Cross submission on Copper Services Investigation Approach Paper

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CHORUS

Introduction

1. This is Chorus' cross submission on the Commerce Commission's (**Commission**) Copper Services Investigation – Approach paper (**Paper**), under 69AH of the Telecommunications Act 2001 (**Act**). Our submission addresses points raised by submitters on the Commission's Paper. In summary:

   1.1. We agree with submissions highlighting the importance of connectivity for rural communities and the rural economy. A wider rural connectivity policy review is necessary – but outside the scope of this investigation;

   1.2. We reiterate that removing copper services from Schedule 1 of the Act (**deregulation**) is separate from retirement, as access determinations only specify price and non-price terms of access *where the network exists*;

   1.3. We disagree with Spark that the Commission should consider amending service descriptions. Copper is a legacy technology that cannot efficiently compete with modern alternatives. Amending requirements for copper services will only distort competition further;

   1.4. We recommend the Commission take a realistic approach to economic substitution which reflects the increasing movement of end-users away from copper to alterative services; and

   1.5. We recommend the Commission be pragmatic about the level of analysis. Some submissions call for analysis at a property-by-property level and Spark supported a review of ancillary services, but these will take significantly more time and provide no material insight into competition. Further analysis on co-location and backhaul markets beyond those supporting copper access services would be outside the scope of this investigation.

2. This submission contains no confidential information and there is no confidential version.

Cross Submission

3. We agree with submitters that voice and broadband markets have become more competitive over time, and that it is important for the Commission to review regulations to ensure they are still fit for purpose.

4. The increase in competition is reflected in the significant decrease in copper connections over the last decade, from around 1.7m connections in December 2015 (when the current copper service price paths were set) to 175k in March 2024 with end-users moving to modern alternatives like fibre, wireless, satellite and mobile. Alongside this, the copper network is nearing the end of its useful life and we are retiring the network within the decade.[1]

5. The increase in competition from these modern alternatives means the current copper regulations are not fit for purpose because they do not best promote competition for the benefit of end-users. We agree with Enable[2] that there is no need for copper services to be regulated. Removing these outdated regulations is an essential step towards meeting the rural connectivity challenge.

[1] Chorus, *Chorus signals copper retirement within the decade; focus on rural fibre extension* (accessed 31 May 2024), https://company.chorus.co.nz/media/releases/chorus-signals-copper-retirement-within-decade-focus-rural-fibre-extension
[2] Enable Networks Limited, Submission on the Copper Services Investigation Under Section 69AH of the Telecommunications Act (22 May 2024), at 3.3.

Deregulation is only one part of improving rural connectivity

6. We appreciate the time taken by Federated Farmers and Rural Women New Zealand to contribute to this consultation. Their participation highlights the challenge currently facing rural New Zealanders to ensure they are not left behind in the move to next generation communications. We know that phasing out copper may be a daunting prospect for some rural communities who have relied on this technology, and we intend to support them through this transition. We have stated that a review of New Zealand's universal service arrangements is urgently required.[3] We have also called for a coordinated long-term plan for the country's rural connectivity infrastructure.[4] Chorus is committed to playing our part in addressing this challenge, including through our investment in taking fibre to 10,000 homes and business across 59 communities outside the UFB footprint.

7. This investigation must align the regulatory framework to the reality of copper retirement. Any decision other than deregulation would create uncertainty, confusion and likely exacerbate the concerns of rural communities.

8. Separate to this investigation, policymakers must take the opportunity to consider the rural connectivity challenge to ensure a comprehensive, timely approach is taken to supporting modern rural connectivity.

Copper access determinations are not coverage requirements

9. Some submitters seem to assume that the existence of a standard terms determination prevents the retirement of a network or assets and that deregulation is a prerequisite to copper retirement. This is not the case. As we outlined in our submission, access determinations are just that - specification of price and non-price terms of access to a network *as and where* it exists. The mechanisms allowing the access provider to specify and change where a service is available exist within the standard terms determinations.

10. The copper access determinations have never been 'service obligations' in the sense of ensuring that any area or end-user premises is covered by a particular service.

11. The genesis of current copper regulation was enabling the Commission to specify the price and non-price terms of access to Telecom New Zealand's copper network, giving access seekers the ability to compete with Telecom's retail business using its network assets on a level playing field. Any reduction in coverage would mean a corresponding reduction in Telecom's opportunity to sell its own retail services. The retirement of the copper network was not contemplated at that time. Therefore, the ability of the access provider (then Telecom) to add, remove and change network coverage is incorporated into the standard terms determinations.

12. As we moved to a structurally separated framework, the role of copper access determinations was diminished. Chorus, unlike Telecom, has no retail business and therefore no opportunity to generate income from our network assets except by selling wholesale access services. The open access requirements that have been part of Chorus' framework since its inception operate to ensure Chorus has neither the incentive nor the opportunity to restrict access in an anti-competitive way. Perhaps the only remaining value of the access determinations to competition was as an ex-ante price control. To the extent that Chorus' control of the copper network gave it market power, it might be able raise prices above a level that would be sustainable in a competitive market. The price caps in the access determinations prevented this.

