

Specified Points of Interconnection – Framework and decision relating to amending the s 231 notice

Response to submissions

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Introduction

Purpose of this paper

1. This document outlines our response to submissions on Part A of our consultation paper “Specified points of interconnection - Draft framework for amending s 231 notice and changes since 2019” (**Consultation Paper**) published 19 August 2022.¹
2. This paper sets out a summary of the key themes raised in submissions on Part A of the Consultation Paper and is not intended to be a comprehensive response to all issues raised in submissions.
3. This paper should be read in conjunction with our final framework “Specified points of interconnection - Framework for exercising our powers under s 231 of the Telecommunications Act 2001” (**Framework Paper**) published alongside this paper.
4. Our responses to submissions on Part B of the Consultation Paper are set out in our reasons paper “Specified points of interconnection – final decision to amend s 231 notice” published alongside this paper.
5. We thank submitters for their submissions and engagement in the process of developing the framework.
6. All abbreviations and terms used in this document are either defined, or have the same meaning as, in the Framework Paper.

Our process

7. We published our Consultation Paper on 19 August 2022 and invited submissions from interested stakeholders.
8. We received submissions from 2degrees New Zealand Limited (**2degrees**), Chorus Limited (**Chorus**), Internet Service Providers Association of New Zealand (**ISPANZ**), Mercury Limited (**Mercury**), Spark New Zealand Limited (**Spark**), Tuatahi First Fibre (**Tuatahi**) and Vodafone New Zealand Limited (**Vodafone**).

Structure of this paper

9. This document includes the following sections:
 - 9.1 Change request process:
 - 9.1.1 Industry process;
 - 9.1.2 Commission consultation;
 - 9.1.3 Process for dealing with emergency events;

¹ The Consultation Paper can be found on the Commission’s website at:
https://comcom.govt.nz/_data/assets/pdf_file/0034/290599/Specified-points-of-interconnection-Consultation-paper-on-draft-framework-on-changes-since-2019-19-August-2022.pdf.

- 9.2 Legal framework – application of s 166;
- 9.3 Guide to our evaluation of SPOI change requests under Part 6:
 - 9.3.1 Promotion of workable competition – approach to applying s 166(2)(b) in evaluating change requests;
 - 9.3.2 Proportional analytical steps - approach to applying s 166(2)(b) in evaluating change request;
- 9.4 Competitive outcomes assessment:
 - 9.4.1 Availability of services at a SPOI;
 - 9.4.2 Backhaul at a SPOI;
 - 9.4.3 Technical purpose; and
- 9.5 Inclusion of SPOI assets in the regulatory asset base; and
- 9.6 Imposition of conditions by the Commission.

General themes from submissions

- 10. The key themes arising from submissions discussed in the following sections relate to:
 - 10.1 the change request process;
 - 10.2 the legal framework, in particular, the application of s 166;
 - 10.3 our guide to our evaluation of SPOI change requests under Part 6;
 - 10.4 our competitive outcomes assessment; and
 - 10.5 the inclusion of SPOI assets in the regulatory asset base (**RAB**).

Change request process

Industry process

Background

- 11. In our Consultation Paper we expressed the need for the industry to use an appropriate forum to discuss POI changes that are technical, operational and commercial and considered the NZ Telecommunications Forum Inc (**TCF**) Change Management Forum to be appropriate.

Submissions

- 12. Spark, 2degrees and Vodafone submitted that the TCF Change Management Forum is the appropriate forum for industry consultation on SPOIs.

12.1 Vodafone and Spark set out the differences between the two TCF forums as follows:

12.1.1 The Change Management Forum offers higher potential for genuine industry engagement and a formal voting mechanism helps determine the industry's position in a very clear manner.²

12.1.2 The Product Forum considers technical/operational issues and is a discussion/collaborative forum with no formal vote.

13. However, it is clear from submissions that the Change Management Forum has never been established by the TCF. Although ISPANZ submitted in support of it being established.³
14. Chorus submitted that the industry retains the current industry forum (being the Product Forum) as the sole forum for consultation.⁴

Response to submissions

15. We remain of the view that it makes sense to leverage existing industry consultation processes, and that evidence of consultation should be provided as part of a change request.
16. Adequate industry consultation up front will assist the Commission when evaluating any change request and may expedite the Commission's process.
17. However, we understand from submissions that POI changes are generally submitted to the TCF Product Forum, rather than the Change Management Forum. We consider it is not unreasonable that industry uses the TCF Product Forum.
18. We have amended the framework to reflect that while evidence of industry consultation should be provided, the form of that consultation is up to industry.

Commission consultation

Background

19. As stated in our Consultation Paper, we consider that s 231(3) requires us to amend the initial notice in the manner in which it was made, which includes consulting on our draft decision to amend the s 231 notice.

² Vodafone "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 7.

³ ISPANZ "Submission on specified points of interconnection draft framework" (September 2022), page 4.

⁴ Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), page 3.

Submissions

20. 2degrees and ISPANZ supported the need for Commission consultation.⁵ ISPANZ noted the importance of access seekers being able to represent their views directly to the Commission.⁶
21. Both Chorus and Tuatahi disagreed that we must consult on our draft decision to amend the s 231 notice.
- 21.1 Chorus submitted that:
- 21.1.1 consultation by the Commission “unnecessarily duplicates the consultation process undertaken with industry participants” and this will “drive increased cost and resources for little benefit.”^{7,8}
- 21.1.2 the Commission should instead allow a window for stakeholders to object to a change request and only intervene where there is significant industry misalignment.⁹
- 21.2 Tuatahi submitted that the Commission’s consultation process is not required or contemplated by s 231.¹⁰ In particular, it noted that the initial notice and subsequent notices are distinguishable and therefore different processes should apply:
- the Commission, in prescribing its first notice, required feedback on its interpretation of the relevant parts of the Act, and needed to ensure that the POIs it proposed to prescribe were accurate i.e. that the notice would capture all POIs that applied as at close of 31 December 2019 under the UFB initiative (as required by s 231(5)(a)).

