



ENABLE NETWORKS LIMITED AND ULTRAFAST FIBRE LIMITED

**CROSS-SUBMISSION ON NZCC FIBRE INFORMATION DISCLOSURES
DRAFT DECISIONS REASONS PAPER DATED 27 MAY 2021**

5 AUGUST 2021

PUBLIC VERSION

Introduction

1.1 This cross-submission is made by Enable Networks Limited (**Enable**) and Ultrafast Fibre Limited (**Ultrafast Fibre**) (collectively referred to in this submission as **LFCs**) in response to submissions made on the Commerce Commission's (**Commission**) *Fibre Information Disclosures Draft Decisions Reasons Paper* dated 27 May 2021 (**Reasons Paper**).

1.2 We have focussed our attention on key issues raised in submissions. For issues we have not commented on in this cross-submission we affirm the position set out in our submission of 8 July 2021.

2. The unique competitive landscape of telecommunications

2.1 It has always been acknowledged by the Commission that while "*Parliament made a deliberate decision to base the regulatory model in Part 6 on the existing model in Part 4...we must always take into account the specific characteristics of the telecommunications market*".¹

2.2 These special characteristics include "*the unique competitive landscape of telecommunications*".²

2.3 More than two and a half years ago the Commission noted the potential of fixed wireless access (FWA) to become an alternative to fixed fibre when 5G services were launched.³

Mobile networks are also being used to provide FWA services as an alternative means to access the internet in areas covered by FFLAS. In the coming years, the launch of improved mobile technology, known as 5G, will increase the appeal of mobile networks for offering FWA services.

2.4 We submitted then that "*emerging 5G technology will increase the scale and extent of such competition before Part 6 comes into effect*".⁴ Vodafone's submission discloses that FWA has already increased the scale and extent of competition between fixed broadband access services to a far greater extent than even we predicted in December 2018.

2.5 According to Vodafone:

(a) *The fixed telecommunications market is entering one of the most dynamic and competitive phases in its history. The success that we are seeing with the uptake of FWA is down to the differentiated experience that it delivers, the price at which it's offered, and our customers desire for choice. For many of our customers who are currently on copper, 4G FWA will provide everything they need to reliably browse, stream and video call together with a much simpler install and setup experience. 5G FWA offers even higher levels of performance and attractiveness to consumers in those areas where it is available;*⁵

(b) *Vodafone's cheapest home internet plan is a \$40 FWA service with a 60GB cap. We also recently introduced an unlimited FWA plan for only \$65 per month. These are prices that cannot be matched by fibre services given the wholesale costs that retailers face;*⁶

¹ NZCC *New regulatory framework for fibre consultation questions* 9 November 2018 [5.9], [5.10]

² MBIE *Regulating Communications in the Future*, September 2015 [5.24]

³ *New regulatory framework consultation questions* [2.39]

⁴ Enable, Ultrafast Fibre and Northpower Fibre *New regulatory framework for fibre, Response to Commerce Commission's consultation questions* 21 December 2018 [4]

⁵ Vodafone Aotearoa *Submission on the draft price-quality path to be applied to Chorus* 8 July 2021 (**Vodafone**) [5]

⁶ Vodafone [6]