13. Today, with fibre coverage to most of the country, the international move away from copper as a legacy technology and the expansion and improvement of wireless and satellite alternatives,

[3] Chorus, Copper services investigation approach paper submission (22 May 2024), at 27.
[4] "A World Without Copper", Presentation by Anna Mitchell, Chorus GM Fibre Frontier, to TUANZ Rural Connectivity Symposium, (7 May 2024).

the access determinations for copper services do not promote competition. Control of a legacy network covering increasingly small pockets of the country with inferior services, cannot credibly be said to confer market power. There is zero opportunity to generate supernormal profits by increasing copper prices or restricting access. Chorus' objective is to carry out a timely and efficient retirement of the network with as little disruption to end-users and our retail partners as possible.

14. We reiterate that a key factor in the Commission's investigation is that there is no factual or counterfactual scenario in which the copper network continues to operate. The sole question at issue is whether deregulation or continued regulation of copper services during the period in which the copper network is being retired is likely to best promote competition for the long-term benefit of end-users. The only credible answer is that deregulation will best achieve this objective.

Amending copper service descriptions is not the solution

15. Spark proposed that the Commission consider changes to the Schedule 1 service descriptions and, subsequently, the standard terms determinations to specify new service performance requirements and withdrawal processes.[5] We disagree:

    15.1. Spark's proposal is based on advancing purposes unrelated to the promotion of competition. They appear to be based on ensuring availability of services and establishing conditions for network retirement which is outside the scope of regulation under Part 2; and

    15.2. Any investment in establishing new or revised copper services would be wasteful and likely to distort rather than promote competition. No provider operating the copper network in a competitive market would make such investments. If the Commission finds there is sufficient competition, enforcing a change in performance levels will distort competition – this would be inconsistent with s18.

16. Copper services are not the best option for most users – this is the nature of a legacy technology that cannot efficiently compete with modern alternatives. We acknowledge submissions that the quality of service supported by ADSL is inadequate. However, the issue is the network technology itself and this cannot be solved by regulation or further investment in a copper network that will not meet consumer needs. The solution lies in alternatives that are available today - fibre, fixed wireless access (**FWA**), WISP wireless, geostationary satellite and low-earth orbit (**LEO**) satellite – which need to be invested in and made more available and accessible. There is no prospect of establishing a fit-for-purpose copper-based service at a price which allows for sustainable cost recovery in the current and future telecommunications environment.

The Commission should take a holistic approach to economic substitution

17. We agree with Tuatahi First Fibre's view[6] that the Commission should not take a narrow view of economic substitutes. This is consistent with the Commission's proposed approach[7] and the approach taken in previous reviews. Ultimately, end-users are rapidly moving away from copper which shows that, from an end-users' perspective, services with different technical capabilities are effective substitutes.

18. Some submissions propose that the Commission consider additional service characteristics when considering alternative services. However, individual service characteristics should not detract from the big picture – end-users and retail service providers (**RSPs**) are rapidly moving away

[5] Spark NZ, Copper services investigation approach paper submission (22 May 2024), at 11.
[6] Tuatahi First Fibre, Tuatahi First Fibre Limited Submission on Commerce Commission New Zealand Approach Paper for the Copper Services Investigation under section 69AH of the Telecommunications Act (22 May 2024), at 10.
[7] Commerce Commission, Copper Services Investigation under section 69AH of the Telecommunications Act Approach Paper (22 April 2024), at footnote 71.

from copper. Since copper connections peaked, over 90% of end-users have left copper so there *must* be sufficient alternatives. In particular, we note:

18.1. It was suggested that alternative services should be provided by a similar number of RSPs as copper services, however, this is unnecessary.[8] This has not stopped copper declining to date and would not account for the increase in competition in the future. Existing FWA and LEO services are already recognised as substitutes for copper,[9] and end-users are switching to them from copper, even though they support a different range of RSPs. In the future, RSP support for copper services will matter less. The number of RSPs supporting copper services has been declining over time[10] while an increasing number of retailers are supporting FWA and satellite services. While it was initially only the MNOs that retailed FWA services, other RSPs such as Mercury and Contact Energy are increasingly reselling it. Similarly, Starlink business services are also retailed by 2degrees and recently One NZ claimed that their mobile coverage will serve the entire country through its LEO services.[11]

18.2. It was also suggested that electricity supply should be considered as part of the service characteristics.[12] This 'feature' of legacy copper services shouldn't be a material factor when assessing the state of competition in the market. In other words, how a service is powered is irrelevant to the number of alternative services or the competition assessment. Copper services require power just as other services do. Copper services require power at the cabinet/exchange - just as power is required by fibre, FWA and satellite – and back-up power for copper services typically only lasts a few hours. For copper broadband, customer premises equipment (**CPE**) is still required at the end-user's property which is susceptible to the same power outages as CPE for alternative services are. For copper voice, assuming the end-user is using a phone powered by the network rather than a cordless phone which still requires power at the end-user's premises, back-up power lasts for less time than most mobile phones with full battery charge. Regardless, end-users that have back-up power, such as diesel generators, will be able to maintain power to their CPE. Put simply, power supply does not materially differentiate copper services from alternatives and, as highlighted after Cyclone Gabrielle, copper does not perform better during emergencies.[13]