Response to submissions

22. Our view remains unchanged from that set out in our Consultation Paper.
23. Even if s 231(3) could be read as not requiring us to consult, there is still a general expectation of consultation where our decision impacts stakeholders' rights/interests.
24. In response to Chorus, we do not consider that the Commission’s consultation process duplicates the existing industry process. The Commission is required to apply the legal framework in coming to a decision, whereas that same framework does not apply to the industry-led process.

⁵ 2degrees “Submission on specified points of interconnection draft framework” (19 August 2022), page 1.

⁶ ISPANZ “Submission on specified points of interconnection draft framework” (September 2022), page 6.

⁷ Chorus “Submission on specified points of interconnection draft framework” (16 September 2022), page 3.

⁸ *ibid.*

⁹ *ibid.*, paragraph 20.

¹⁰ Tuatahi First Fibre “Submission on specified points of interconnection draft framework” (16 September 2022), paragraph 27.2.

25. We acknowledge Tuatahi's point in respect of the difference between the initial notice and subsequent notices. However, the wording of s231(3) and the general expectation of consultation for decisions of this kind, indicates that it is appropriate to consult on any decision to amend the s 231 notice.
26. It is important to note in response to both Chorus' and Tuatahi's concerns that our evaluation of a change request, including the level of consultation, will be proportionate to the change request and informed by the scope of industry consultation that has already taken place.

Process for dealing with emergency events

Background

27. In our Consultation Paper we stated that:¹¹

We expect change requests to be submitted to us for approval ahead of a new POI being commissioned or a change to a SPOI being made. However, we understand that in certain circumstances (eg, a disaster event), this may not be possible/practical.

Submissions

28. Both Chorus and Tuatahi indicated that they need to be able to urgently deal with emergencies which are out of its control, such as natural disasters or an unacceptable level of risk, that may require a change to a SPOI or the addition of a new POI.¹²
29. In particular, Chorus suggested that the requirement for consultation and other process steps could be disregarded in extraordinary circumstances.¹³

Response to submissions

30. In emergency events, we agree that regulated fibre service providers need to be able to act quickly to ensure network stability. Therefore, in those circumstances it may not be practical to undertake an industry process and prepare a full change request setting out the information discussed in our Framework Paper.
31. To ensure that our framework enables regulated service providers to respond to emergency events, we have updated our Framework Paper to reflect that:
- 31.1 In the case of emergency events we would expect to be notified of the change, but note that our approval is not required for temporary changes, such as the closure of a SPOI, while maintenance or reconstruction is done.

¹¹ Commerce Commission "Specified Points of Interconnection – Draft framework and decision relating to amending the s 231 notice and changes since 2019" (19 August 2022), paragraph 60.

¹² Tuatahi First Fibre "Submission on specified points of interconnection draft framework" (16 September 2022), page 5; Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), paragraphs 11 and 20c.

¹³ Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 20c.

- 31.2 If restitution of the SPOI is not feasible and a replacement SPOI is required, we would require a change request to be provided in retrospect which includes the standard information set out in the Framework Paper.

Legal framework

Application of section 166

Background

32. Section 166 applies where the Commission is required to make a recommendation, determination, or decision under Part 6 of the Act.¹⁴
33. We therefore took the view that s 166 applies to the Commission's decision to amend the s 231 notice.

Submissions

34. Tuatahi submitted that for the following reasons s 231 does not require or authorise the Commission to apply s 166:¹⁵
- 34.1 Section 166 only applies to mandatory decisions, whereas the Commission's powers under s 231 are discretionary.
- 34.2 Under s 231(4)(b) the Commission must not amend a SPOI unless the amendment *is consistent* with the purpose in s 162. Whereas s 166 requires the Commission to only amend a SPOI if it considers the amendment *best gives, or is likely to best give*, effect to the purpose in s 162, which is a higher threshold than that explicitly required to be applied under s 231(4)(b).
- 34.3 The Commission did not mention s 166 in its 2019 reasons paper accompanying the initial notice.
35. Chorus was concerned that we have an inappropriate focus on creating a theoretically perfect competition outcome instead of a workable outcome that meets industry needs, but ultimately recognises the relevance of s 166 to decision-making under Part 6 (see paragraphs 42.2 to 42.3 below).¹⁶
36. ISPANZ submitted that the principles and factors for considering s 166 outlined in our Consultation Paper are appropriate,¹⁷ while Spark was supportive of our proposed criteria/considerations for changing or adding SPOIs.¹⁸

¹⁴ Telecommunications Act 2001, s 166(1).

¹⁵ Tuatahi First Fibre "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 19.

¹⁶ Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 19.

¹⁷ ISPANZ "Submission on specified points of interconnection draft framework" (September 2022), page 7.

¹⁸ Spark NZ "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 40.