- (c) *Chorus itself notes that its revenues have declined due to FWA competition. Analysts have also recognised that FWA uptake and Chorus' continuing decline in share of fixed connections will impede its financial performance;*⁷
 - (d) *Mobile operators like Vodafone are currently rolling out their 5G networks. The expectation of growing FWA market share is a significant element of the business case for this ongoing investment;*⁸
 - (e) *We expect that [the 100Mbps] service will become less relevant over the first regulatory period as it is outcompeted on price by FWA plans and other alternatives;*⁹ and
 - (f) *Mobile operators have published ambitions to grow the market share of FWA over the first regulatory period so that it captures 30-40% of the fixed internet market. As 5G FWA becomes more commonplace this will create competitive pressure on Chorus and is very likely to slow fibre uptake compared to its ambitions.*¹⁰
- 2.6 What is clear from the Vodafone submission is that competition is more intense than policymakers could ever have imagined when they proposed in 2015 to adopt a Part 4 BBM model for fixed fibre regulation. The two year extension granted to the Commission has resulted in a seven year period from initial regulatory design to implementation, which in a fast moving industry such as telecommunications will inevitably result in a “dead on arrival” regulatory regime that is simply not fit for purpose when it comes into effect.
- 2.7 It is inconceivable that policy-makers today, confronted with the highly competitive fixed broadband market so vividly described by Vodafone, would adopt a regulatory framework with wholesale-only structurally separated service providers subject to Part 4 style BBM regulation for one technology (fixed fibre) and vertically-integrated unregulated service providers for the other technology (FWA).
- 2.8 We have previously expressed our concerns that the technology specific nature of the Part 6 regime is distorting competition in the fixed broadband market in favour of FWA operators. It is essential for the promotion of workable competition in telecommunications markets for the long-term benefit of end-users of telecommunications services, as required by s166(2)(b) of the Act, that the Commission ensures that this distortion is as small as the statutory regime allows. The Commission must do what it promised to do, but failed to deliver in the Draft Determination, and take account of “*the actual competitive landscape*”¹¹ in making its final determination.
- 3. Confidential Information**
- 3.1 As we made clear in our submission, the competitive nature of the fixed broadband market means it is essential that any commercially sensitive information we are required to disclose must be Commission-only disclosures under s188(c) of the Act.¹²
- 3.2 Not surprisingly, our fixed broadband competitor Vodafone argues for full disclosure of our commercially sensitive information. Having spent most of its submission trumpeting its view that its FWA services are superior to fibre services, offered at “*prices that cannot be matched by fibre*”

⁷ Vodafone [7]

⁸ Vodafone [10]

⁹ Vodafone [21a]

¹⁰ Vodafone [24]

¹¹ NZCC Fibre regulation emerging views: Technical Paper 21 May 2019 [15] (own emphasis)

¹² Enable Networks and Ultrafast Fibre Submission on NZCC Fibre Information Disclosures Draft Decisions Reasons Paper dated 27 May 2021 8 July 2021 (Enable/UFF) [3.8(a)]

services”¹³ which will be “outcompeted on price by FWA plans”¹⁴, and predicting that over the first regulatory period FWA will “capture 30%-40% of the fixed internet market”,¹⁵ Vodafone submits that it is entitled to see our commercially sensitive information.

- 3.3 According to Vodafone “a culture of ‘assume it is confidential’ has set in at the Commission resulting in significant information being withheld from interested persons to a point where it is difficult to comment meaningfully on proposals”.¹⁶ “As a regulated utility Chorus and the other LFC’s must accept that information is publicly disclosed unless there is a very strong reason to withhold.”¹⁷
- 3.4 Chorus and LFCs are regulated under Part 6 of the Act. As we set out in our submission, and the Commission accepts, the Commission must take account of “the actual competitive landscape”¹⁸ for fixed broadband services in making decisions under Part 6; a landscape that was described by officials in 2015 as “uniquely competitive”,¹⁹ and which has become increasingly more competitive over the intervening six years. Vodafone in its submission has very eloquently described the current competitive landscape, and demonstrates why, under Part 6 unlike Part 4, disclosure of all our commercially sensitive information must be on a Commission-only basis.
- 3.5 Vodafone goes on to allege either collusion or co-ordination among LFCs “to adopt the same confidentiality approach as the company that discloses information first” and implies a lack of integrity in the consultation process.²⁰ We reject Vodafone’s unsubstantiated and offensive allegations and invite Vodafone to withdraw them.
- 3.6 It can come as no surprise that LFCs are of a similar view on this point. Being required to share commercially sensitive information with a competitor would be resisted by any participant in a competitive market, and LFCs are no exception. Importantly, as we outlined in our submission,²¹ disclosure, other than on a Commission-only basis, of information that in the normal course of business would be regarded as commercially sensitive would be contrary to s166(2)(b) of the Act; it would not promote competition in telecommunications markets for the long term benefit of end-users.
- 3.7 As LFCs that operate in Information Disclosure (ID) only areas, we face additional competition from Chorus. We therefore agree with Chorus that:
- ID-only asset information is commercially and competitively sensitive information. Publishing this information would give insight to our competitors of our investment in LFC areas.*²²
- 3.8 We encourage the Commission to recognise the additional competition we face from Chorus within our UFB areas and adopt different ID requirements for us where appropriate as set out in our 8 July 2021 submission.

