under section 236.	In the event Option 2 is unable to be achieved within a reasonable timeframe (for any reasons, whether or not that includes TCF members failing achieve alignment on key terms), we support this Option 3.

We thank the Commission for the opportunity to provide feedback on the Open Letter and would be happy to discuss our comments in more detail.