Response to submissions

37. Our position is unchanged from that set out in our Consultation Paper.
38. In response to Tuatahi:
- 38.1 We acknowledge there is some ambiguity in the wording of s 166, but we disagree that it only applies to mandatory decisions.
- 38.1.1 The legislative history suggests s 166 was intended to apply to all decisions under Part 6:¹⁹
- New section 166 would require the Commission and the Minister to seek to best give effect to this purpose in *any* recommendations, determinations, or decisions (emphasis added).
- 38.1.2 It would be odd if certain decisions under Part 6 were governed by the s 166 considerations but others (such as s 231) were not.
- 38.2 While we do agree that there is some conflict between the wording of s 231(4)(b) and s 166, we consider the best way to resolve this conflict is in favour of applying s 166 because it is clear that it applies to a decision under Part 6, while s 231 is not explicit that s 166 does not apply. We note that competitive considerations in relation to POI are well established in regulatory practice overseas.²⁰
- 38.3 It is important we consider the impact of the location and number of POIs on not just FFLAS markets but also non-FFLAS markets. Section 166 enables us to do that as it relates to the wider telecommunications markets, whereas s 162 is restricted to FFLAS markets.
- 38.3.1 Of note, the number and location of POIs may have competition effects in telecommunications markets, including upstream markets (particularly backhaul markets) and downstream markets (particularly retail markets).
- 38.4 In our initial notice we only prescribed those POIs which we were required to prescribe under s 231(5)(a) and therefore we did not need to consider the framework for prescribing additional POIs or amending SPOIs, which includes the application of s 166. The absence of s 166 in our 2019 reasons paper does not preclude its application in the future.

¹⁹ Final report of the Economic Development, Science and Innovation Committee on the Telecommunications (New Regulatory Framework) Amendment Bill (4 May 2018), page 4.

²⁰ See for example ACCC “Domestic Transmission Capacity Service - An ACCC Final Report on the review of the declaration for the Domestic Transmission Capacity Service” (April 2019), Chapter 6.

Guide to our evaluation of SPOI change requests under Part 6

Promotion of workable competition – approach to applying s 166(2)(b) in evaluating change requests

Background

39. In our Consultation Paper we proposed to promote workable competition on the following basis:²¹

As set out in s 166, in deciding whether to amend the s 231 notice, we are required to consider, and give effect to, the promotion of workable competition in telecommunications markets for the long-term benefit of end-users of telecommunications services.

40. We wish to clarify that omitting “to the extent we consider it relevant” was an error and we realise this might have caused misunderstanding.
41. Our final position is that s 166(2)(b) provides that, *to the extent we consider it relevant* (emphasis added), we must make decisions which we consider best give effect to the promotion of workable competition in telecommunications markets for the long-term benefit of end-users of telecommunications services.

Submissions

42. We received submissions on our proposed approach to promoting workable competition set out in our Consultation Paper from ISPANZ, Spark, Chorus and Tuatahi.
- 42.1 ISPANZ and Spark supported our proposed approach for the promotion of workable competition, including s 166 and s 162 considerations.²²
- 42.2 Chorus recognised the relevance of s 166(2)(b) to decision-making under Part 6, including to amend a SPOI or specify a POI, stating “[w]e agree that the Commission, in making any decision under Part 6 (including to amend or specify a POI), must give effect to the s 162 purpose and, to the extent relevant, to the promotion of workable competition.”²³
- 42.3 However, Chorus’ submission also indicates its concern that our proposed approach would give the promotion of competition a special status, “maximising competition” at the expense of other considerations such as technical drivers, incentives to operate efficiently, and ability to meet quality standards.²⁴

²¹ Commerce Commission “Specified Points of Interconnection – Draft framework and decision relating to amending the s 231 notice and changes since 2019” (19 August 2022), paragraph 71.

²² ISPANZ “Submission on specified points of interconnection draft framework” (September 2022), page 6; Spark NZ “Submission on specified points of interconnection draft framework” (16 September 2022), paragraph 40.

²³ Chorus “Submission on specified points of interconnection draft framework” (16 September 2022), page 2.

²⁴ *ibid*, pages 2 to 4.

- 42.4 Tuatahi objected to our proposed approach to promoting workable competition, and to the application of s 166 (as discussed above at paragraph 34).²⁵

Response to submissions

43. Our approach to promoting workable competition is largely unchanged from that set out in our Consultation Paper.
44. We wish to reiterate that s 166 applies to our decision to amend the s 231 notice, and this requires us to apply the s 162 purpose and to promote workable competition to the extent we consider it relevant. Our final Framework Paper provides additional clarity on the issues we consider relevant to the application of s 166(2)(b) in our decision-making process.
45. In response to Chorus, we recognise the concerns and seek to clarify our position on promoting workable competition under Part 6.
- 45.1 We are not proposing to promote workable competition in every change request scenario but only *to the extent we consider it relevant*, which means on a case by case basis where the long-term benefits to end-users of telecommunications services outweigh the costs of doing so.
- 45.2 As we have emphasised in our final Framework Paper, we consider that the application of s 166(2)(b) stands alongside our obligation to make decisions that best give effect, or are likely to best give effect, to the s 162 purpose statement.
- 45.3 Our view, which is consistent with what we said in respect of the Fibre Input Methodologies Determination 2020 (**Fibre IMs**), is that in giving effect to the purposes set out in s 166(2), neither of s 166(2)(a) nor s166(2)(b) has primacy over the other.²⁶
- 45.4 We recognise that a resilient and 'fit for purpose' FFLAS network supported by continued incentives for regulated providers to invest and innovate on the network, including in response to developments in downstream telecommunication markets (s 162(a) and (b)) is essential to promoting the Part 6 purpose. This is also consistent with our position in the Fibre IMs.²⁷
46. In response to Tuatahi, our view on the application of s 166 is unchanged. See paragraph 38 above.