¹³ Vodafone [6]

¹⁴ Vodafone [21a]

¹⁵ Vodafone [24]

¹⁶ Vodafone [35]

¹⁷ Vodafone [37]

¹⁸ NZCC Fibre regulation emerging views: Technical Paper 21 May 2019 [5]

¹⁹ MBIE Regulating Communications in the Future September 2015 [5.24]

²⁰ Vodafone [38]

²¹ Enable/UFF [2.4]

²² Chorus, Submission on Draft Information Disclosure Determination, 8 July 2021 (Chorus) [134]

4. **Part 4AA information**

4.1 Compass Communications submits that ID reporting requirements should include

- (a) information that enables access seekers to ensure that equivalence and non-discrimination obligations under the Act and the deeds are being met;
- (b) information to allow an access seeker to compare service levels they receive relative to other access seekers; and
- (c) the service levels the LFC has provided to itself.²³

4.2 The obligations Compass refers to are set out in Part 4AA of the Act, which contains its own compliance, monitoring and information disclosure regime. This Part 4AA information is not relevant to Part 6 disclosure.

5. **Quality metrics and performance disclosures**

5.1 Chorus has submitted that the proposed new ID quality reporting regime to apply from 1 January 2022 is unworkable and requires a transition to implementation.²⁴ We agree.

5.2 We also agree with Chorus' submission that it is necessary to strike a balance between accuracy and cost-effectiveness in reporting quality performance²⁵, and Vodafone's submission that cost-trade-offs should be considered when establishing performance metrics.²⁶

5.3 For this reason, we support Chorus²⁷, Vodafone²⁸ and Vocus²⁹ who all submit that existing contractual service standards should form the basis of quality performance disclosures.

5.4 2degrees has submitted that additional metrics should be included for all of the optional quality elements, including ordering and switching:

We consider this to be a least regrets approach and would help identify whether there are wider potential areas of concern that may require regulation for future PQP resets.³⁰

5.5 We do not agree with such a broad approach to ID at this stage. We submit that this proposal extends beyond the s186 purpose of ID for 'sufficient' information to be provided to interested parties, and it is not consistent with the principle of proportionate regulation. As described in the Reasons Paper³¹, the Commission expects to refine the ID requirements overtime as the performance of regulated providers is better understood. We submit that that is the appropriate time for the Commission to consider the optional quality elements.

²³ Compass Communications 'Submission on the Draft Fibre Information Disclosure Determination 2021' 8 July 2021, p1

²⁴ Chorus [156]

²⁵ Chorus [8.3] [159]

²⁶ Vodafone [22b]

²⁷ Chorus [8.3]

²⁸ Vodafone [22a]

²⁹ Vocus 'Consultation on Chorus' Price-Quality Path from 1 January 2022 – Draft Decision, Submission to the Commerce Commission' 8 July 2021 (**Vocus**) [21.2]

³⁰ 2degrees 'Chorus' price-quality path from 1 January 2022 – Draft decision Reasons paper' 8 July 2021 (**2degrees**) [page 8]

³¹ Reasons Paper p4

5.6 Compass has submitted that provisioning rules and methods should be disclosed as well as handover connection availability, LAG availability and port demand³². However, these are features of our operating processes, and disclosure of this information would not be consistent with the s186 purpose of ID.

