



TCF Submission

Commerce Commission's Determining Specified Fibre Areas Process and Issue Paper

15 February 2019

A. Introduction

1. This submission is made by the New Zealand Telecommunications Forum (**TCF**) in relation to the Telecommunications (New Regulatory Framework) Amendment Act 2018 (**the Act**). The TCF is the telecommunications sector's industry body which plays a vital role in bringing together the telecommunications industry and key stakeholders to resolve regulatory, technical and policy issues for the benefit of consumers, and the sector.
2. This submission is made in response to the Commerce Commission's (**the Commission**) paper "Determining Specified Fibre Areas – Process and Issues Paper", dated 26 November 2018 (the Issues Paper). The table in Appendix 1 details the TCF's answers to specific questions raised in the Issues Paper.

B. General Comment

3. The TCF supports the removal of copper fixed line access services at the earliest opportunity but notes that this must be undertaken as an orderly and managed process that protects end-users. The regime which will allow Chorus to withdraw copper services comprises two key components; the services must be in a Specified Fibre Area (**SFA**) and Chorus must comply with the provisions of Copper Withdrawal Code (**CWC**).¹ Overarching these two components is the regulatory environment relating to wholesale access services which regulate wholesale prices in a SFA. The interaction of all these components requires that a holistic approach be taken when considering the individual parts.

¹ The CWC is still in development.

4. At a holistic level, it would seem reasonable that a SFA is defined as a broad geographical area where specified fibre services are available to end-users. The role of regulation in an SFA is covered in section D. of this submission. The CWC should encourage us to work together to protect existing end-users who may be unable to be connected to a specified fibre service within a reasonable timeframe where copper is being withdrawn. The interaction between the definition of SFA and the definitions and processes in the CWC must work together to ensure appropriate protections are in place for copper end-users during the withdrawal process.
5. Consequently, it is difficult to see how a SFA can be determined in the absence of greater certainty about the role of the CWC and the regulatory regime which applies to existing copper connections in SFAs. This TCF submission is therefore based on the assumption that the SFA is based on a broad geographic area of the availability of fibre, and the CWC and regulatory regime provides adequate protection to individual end-users within a SFA during copper withdrawal.
6. The TCF foresees that a limited set of circumstances exist where individual end-users may not be able to be connected to fibre within a reasonable timeframe as required under the CWC provisions. Specifically, the TCF is concerned that third party property consents may be withheld by neighbours where an installation is not enabled by the Broadband Property Access legislation e.g. within an SFA where Category 3 installations are required, or where a neighbour has a legitimate objection to a Category 2 installation. Landlords may also restrict their tenant's ability to install fibre to their property². The concern for the TCF is that, given the objective to allow copper withdrawal we find solutions for addressing these issues. Some solutions will be industry led; others may require further consideration from policy makers.

C. Specified Fibre Area Statutory Test

7. The Act requires the Commission to annually determine the geographic areas in which a specified fibre service is available to end-users³. These geographic areas will be described in a public notice issued by Commission which will declare an area as a SFA.
8. The TCF agrees with the Commission's proposed approach of determining SFAs reasonably broadly on the basis of premises passed by a fibre network.
9. However, the TCF notes that the Act contains two separate tests related to fibre service availability. The first consideration is under s. 69AB (1) and (2) where the Commission is required to consider whether a SFS is "available" to end-users in order to determine SFAs.
10. The second test is under Schedule 2A, cl 1 (3)(a) which provides that Chorus may stop supplying a copper service to end-users located in a SFA where the end-user is "able" to access a fibre service; and have a connection to a fibre service installed within a reasonable time and at no cost to the end-user. This test is more appropriately considered in detail in the CWC and is an aspect of the consumer protection requirements of the Code.
11. The questions about whether fibre is available or whether the end-user is able to connect to the fibre network are quite different tests and deal with different levels of detail relating to each

² The TCF has submitted that tenants should have the right to install fibre under the Residential Tenancy Act as part of the government's review

³ s. 69AB(1) and s. 69AB(6)(a)

individual premises. The TCF encourages the Commission to keep the question of availability at a high level and consider, as proposed in the Issues Paper, whether a premises has been passed by the fibre network.