²⁵ Tuatahi First Fibre “Submission on specified points of interconnection draft framework” (16 September 2022), paragraph 7.

²⁶ Commerce Commission “Fibre input methodologies: Main final decisions – reasons paper” (13 October 2020), paragraph 2.239.

²⁷ Ibid, paragraph 2.393.2.

Proportional analytical steps - approach to applying s 166(2)(b) in evaluating change requests

Background

47. In our Consultation Paper we proposed that we will consider a change request in the context of how the proposed amendment to a SPOI or request to prescribe a new POI is likely to impact on the competitive outcomes in the wholesale or retail telecommunications markets. To provide examples, we stated that we will evaluate, among other things, whether the change request might result in different competitive effects and outcomes, for example where the change request may:²⁸
- 47.1 result in an overlap with a POI Area of another regulated fibre service provider, such that some end-users could be switched at SPOIs of different regulated fibre service providers, thus introducing more competition at the wholesale level;
 - 47.2 introduce additional costs for some existing retail service providers or for new retail service providers such that these access seekers will be disadvantaged in their ability to compete in downstream (retail) markets compared to other access seekers;
 - 47.3 have an exclusionary effect for some access seekers (eg, because they are unable to extend their network to interconnect at a new location within a reasonable timeframe);
 - 47.4 reduce competition in inter-candidate area/national backhaul markets (eg, because backhaul providers have built their networks to existing SPOIs); and/or
 - 47.5 have a dampening effect on innovation and access seekers' ability to add new services for end-users (eg, because of the technical capabilities of the proposed new SPOI).
48. We noted that in cases where a potential effect on competition from the change request is identified, we will consider any mitigations proposed by the regulated fibre service provider.
49. We also set out principles and draft views relevant to our approach to applying s 166(2)(b) in evaluating change requests. These included:
- 49.1 For the purposes of s 166(2), a SPOI must have access to at least two wholesale backhaul providers. This promotes workable competition by preventing the regulated fibre service provider from being the only provider of backhaul.²⁹

²⁸ Commerce Commission "Specified Points of Interconnection – Draft framework and decision relating to amending the s 231 notice and changes since 2019" (19 August 2022), paragraph 72.

²⁹ *ibid*, paragraph 76.2.

- 49.2 That relevant minimum technical handover functionality at specified POIs concerned service levels that may be considered as part of our other Part 6 regulatory functions such as information disclosure requirements.³⁰
- 49.3 Capability is covered by co-location and interconnection services. We do not consider it necessary to specify minimum technical functionality for a SPOI in our framework.³¹

Submissions on high level aspects of our approach

50. Submitters' views on our proposed evaluation approach, and on our position relevant to applying s 166(2)(b) in evaluating change requests, covered both high-level and specific aspects.
51. We received submissions on high-level aspects of our proposed approach from Chorus, Tuatahi, Spark and 2degrees.
- 51.1 Spark and 2degrees were generally supportive of the proposed approach for evaluating proposals.³²
- 51.2 Chorus supported the use of principles and guidelines to assist an assessment but opposed our proposed competition evaluation guidance and recommended that we reconsider it.³³
- 51.3 Chorus expressed concern, describing our proposed approach as "disproportionate" and "unworkable", and our proposed competition evaluation guidance as a "heavy handed regulatory exercise".³⁴
- 51.4 Tuatahi opposed the purpose of the proposed approach (discussed at paragraph 34) and, like Chorus, expressed concern over the complexity of the proposed process:³⁵

[T]he Consultation Paper proposes a far more complex process requiring substantial information, analysis, consultation, and decision-making by the Commission.

³⁰ Commerce Commission "Specified Points of Interconnection – Draft framework and decision relating to amending the s 231 notice and changes since 2019" (19 August 2022), paragraph 38.

³¹ *ibid*, paragraph 39.

³² Spark NZ "Submission on specified points of interconnection draft framework" (16 September 2022), paragraphs 24 and 40; 2degrees "Submission on specified points of interconnection draft framework" (19 August 2022), page 1.

³³ Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), 16 September 2022, page 3.

³⁴ Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), pages 2-3, page 9.

³⁵ Tuatahi First Fibre "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 18.

Submissions on the wholesale backhaul provider principle

52. We received submissions on our proposed principle that "For the purposes of s 166(2), a SPOI must have access to at least two wholesale backhaul providers" from ISPANZ, Spark, and Chorus.

52.1 ISPANZ supported the proposed principle and submitted:³⁶

[W]hen new POIs are to be established, backhaul from those sites should not just be open to competition, it should also be currently available from at least two wholesale providers.

52.2 Chorus opposed the principle and recommended that we remove it. Chorus submitted points including:³⁷

When a new POI is established, there may be only one backhaul provider initially, but others are likely to utilise it over time. Requiring two providers at the outset to receive specification does not allow for this possibility.

If it is pre-determined that a SPOI must have two backhaul providers, other providers that wanted to prevent Chorus expanding its backhaul network could game the system by choosing not to provide (or indicating to the Commission that they would not provide) backhaul services from a particular POI, thus preventing it from becoming a SPOI.

Submissions on other aspects of our proposed approach

53. Spark and ISPANZ expressed views relating to the impacts that the provision of co-location services can have on other markets.

53.1 Spark suggested that a relevant competition consideration may be the impact of SPOI changes on the provision of co-location services to wholesale customers:³⁸

The Commission could add to the list that proposals may have an impact on downstream and adjacent wholesale markets, for example, the provision of collocation services to wholesale customers.

