

Fibre fixed line access service deregulation review under section 210 of the Telecommunications Act

Draft assessment framework paper

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Associated documents

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Chapter 1 Introduction

Purpose and structure

- 1.1 This paper sets out:
 - 1.1.1 the assessment framework that we propose to apply when we undertake a fibre fixed line access service deregulation review (FFLAS deregulation review) under the Telecommunications Act 2001 (the Act);
 - 1.1.2 the parameters for the reasonable grounds assessment and how they apply to a FFLAS deregulation review;¹ and
 - 1.1.3 the type of evidence we propose to consider when doing the reasonable grounds assessment.
- 1.2 This paper seeks stakeholder feedback on the proposed assessment frameworks, and is structured as follows:
 - 1.2.1 Chapter 1 is an introduction in which we outline the background and process for a FFLAS deregulation review, and provide information on making submissions;
 - 1.2.2 Chapter 2 outlines the legal and economic frameworks for the reasonable grounds assessment for a FFLAS deregulation review;
 - 1.2.3 Chapter 3 outlines the description of FFLAS for our reasonable grounds assessment for a FFLAS deregulation review;
 - 1.2.4 Chapter 4 outlines the geographic description of the supply of FFLAS for our reasonable grounds assessment for a FFLAS deregulation review; and
 - 1.2.5 Chapter 5 outlines the types of evidence we propose to consider when undertaking our reasonable grounds assessment for this FFLAS deregulation review.

Background

- 1.3 Section 210 of the Act sets out that the Commission may, at any time after the implementation date, review how one or more fibre fixed line access service (FFLAS) are regulated if the Commission has reasonable grounds to consider that those services should no longer be:²
 - 1.3.1 regulated under Part 6 of the Act; or

¹ The reasonable grounds assessment is mandated and required under s 210 of the Act.

² Telecommunications Act 2001, s 210(1).

- 1.3.2 subjected to price-quality (PQ) regulation under Part 6 of the Act.
- 1.4 We are required to consider whether there are reasonable grounds to start a FFLAS deregulation review before the start of each regulatory period.³ We refer to this step throughout this paper as the ‘pre-review’.
- 1.5 The next regulatory period begins on 1 January 2025.⁴
- 1.6 This paper sets out our proposed framework and the types of evidence we propose to consider when deciding whether there are reasonable grounds to start a review. Once we have considered these parameters, we will issue a draft decision as to whether reasonable grounds exist. We intend to invite submissions on that draft decision, before issuing a final decision. If we conclude that reasonable grounds exist, we may review how one or more FFLAS are regulated under Part 6.

Process

- 1.7 Table 1.1 sets out our process for the reasonable grounds assessment.

Table 1.1 Our process

Milestone	What?	Indicative date
Draft assessment framework paper (this paper)	Proposed legal framework, economic framework, geographic breakdown and service definitions	7 December 2023
Submissions	Submissions on our draft assessment framework	16 February 2024
Cross-submissions	Cross-submissions on our draft assessment framework submissions received	15 March 2024
Reasonable grounds draft decision	Draft decision as to whether there are reasonable grounds to consider how 1 or more FFLAS are regulated	TBC
Reasonable grounds final decision	Final decision as to whether there are reasonable grounds to consider how 1 or more FFLAS are regulated	TBC

- 1.8 Depending on the outcome of our reasonable grounds assessment under s 210:
- 1.8.1 We may conduct a FFLAS deregulation review (this could only occur if we find there are reasonable grounds to start a review).⁵
- 1.8.2 If we conduct a FFLAS deregulation review, we must make a recommendation to the Minister after a review.⁶

³ Telecommunications Act 2001, s 210(3).

⁴ *Determination of the duration of the second regulatory period for Fibre Price-Quality Path Determination 2024* [2023] NZCC 2.

⁵ Telecommunications Act 2001, s 210(1).

⁶ Telecommunications Act 2001, s 210(6).

- 1.9 If we do not find reasonable grounds to start a FFLAS deregulation review, there will be no need to conduct the steps outlined above.

Information for interested parties on making a submission

Process and timeline for making submissions

- 1.10 We are seeking submissions on the proposals contained in this paper by 5pm, 16 February 2024. We then intend to invite cross-submissions by 5pm, 15 March 2024.
- 1.11 You should address your responses to:
- 1.11.1 Keston Ruxton (Manager, Fibre PQ Regulation)
 - 1.11.2 c/o infrastructure.regulation@comcom.govt.nz
- 1.12 Please include “FFLAS deregulation review” in the subject line. We prefer responses to be provided in a file format suitable for word processing in addition to PDF file format.

Confidentiality

- 1.13 Please note that we intend to publish all submissions on this draft assessment framework paper.
- 1.14 The protection of confidential information is something the Commission takes seriously. The process requires you to provide (if necessary) both a confidential and non-confidential/public version of your submission and to clearly identify the confidential and non-confidential/public versions.
- 1.15 When including commercially sensitive or confidential information in your submission:
- 1.15.1 Please provide clearly labelled confidential and public versions. We intend to publish all public versions on our website.
 - 1.15.1 The responsibility for ensuring that confidential information is not included in a public version of a submission rests entirely with the party making the submission.
 - 1.15.1 Please note that all submissions we receive, including any parts that we do not publish, can be requested under the Official Information Act 1982. This means we would be required to release material that we do not publish unless good reason existed under the Official Information Act 1982 to withhold it. We would normally consult with the party that provided the information before any disclosure is made.