12. Paragraph 56.2.2 of the Issues Paper notes that a premises is passed if an address point “can be connected with minimal civil construction”. This test is quite different to whether the fibre network is available and requires a detailed consideration of possible installation barriers for individual premises. The question of whether a particular premises can be, or is able to be, connected should rest with the Copper Withdrawal Code, as envisaged by Schedule 2A, cl 1 (3)(a).
13. Likewise, in paragraph 64 of the Issues Paper, the Commission is combining the detailed question of whether a premises is able to be connected, with the broader question of whether a fibre service is available, or more generally, passes a premises.
14. The TCF encourages the Commission to clearly separate the broader question of availability, from the more detailed question of whether the end-user is able to have fibre connected. These two questions are posited separately in the Act, and at different stages of the copper withdrawal process.
15. Furthermore, contracts between Chorus and CIP provide for funding to be released for Chorus on the basis of premises passed. In this case CIP must be satisfied that fibre connections are available to premises in a given area. It would be efficient for the Commission to leverage this process to the greatest extent possible in the process of defining a SFA.
16. The RSP members⁴ of the TCF support the broader test of a fibre service being available as premises passed but this presupposes the Commission’s view of de-regulation of copper services. Chorus’ view is that the interpretation of the Act in relation to whether STD terms apply in SFAs is not relevant to the test applied for declaring an SFA.

D. Deregulation of copper services in a SFA

17. The Commission’s Issues Paper sets out its view on the regulatory impact of specifying a fibre geographical area as an SFA. In paragraph 73, the Commission posits that when an area is designated as a SFA, if Chorus chooses to continue to provide UBA and UCLF services in the area, then the services continue to be subject to regulation under “Schedule 1 of the Act, including UBA and UCLF STDs”.
18. The Commission will appreciate that TCF members hold differing views regarding the interpretation of the policy intent of the Act.
19. The effect of taking the Commission’s view, which is supported by RSP and LFC members of the TCF, is that many of the regulatory controls on the copper service inside the SFA remain until the end-user is migrated to a specified fibre service (the exception is the TSO obligation which the Act explicitly excludes⁵). This interpretation of the impact of continued regulation on copper

⁴ With the exception of Trustpower whose view is that both tests should apply regardless of the Commission’s view on the deregulation of copper services.

⁵ Telecommunications Act 2001, s 69AE(a)

services in a SFA supports the view that the appropriate way to determine a SFA is for the Commission to consider whether SFS are “available” to end-users as premises passed.

20. Chorus’ view is that the clearly communicated policy intent of the Act is that once an SFA is declared copper fixed line access services are deregulated.⁶ This view aligns with the purpose of Part 2AA, Subpart 1 which states that the purpose is to “deregulate copper fixed line access services in areas where fibre fixed line access services are available” and is then given effect through the relevant provisions of the Act. There is no linkage between this deregulatory effect and how fibre “availability” should be assessed for the purposes of declaring an SFA.
21. On the question of the regulatory impact of defining a SFA, the TCF encourages the Commission to consider submissions from our individual members.

E. Conclusion

22. The TCF supports the policy intent of enabling an environment where the best outcomes for consumers are achieved, allowing for a smooth migration to fibre which will be commercially driven, and consumers are protected.
23. The TCF ideally supports the definition of SFA being based on ‘premises passed’ and therefore a broad approach taken to determining these geographical areas. The Commission is encouraged to leverage the CIP process for determining where premises are passed. However, RSP members have highlighted that the Commission’s view on the deregulation of copper might impact the way that the SFA is determined.
24. On the issue of the regulatory impact of determining a SFA, the TCF notes that its members have differing views and encourages the Commission to consider the separate submissions from TCF members.
25. The TCF is happy to answer any questions the Commission might have on the views set out in this submission.

Yours sincerely,



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⁶ For example - Cabinet Minute “Review of Telecommunications Act 2001: Final Policy Decisions for Fixed Line Communications Services (February 2017) EGI-16-MIN-0361.