53.2 ISPANZ considered that "Chorus and other LFCs should provide facilities for collocation of service provider equipment at all POIs" for the market to serve consumers' best interests.³⁹

54. We received a submission on equivalence in the provision of services for backhaul from POIs and SPOIs from ISPANZ, and a submission from Spark on varying service options at Chorus and Spark sites.

³⁶ ISPANZ "Submission on specified points of interconnection draft framework" (September 2022), page 2.

³⁷ Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), paragraphs 21 and 28.

³⁸ Spark NZ "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 41.

³⁹ ISPANZ "Submission on specified points of interconnection draft framework" (September 2022), page 2.

- 54.1 ISPANZ regarded equivalence as a necessary principle for "the [internet services provision] market to function in consumers' best interests", and recommended that:⁴⁰

When Chorus and other LFCs provide OSI Layer 1 or 2 services such as dark fibre, DWDM or ethernet services for the backhaul of Handover Links from POIs and SPOIs, they must provide the same facilities to other access seekers that the LFC provides to itself in the provision of these services. This provision is required by the Fibre Deed of Equivalence.

- 54.2 Spark expressed concern that the full-service options (eg: 100Gbps handover connections) are not always available at SPOIs at Spark sites:⁴¹

(...) Chorus does not support very-high capacity 100Gbps handovers - or geographic diversity handover options¹⁰ - at SPOIs located in Spark sites. The limitations mean that, in practice, these SPOIs cannot meet service provider capacity and resiliency requirements for the large data volumes currently carried by networks, and service providers are inevitably required to build handovers to different SPOIs.

55. Several submitters expressed concern that when a SPOI location is changed, service providers face increased costs to re-establish handover links and that the prices on the associated backhaul can be excessive.⁴²

- 55.1 Spark submitted that costs are potentially significant and gives examples of the cost types:⁴³

[S]ervice providers and their customers face potentially significant costs to change POI locations, including costs associated with reconfiguring networks to maintain capacity and resiliency and migrating customers, and service outages for end-users.

- 55.2 Mercury submitted on the "significant costs on ISPs by having to establish new backhaul links to their core network", and described Chorus pricing on ICABS following its decision to no longer offer hand-over services at the Hamilton POI:

As an example, Chorus decision not to offer hand-over services at Hamilton POI anymore has meant we have had to:

- a. Order new hand over links (HOLs) at Frankton Junction

⁴⁰ ISPANZ "Submission on specified points of interconnection draft framework" (September 2022), pages 3-4.

⁴¹ Spark NZ "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 27.

⁴² Spark NZ "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 6; 2degrees "Submission on specified points of interconnection draft framework" (19 August 2022), page 1; Mercury "Submission on specified points of interconnection draft framework" (31 August 2022), pages 1-2; Vodafone "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 2; ISPANZ "Submission on specified points of interconnection draft framework" (September 2022), page 3.

⁴³ Spark NZ "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 6.

b. Order additional Intra Candidate Area Backhauls (ICABS) so as to extend the HOL back to an alternate site (HN, or CLE) i. Chorus mitigated this latter cost by offering 'free' ICAB service to the original POI so that we could pick up the handovers but in 2021 stopped offering the service and is now charging a significant price to provide this service.

55.3 ISPANZ submitted that regulated fibre service providers should be prevented from price gouging on ICAB services and submits an example of Chorus pricing for ICAB links:⁴⁴

Chorus and other LFCs should be required to charge a fair price for intra-candidate area backhaul (ICAB) services from Alternate POIs. If an RSP needs to use ICAB services from an Alternate POI to connect back to their network at an existing POI or other site, controls should be in place to prevent LFCs from price gouging on these "bottleneck" services. For example, to extend a Chorus handover link to another POI, two ICAB links @ \$461.25+GST each are required. Other LFCs charge \$120+GST per month for ICAB links between two local Central Offices. Chorus charge 384% of what other LFCs charge for an equivalent service.

56. Chorus submitted on our proposal to consider whether a change request is likely to impact on competitive outcomes and to evaluate, among other things, whether a change request might result in certain competitive outcomes.

56.1 Chorus interpreted these competitive outcomes as "proposed evaluation criteria" which it finds to be "prescriptive" and opposed our proposed approach.⁴⁵

56.2 Chorus' submission reflected concerns including that the proposed competitive outcomes examples:

56.2.1 mischaracterise technical decisions and circumstances as competition issues,⁴⁶

56.2.2 frame competition determinants too narrowly;⁴⁷ and

56.2.3 create potentially perverse incentives on retail service providers.⁴⁸

56.3 Chorus also provided specific comments on each competitive outcome example in our proposal.⁴⁹

⁴⁴ ISPANZ "Submission on specified points of interconnection draft framework" (September 2022), page 3.

⁴⁵ Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), paragraphs 21 and 23.

⁴⁶ Ibid, Table 1, pages 9 and 11.

⁴⁷ Ibid, Table 1, page 10.

⁴⁸ Ibid, Table 1, page 10.

⁴⁹ Ibid, Table 1, pages 9-11.