Chapter 2 Assessment framework

Purpose and structure

- 2.1 This chapter sets out the legal and economic frameworks that we propose to apply in deciding whether reasonable grounds exist to start a review.
- 2.2 This chapter is structured as follows:
 - 2.2.1 legal framework; and
 - 2.2.2 economic framework.

Legal framework

- 2.3 Since 1 January 2022, providers of regulated FFLAS have been subject to regulation under Part 6 of the Act. Chorus Limited (Chorus) is the only Local Fibre Company (LFC) subject to price-quality (PQ) regulation under Part 6.
- 2.4 Section 210 of the Act (which is contained in Part 6) sets out that the Commission may, at any time after the implementation date, review how 1 or more FFLAS are regulated if the Commission has reasonable grounds to consider that those services should no longer be:⁷
 - 2.4.1 regulated under Part 6 of the Act; or
 - 2.4.2 subjected to PQ regulation under Part 6 of the Act.
- 2.5 The Commission must, before the start of each regulatory period (except the first regulatory period), consider whether there are reasonable grounds to start a review.⁸

Section 166

- 2.6 Section 166 specifies the matters that we are required to consider when we exercise our functions under Part 6 of the Act. When making a decision under Part 6, we must do so in a way that best gives, or is likely to best give, effect to s 162, and to the extent relevant, to the promotion of workable competition in telecommunications markets.

“166 Matters to be considered by Commission and Minister

(2) The Commission or Minister must make the recommendation, determination, or decision that the Commission or Minister considers best gives, or is likely to best give, effect-

⁷ Telecommunications Act 2001, s 210(1).

⁸ Telecommunications Act 2001, s 210(3).

- (a) to the purpose in section 162; and
- (b) to the extent that the Commission or Minister considers it relevant, to the promotion of workable competition in telecommunications markets for the long-term benefit of end-users of telecommunications services.”

Section 162

2.7 In reaching our view on whether there are reasonable grounds for commencing a review, we must make the decision that will give, or is likely to best give, effect to the purpose set out in s 162 of the Act:

“162 Purpose

The purpose of this Part is to promote the long-term benefit of end-users in markets for fibre fixed line access services by promoting outcomes that are consistent with outcomes produced in workably competitive markets so that regulated fibre service providers-

- (a) have incentives to innovate and to invest, including in replacement, upgraded, and new assets; and
- (b) have incentives to improve efficiency and supply fibre fixed line access services of a quality that reflects end-user demands; and
- (c) allow end-users to share the benefits of efficiency gains in the supply of fibre fixed line access services, including through lower prices; and
- (d) are limited in their ability to extract excessive profits.”

Section 210

2.8 Section 210(1) of the Act provides that the Commission:⁹

“may, at any time after the implementation date, review how 1 or more fibre fixed line access services are regulated under this Part if the Commission has reasonable grounds to consider that those services-

- (a) should no longer be regulated under this Part; or
- (b) should no longer be subject to price-quality regulation under this Part”.

2.9 Section 210(2), allows the Commission, without limitation, to describe a service under review with reference to any 1 of more of the following:

- 2.9.1 the geographic area in which the service is supplied:
- 2.9.2 the service’s end-users:
- 2.9.3 the service providers who seek access to the service:

⁹ Telecommunications Act 2001, section 210(1).

- 2.9.4 the technical specifications of the service:
- 2.9.5 any other circumstances in which the service is supplied.
- 2.10 Section 210(3) sets out that the Commission must, before the start of each regulatory period (except the first), consider whether there are reasonable grounds to start a review.¹⁰
- 2.11 We consider that reasonable grounds to investigate whether a service should no longer be regulated or no longer be subject to PQ regulation, as provided for by s 210 of the Act, exist where there is evidence that circumstances may have changed to such an extent that continued regulation, or the regulation in its current form, as the case may be, is no longer necessary to best promote the long-term benefit of end-users in markets for FFLAS.
- 2.12 This baseline is to be applied within the applicable regulatory context and with any specific relevant legislative provisions overlaid. In the case of this review, the assessment of whether there are reasonable grounds should be made with reference to the factors listed in s 210(4) of the Act:
- “(4) A review may consider the following:
- (a) whether competition to 1 or more fibre fixed line access services has increased or decreased in a relevant market:
- (b) the impact of any increase or decrease on the ability of regulated fibre service providers to exercise substantial market power:
- (c) whether the purpose of this Part would be better met if 1 or more fibre fixed line access services:
- (i) were no longer regulated under this Part; or
- (ii) were no longer subject to price-quality regulation under this Part”.
- 2.13 As this is the first reasonable grounds assessment under s 210, we consider the most appropriate date from which to assess whether there may have been a change in circumstances, is the date from which the PQ regulation of FFLAS came into effect, which was 1 January 2022 (the implementation date).
- 2.14 We consider that to conduct a reasonable grounds assessment we will need to ‘describe’ FFLAS in s 210(2) terms (or divide into subgroups of services). Our starting point for this is to consider the definition of FFLAS in the Act.