6. Pricing disclosures

6.1 Chorus has submitted that incentive payments are expenditure, and therefore they should be excluded from the pricing and revenue disclosures³³. We agree with this submission because it is consistent with the Input Methodologies (IMs), and the ID determination must apply the IMs. In addition, we note that Chorus also submits that excluding incentives from pricing disclosures is consistent with the definition of price in the Telecommunications Act.³⁴

6.2 We agree with Chorus' submission that disclosure of commercially sensitive pricing information by plan does not promote competition and is contrary to the s162 purpose.³⁵ As we have noted in our submission, we disclose pricing information on our websites, and any pricing information made available through ID should be consistent with our current public disclosures.

7. Enable Social Housing offer

7.1 Spark submits that the costs of Enable's social housing offer of a free broadband service to up to 2500 eligible tenants should be transparent.³⁶

7.2 Enable agrees and intends to disclose the relevant information in its disclosures, as follows:

- (a) in Schedule 25 which requires disclosure of pricing and availability information for each service;
- (b) in Schedule 14a which requires explanations about annual financial performance; and
- (c) in Schedule 15 which provides for further voluntary explanations about annual financial performance.

8. Other drafting suggestions

8.1 In its submission, Chorus proposes alternative approaches to some of the technical proposals in the draft decision. We explain below where we consider the proposals have merit (using Chorus' submission references), or alternatively may not be appropriate for Enable and UFF:

Proposal	LFC response
Pricing disclosures (S25 and S25)	
Connection number reporting is not appropriate for non-access services (111 -112)	Support. As non-access services cannot be accurately counted, aggregated service products such as backhaul, colocation or hand over ports should be excluded.

³² Compass [page 2-3]

³³ Chorus [84]

³⁴ Chorus [93]

³⁵ Chorus [105]

³⁶ Spark *Fibre ID and PQ draft decisions* 8 July 2021 [88]

Proposal	LFC response
Central office definition is corrected (113.1)	We support the proposal that only buildings and active roadside cabinets that are fibre concentration points should be included. The draft definition is not appropriate.
Asset management disclosures (S12 and S12a)	
Utilisation metric ‘% fill (lit fibres)’ (Column Q) is changed to ‘CO to a FFP with % fill greater than 85% or agreed level’ (122.1)	We do not support utilisation disclosures; see Table 4 of our submission.
Report on peak throughput, not on aggregate maximum peak demand across all ports by POI area (125.1)	Support. This is how the industry has traditionally measured peak traffic and successfully managed capacity and demand.
Replace peak to average ratio with average throughput per user (ATPU) (125.2)	Support. ATPU provides a more realistic forecast. We repeat our submission that forecast data does not extend beyond 3 years and should not be publicly disclosed.
Demand forecasts should include GPON connections and P2P information (128.2)	Support. The forecast demand data should not be publicly disclosed.
Quality disclosures (S19 and S20)	
Align definitions of simple and complex new connections with cycle time requirements in fibre reference offers (147)	We support the need for agreed definitions across all LFCs and Chorus, and that the drafts definitions are not clear and need refining. This is why we suggested, where applicable, the current RSP SLAs as a good starting point as they represent a whole of industry approach as opposed to the original UFB1 CIP SLAs, which can differ by UFB contract and provider. Once the definitions are determined, there will need to be a transition period before data can be disclosed.
Measure traffic performance in accordance with existing layer 2 reporting regime (port utilisation and a sample set of OLT reference probes rather than probes on every connection) (147)	Support. It is not practical or desirable to measure on all FFLAS. Measurement on a live customer circuit has significant technical challenges such as the customer’s traffic disrupting the measurement traffic resulting in invalid reporting.
9. Next steps	
9.1 As Chorus and the LFCs have previously submitted, there are substantial technical details to be resolved before a workable set of disclosure requirements can be implemented. The Commission should schedule workshops with the FFLAS providers to develop common definitions for expenditure categories and quality measures. Workshops are effective forums for reaching agreement on terms which can be applied consistently by all regulated providers.	

- 9.2 We also request that the Commission facilitate a technical drafting consultation prior to the final determination being issued. The ID determination and schedules are necessarily very precise about the information to be disclosed. Unforeseen errors or ambiguity in the determination will compromise the practical implementation of the determination, including for certification and audit. A technical drafting consultation period, of about two weeks, has been used by the Commission in the past to good effect for similar decisions.