Response to submissions on high level aspects of our approach

57. We recognise the mix of views on our proposed approach to applying s 166(2)(b), including the concerns that it is disproportionate, predetermining and complex. We have considered all submissions carefully in finalising our guidance.
58. In response to submissions on high-level aspects of our proposed approach, we have updated the guidance to reflect proportionate analytical steps.
- 58.1 While we find that the application of s 166(2)(b) in evaluating change requests requires us to consider whether each change has the potential to promote or limit competition in any telecommunications market, we do agree that a competition assessment approach with analytical steps proportionate to each specific change request is appropriate.
- 58.2 We will take a proportionate approach to considering change requests. The degree of our assessment will vary depending on (among other things) the potential competitive impacts of the change.
- 58.3 We consider that a multi-step approach that starts with competition screening, and only uses other evaluation tools (such as competitive outcomes assessment) where necessary as a backstop, is the most appropriate way to consider competition impacts and trade-offs when applying s 166(2)(b).
- 58.4 To give clarity on this multi-step approach, we set out the continuum of tools that we may use:
- 58.4.1 high-level 'competition screening';
- 58.4.2 backhaul 'competition screening'; and
- 58.4.3 competitive outcomes assessment.
- 58.5 We consider this approach enables us to apply a proportionate analytical process to assessing change requests.

Response to submissions on the wholesale backhaul provider principle

59. In response to submissions on our proposed principle that "For the purposes of s 166(2), a SPOI must have access to at least two wholesale backhaul providers", we have modified this principle and used it to inform our competition screening tools.
- 59.1 We acknowledge that Spark and ISPANZ supported the principle, and that ISPANZ recommended that backhaul be available from at least two wholesale providers at new POIs.
- 59.2 We agree with Chorus that prescribing the presence of two backhaul providers at a SPOI is not required. There are various indicators of competitive constraint on regulated fibre service providers providing

wholesale backhaul, and the presence of an alternate backhaul provider at the POI is only one example.⁵⁰

- 59.3 We also note Chorus' view that "other backhaul providers are generally keen to establish their backhaul services from our new POIs once demand is evident or anticipated".⁵¹ We agree that economic incentives are required for third party wholesale backhaul providers to offer services at POIs, and that demand is a key driver of these incentives.
- 59.4 To clarify our approach, we have modified the principle (see 'capability for wholesale backhaul providers principle' in the Framework Paper, paragraph 91) and used it, along with submissions, to inform our competition screening tools. Specifically, we have added the following factors as backhaul 'competition screening' items that we may have regard to:
- 59.4.1 whether there are alternative third party providers in backhaul services:
- (a) at the POI/SPOI;
 - (b) in very close proximity to the POI/SPOI; and
 - (c) in the POI Area.
- 59.4.2 whether co-location and interconnection services are available to alternate third party providers of backhaul services at the POI/SPOI; and
- 59.4.3 whether there are no additional market conditions that could limit the efficient entry and expansion of alternate providers in backhaul services (such as limited ability of alternate providers to efficiently aggregate backhaul traffic from multiple access seekers inside the POI/SPOI).
- 59.5 Through these factors we intend to check for competitive constraint on the regulated fibre service provider where it is the only provider of wholesale backhaul services at the POI. With these factors we also intend to identify market conditions that may limit the efficient entry and expansion of alternate backhaul providers at the POI (such as the level of sunk costs and distance). We note that multiple market conditions are likely to be relevant, including demand. For example, in areas with high demand we would not expect the distances between backhaul providers and SPOI to have the same entry or expansion limiting effect as areas with low demand, all else being equal.

⁵⁰ Regulatory constraint may also be present in some cases, as we discuss at paragraphs 62.1-62.2.

⁵¹ Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), pages 11-12.

- 59.6 We note similar approaches have been taken by overseas regulators when assessing competition in transmission or backhaul services, and our own past practice in assessing competition in UBA backhaul.⁵²

Response to submissions on other aspects of our proposed approach

60. In response to Spark and ISPANZ views' on the impacts of the provision of co-location services (see paragraph 53 we agree that impacts on downstream and adjacent wholesale markets are relevant considerations and we consider that our 'competition screening' tools will enable us to consider whether each change has the potential to promote or limit competition in any telecommunications market.
61. We acknowledge ISPANZ's submission on the principle of equivalence (see paragraph 54.1), and we note that:
- 61.1 equivalence aims to prevent network operators from distorting competition in downstream markets by requiring the network operator's own downstream business to compete with third party access seekers on an equal footing in terms of key upstream inputs;⁵³
- 61.2 'Central Office and POI co-location services' are subject to equivalence obligations as these are specified as "input services" in the Fibre deeds;⁵⁴ and
- 61.3 we will consider the specific circumstances of each change request and the extent to which equivalence and non-discrimination requirements apply.
62. We acknowledge submitters' concern over increased costs to re-establish handover links following amendments to a SPOI (see paragraph 55). We will consider the specific circumstances and relevant factors of each request, including whether regulatory and/or competitive constraints are sufficient to limit the ability of regulated fibre service providers to set prices in ways that could lead to long-term harm to competition or to detriment to end-users of telecommunications services.
- 62.1 For example, we will look to determine whether the regulated fibre service provider would be constrained in its ability to exercise market power by the presence or proximity of third-party backhaul providers or by legislative requirements, such as the requirement on Chorus for geographically consistent pricing for FFLAS under s 201 of the Act.⁵⁵

⁵² See ACCC "Domestic Transmission Capacity Service - An ACCC Final Report on the review of the declaration for the Domestic Transmission Capacity Service" (April 2019), appendix 5; and Commerce Commission "Review of the designated backhaul services - Decision No. NZCC 29" (5 October 2012).

⁵³ Commerce Commission "Equivalence and non-discrimination guidance" (30 September 2020), paragraphs 3.3-3.5.

⁵⁴ Ibid, paragraph 2.43.