19. The competition assessment does not require all other services to be equivalent or better than the current copper service, as BTG suggest.[14] Services with different technical characteristics, and even substantial technical differences, can still provide a competitive constraint. Broadband products are generally available across a range of speeds, from entry-level through to fast broadband products. End-users might consider substituting to a higher or lower speed level in response to a price rise, creating a chain of substitution across the different speed levels. The price of the high-speed product would therefore be constrained by a willingness of consumers to switch to the lower-speed product.

The Commission should be pragmatic about the level of granularity and analysis

20. We strongly disagree with suggestions to undertake a property-by-property level analysis[15] and to analyse backhaul services separately[16] - the time required for such an analysis would outweigh the benefit. Both would require considerably more analysis without providing any useful insight into competition:

[8] BTG, Copper Services Investigation, page 2.
[9] See for example, One NZ, Response to the Commerce Commission's Statement of Issues (5 March 2024), at 3.2(c).
[10] Commerce Commission, 2022 Telecommunications Monitoring Report (15 June 2023), at page 28.
[11] 2degrees, *2degrees set to offer Starlink Business to customers* (accessed on 31 May 2024), https://www.2degrees.nz/media-releases/2degrees-set-to-offer-starlink-business-to-customers; and Infratil Annual Report, published 21 May 2024, page 38: infratil.com/news/infratil-full-year-results-for-the-year-ended-31-march-2024/infratil-fy2024-annual-report/.
[12] Federated Farmers, Submission on Copper Services Investigation – Approach paper (22 May 2024) and Rural Women New Zealand, Submission Copper Services Investigation (22 May 2024).
[13] Farmers Weekly, *Modern tech has got rural Kiwis covered* (accessed on 31 May 2024), https://www.farmersweekly.co.nz/opinion/modern-tech-has-got-rural-kiwis-covered/
[14] BTG, Copper Services Investigation, page 1.
[15] Spark NZ, Copper services investigation approach paper submission (22 May 2024), at b.
[16] Spark NZ, Copper services investigation approach paper submission (22 May 2024), at a.

20.1. Backhaul and co-location - Spark notes that the regulated backhaul and co-location services may be subject to different competitive constraints. However, the Commission correctly noted that these regulated services can only be used for UBA and UCLF and that it was therefore unnecessary to consider these separately.[17] The purpose of regulating these services was to ensure the regulated copper access services could not be undermined by restricting access to supporting backhaul and co-location services. Therefore, if the copper access services no longer promote competition, then the supporting backhaul and co-location services do not either. No further analysis is required and it would be outside the scope of this investigation to consider co-location or backhaul markets beyond those supporting copper access services.

20.2. A property-by-property level analysis – suggestions that supported this seem to be driven by coverage concerns rather than competition. Regardless, coverage is outside the scope of this investigation. The Commission correctly noted that competition does not take place at an individual property level[18] and therefore a property level analysis would not provide insights into the competitive dynamics within the market. In addition to this, we outlined four additional considerations in our submission which highlight why a property-by-property level analysis is not useful, we apply these below in Table 1. Furthermore, a property-by-property analysis will not lead to an actionable outcome if it results in small pockets of properties that must bear the entire fixed costs of the network.

Table 1: A property-level analysis is not useful for this investigation

Consideration	Property-by-property analysis
Is competition in each area likely to be homogenous?	Yes, however this is because it is the most granular level of analysis.
Do the areas reflect how networks are rolled out in practice?	No. Network operators generally roll out to areas rather than individual properties/premises which reflects the upfront cost of network rollouts. Additionally, using wider areas such as Exchange Service Areas (ESAs), will also be more relevant when considering how the copper network will change in the future with decommissioning.
Are the areas likely robust to data irregularities?	No. Property-level analysis puts more importance on the quality of the data collected. Irregularities are likely to exist given the considerable amount of information collated from several sources for the Rural Connectivity Study (**RCS**).
Are the areas likely robust on a forward-looking basis?	No. A property-level analysis doesn't allow for an abstraction away from current state and won't allow for a clear discussion of future state of competition since forecasting and observations about the market are made at a more aggregated level. As an example, if forecasts suggest that 5G FWA uptake will increase in the future, how can that forecast be applied to an individual property?

[17] Commerce Commission, Copper Services Investigation under section 69AH of the Telecommunications Act Approach Paper (22 April 2024), at 96 and 97.
[18] Commerce Commission, Copper Services Investigation under section 69AH of the Telecommunications Act Approach Paper (22 April 2024), Table 3.