⁵⁵ For our interpretation of the geographically consistent pricing requirement on Chorus, see Commerce Commission "Fibre input methodologies: Main final decisions – reasons paper" (13 October 2020), paragraphs 2.70-2.74; Commerce Commission "Chorus' price-quality path from 1 January 2022 – Final decision – Reasons paper" (16 December 2021), paragraphs 2.2-2.29, 2.100.2 and 2.103, 7.53-7.54,

- 62.2 Even in the absence of competitive constraint, this regulatory constraint may provide a degree of protection against excessive prices in backhaul services such as ICABS.
63. Finally, we acknowledge Chorus' concern over our proposals to consider competitive outcomes and its view that these amount to prescriptive criteria.⁵⁶
- 63.1 In response to Chorus, we included these competitive outcomes examples for informative purposes, and not to prescribe evaluation criteria against which the nominated POI will be assessed. We note this was unclear in our Consultation Paper.
64. We also acknowledge Chorus' specific comments on our competitive outcomes examples.⁵⁷
- 64.1 In response, we recognise that Chorus might make decisions for technical reasons alone. However, we consider that even purely technical decisions can impact competition.
- 64.2 We have also considered Chorus' concerns over perverse incentives and mischaracterised competition determinants and, on balance, we consider that the benefit to stakeholders of providing illustrative examples outweighs any risk from doing so.
- 64.3 On the substance of the competitive outcome we proposed at paragraph 72.1 of the Consultation Paper, we agree that encouraging POI growth in the POI Area of another regulated fibre service provider is not a relevant competition consideration for prescribing SPOIs. We have removed this example from our final Framework Paper.
65. Overall and having considered Chorus' concerns, we have decided to retain four of the proposed competitive outcomes in our final framework paper as illustrative examples for informative purposes only.⁵⁸
- 65.1 We consider that analysis to determine whether the promotion of competition may be relevant, and any subsequent analysis to identify potential competition issues, is better conducted on a case-by-case basis for each change request.
- 65.2 For this evaluation guidance we wish to clarify that, in some cases, in-depth assessment of potential competitive outcomes may be required, including assessing the ability of access seekers to compete in upstream, downstream,

and Attachment C. See also Commerce Commission "Geographically consistent pricing - guidance on our intended approach to s 201 of the Telecommunications Act 2001" (30 September 2021).

⁵⁶ Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), pages 9-11.

⁵⁷ Ibid, pages 9-11.

⁵⁸ Commerce Commission "Specified points of interconnection - Framework for exercising our powers under s 231 of the Telecommunications Act 2001" (16 February 2023), paragraphs 86.1-86.4.

and adjacent markets. We agree that multiple categories of factors are likely to be relevant when considering access seekers' ability to compete.

Minimum technical specification of a SPOI

Background

66. We confirm the position set out in our 2019 SPOI reasons paper, and our Consultation Paper, that we do not consider it necessary in our framework to specify minimum technical functionality at specified POIs (for example, Layer 1 and Layer 2 technical interface at demanded capability and capacities).^{59 60}

Submissions

67. We received submissions relevant to minimum technical specification from Spark and Mercury.
- 67.1 Spark submitted that in all cases “[t]he Commission must approve changes that limit services available from the SPOI (rather than permitting the incremental withdrawal of services)”.⁶¹
- 67.2 Mercury pointed out that “there appears to be no corresponding process which acknowledges when existing POI locations are no longer valid for new connections and what options there are instead”.⁶²

Response to submissions

68. In our view, we do not need to specify minimum technical functionality at a SPOI in our framework, or to approve changes to service availability at a SPOI.
69. However, we consider there should be sufficient services to allow access seekers to be able to access all end-users in a POI Area from a SPOI, and we expect the regulated fibre service provider will consult with stakeholders and will communicate any change in service levels. We expect consultation to cover (among other things) when the change is expected to be effective from, and transition management and grandparenting (if relevant) that ensures equitable access and competitively neutral migration.
70. In relation to our position, we note that:
- 70.1 the Layer 1 and Layer 2 technical functionality of a handover connection is defined in the TCF UFB Ethernet Access Service Description;⁶³

⁵⁹ Commerce Commission “Specified Points of Interconnection: reasons paper” (19 December 2019), paragraph 63.

⁶⁰ Commerce Commission “Specified Points of Interconnection – Draft framework and decision relating to amending the s 231 notice and changes since 2019” (19 August 2022), paragraphs 38-39.

⁶¹ Spark NZ “Follow up letter to submission on specified points of interconnection draft framework” (23 September 2022), page 2.

⁶² Mercury “Submission on specified points of interconnection draft framework” (31 August 2022), page 2.

⁶³ NZ Telecommunications Forum Inc “UFB Ethernet Access Service Description” (11 May 2017), Chapter 13.

- 70.2 co-location and interconnections services are within the scope of FFLAS;⁶⁴
- 70.3 Chorus' fibre undertakings state that Chorus will provide commercial information to access seekers on a non-discriminatory basis that includes network coverage and capabilities (see, for example, cl 5.5(vii) of those undertakings);⁶⁵ and
- 70.4 when considering change requests, we may have regard to:
- 70.4.1 evidence of stakeholder consultation on changes to service levels (see the Framework Paper at paragraphs 63-64);
- 70.4.2 whether co-location and interconnection services are available at the POI/SPOI (for example, see the backhaul 'competition screening' factor in the Framework Paper at paragraph 83.2); and
- 70.4.3 additional market conditions at a POI/SPOI (as above, see the Framework Paper at paragraph 83.3).

Technical purpose

Background

71. Section 231(4)(a) requires that an amendment to a SPOI is for an appropriate technical purpose.
72. In our Consultation Paper we gave examples of an appropriate technical purpose which may include (but are not limited to) traffic load distribution across multiple locations, for example where there are more than 50,000 connections, and situations where existing SPOI locations cannot be expanded.

Submissions

73. Chorus and Tuatahi gave examples of technical reasons that include capacity constraints at the existing SPOI, the location of a SPOI being incompatible with future growth, traffic loading/resilience, location requires upgrading that is not economic and emergency management.⁶⁶
74. Spark submitted that:⁶⁷
- 74.1 an appropriate technical purpose would be where there is a practical or physical reason for the change;

⁶⁴ Commerce Commission, "Chorus' price-quality path from 1 January 2022 – Final decision Reasons paper" (16 December 2021), Table D1.

⁶⁵ Chorus, "Chorus Limited Deed of Open Access Undertakings for Fibre Services", 6 October 2011.

⁶⁶ Chorus "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 26; Tuatahi First Fibre "Submission on specified points of interconnection draft framework" (16 September 2022), pages 4-5.

⁶⁷ Spark NZ "Submission on specified points of interconnection draft framework" (16 September 2022), paragraph 32.

- 74.2 there should be a nexus between the technical purpose and the proposed change; and
- 74.3 changes should be driven by technical concerns rather than commercial strategy.

Response to submissions

- 75. In response to Spark:
 - 75.1 We agree that appropriate technical purpose includes where there is a practical or physical reason for the change. However, the technical purpose need not be the sole purpose of the change. Ie, commercial drivers for the change do not necessarily negate any legitimate technical purpose.
 - 75.2 We agree that there needs to be a nexus between the technical purpose and the proposed change and have updated our framework accordingly.
- 76. In considering Chorus and Tuatahi’s submissions, we have updated our examples of appropriate technical purpose to include changes:
 - 76.1 where the SPOI location is at physical capacity or there are other capacity constraints and it is not economic or physically capable to be expanded;
 - 76.2 for resilience to spread risk where total end-user connections reach a threshold;
 - 76.3 to provide traffic load distribution across multiple locations; and
 - 76.4 for emergency management.
- 77. We note that these are only examples, and whether a change is being made for an appropriate technical purpose will ultimately depend on the particular facts and circumstances.

Inclusion of SPOI assets in the regulatory asset base

Background

- 78. As set out in our Consultation Paper, we considered that any commissioned Layer 2 POI assets cannot enter a RAB for ID purposes until those assets are prescribed as a SPOI.

Submissions

- 79. Chorus submitted that:⁶⁸

⁶⁸ Chorus “Submission on specified points of interconnection draft framework” (16 September 2022), paragraph 34.

- 79.1 The proposed treatment of POI assets represents a departure from the Commission's current practice, but there is nothing about POI assets which warrants differential treatment.
- 79.2 Assets used to support a POI that is not a SPOI are within the fibre network and therefore used in the provision of FFLAS. The POI site and electronics provide multiple functions beyond handover.
- 79.3 The Commission continue treating forecast POI expenditure as forecast base capex, such that:
- 79.3.1 POI expenditure continues to be captured via regulatory proposals as aggregation and/or property/co-location expenditure; and
- 79.3.2 commissioned POIs (whether or not they are SPOIs) enter the opening ID RAB.
- 79.4 Using the individual capex proposal (**ICP**) mechanism for a SPOI is unworkable and a typical SPOI investment is unlikely to meet the requirements of an ICP because the value of SPOI assets is unlikely to meet the threshold.

Response to submissions

80. We have amended our position. We will treat expenditure and assets associated with changes to POIs (**POI expenditure**) the same as other costs incurred in providing FFLAS, to the extent that services provided using POI assets meet the definition of FFLAS.
81. Where Chorus forecast POI expenditure in advance of a regulatory period, that expenditure can be included in base capex, provided it meets the expenditure objective, ie, where it "reflects the efficient costs that a prudent fibre network operator would incur to deliver PQ FFLAS of appropriate quality."⁶⁹
82. Where POI expenditure either cannot be forecast at the start of the period, or where the forecast expenditure does not meet the expenditure objective, the individual capex mechanism remains available for such expenditure to be included in forecasts closer to the time of commissioning, when better information about the prudence and efficiency of the investment may be available.

Imposition of conditions by the Commission

Background

83. As set out in our Consultation Paper, we consider that we can impose conditions as part of a decision to amend the s 231 notice.

⁶⁹ Commerce Commission, "Fibre Input methodologies – Determination 2020 (consolidated as of 29 November 2021)" (21 December 2021), paragraph 3.8.5(2).

Submissions

84. Spark, Mercury and ISPANZ agreed that we can impose conditions.
85. ISPANZ suggested we can only impose conditions if those conditions support competition.
86. Tuatahi submitted that the Commission has no inherent or explicit power to impose conditions, and that our position appears to rely upon our interpretation of s 166 applying to a decision to amend the s 231 notice (which Tuatahi disagreed with, as discussed in paragraph 34).⁷⁰

Response to submissions

87. Our view remains unchanged from that expressed in our Consultation Paper.
88. While we agree that we do not have an explicit power under s 231 to impose conditions, s 231 is silent on this point and is therefore open to interpretation. We consider that taking a purposive interpretation which allows us to impose conditions enables us to best give effect to the s 166(2) matters.
89. We have amended the framework to reflect that we will not seek to impose conditions in all circumstances, only where doing so would best give effect to the s 166(2) matters.

⁷⁰ Tuatahi First Fibre “Submission on specified points of interconnection draft framework” (16 September 2022), page 6.