¹⁰ Telecommunications Act 2001, section 210(3).

Definition of FFLAS

2.15 “FFLAS” is defined in s 5 of the Act as follows:

“(a) means a telecommunications service that enables access to, and interconnection with, a regulated fibre service provider’s fibre network; but

(b) does not include the following:

(i) a telecommunications service provided by a regulated fibre service provider (F) if the ultimate recipient of the service is F or a related party of F (as if the test for related parties were the same as the test in section 69U, applied with any necessary modifications):

(ii) a telecommunications service provided, in any part other than a part located within an end-user’s premises or building, over a copper line:

(iii) a telecommunications service used exclusively in connection with a service described in paragraph (ii)”.

2.16 In turn, “telecommunications service” is defined in s 5 as:

“any goods, services, equipment, and facilities that enable or facilitate telecommunication”.

2.17 “Telecommunication” is defined in s 5 as:

“the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not”.

2.18 The definition of FFLAS in s 5 of the Act incorporates the broad definition of telecommunications service, which includes goods, services, equipment and facilities that both enable and facilitate telecommunication.¹¹

2.19 The definition of FFLAS is also qualified by the requirement that the telecommunications service enables access to, and interconnection with, a regulated provider’s fibre network. Therefore, FFLAS are limited to services that relate to the fibre network of a regulated provider who is declared in regulations under s 226 of the Act to be subject to PQ or information disclosure (ID) regulation, or both.

2.20 We set out which services fell within the definition of FFLAS in our final decision on Chorus’ first PQ path (PQP1), and this is discussed in more detail below.¹² This is not being reconsidered as part of this reasonable grounds assessment.

¹¹ Commerce Commission “Chorus’ price-quality path from 1 January 2022 – Final decision – Reasons paper” (16 December 2021), Attachment D.

¹² Commerce Commission “Chorus’ price-quality path from 1 January 2022 – Final decision – Reasons paper” (16 December 2021), Attachment D.

Geographic area in which the service is supplied

- 2.21 As set out above, s 210(2) of the Act also gives the Commission (without limitation) the ability to describe a service under review by reference to certain factors.¹³ One factor is the geographic area in which the service is supplied. In conducting our reasonable grounds assessment, we will need to identify what geographic area we are considering.
- 2.22 The Telecommunications (Regulated Fibre Service Providers) Regulations 2019 (the Regulations) were declared under s 226 of the Act. These Regulations prescribe that Chorus is the only LFC subject to PQ regulation under Part 6 of the Act. The services subject to PQ regulation are defined as, “all fibre fixed line access services, except to the extent that a service is provided in a geographical area where a regulated fibre service provider (other than Chorus Limited) has installed a fibre network as part of the UFB initiative.”¹⁴
- 2.23 The Regulations also set out that Chorus, Enable, Northpower and Tuatahi are subject to ID regulation for all FFLAS.¹⁵
- 2.24 We discuss each of these in the chapters that follow, specifically:
- 2.24.1 service definitions (discussed in Chapter 3); and
- 2.24.2 geographic area in which service is supplied (discussed in Chapter 4).
- 2.25 At this stage, we are proposing these descriptions to inform our reasonable grounds assessment only. For the purposes of a full deregulation review (if we consider there are reasonable grounds for starting one) it may be logical to describe the services under review differently.

Economic framework

- 2.26 We have developed an economic framework for assessing whether there are reasonable grounds for commencing a deregulation review, which is based on the approach we have taken in other deregulation reviews under Schedule 3 of the Act. We are seeking feedback on this framework.
- 2.27 Under this framework, our reasonable grounds assessment will look at the following:
- 2.27.1 the regulated service in question and how the regulated service is used to offer retail services to end-users;

¹³ Telecommunications Act 2001, s 210(2).

¹⁴ The Telecommunications (Regulated Fibre Service Providers) Regulations 2019, regulation 6.

¹⁵ The Telecommunications (Regulated Fibre Service Providers) Regulations 2019, regulation 5.

- 2.27.2 whether there are other retail services that do not use the regulated service and that are close economic substitutes to those retail services offered using the regulated service; and
 - 2.27.3 whether those other retail services represent a competitive constraint on the supply of the service in question.
- 2.28 Our preliminary view is that we should start with the regulated service in question (which in this case is FFLAS, supplied at the wholesale level), and then look at how that service is being used to offer retail services to end-users. We intend to consider what alternative retail services may be available to end-users in the retail market, and whether these alternatives represent a competitive constraint on the supply of FFLAS-based retail services.
- 2.29 FFLAS is used by retail service providers to offer voice and broadband services to residential and business end-users – either directly (using fibre bitstream) or indirectly (for example using fibre transport and co-location services). Alternate voice and broadband services are also offered by retail service providers directly to end-users by way of a number of other technologies, such as cable or copper networks, 4G and emerging 5G wireless broadband. However, some of these wireless networks use FFLAS indirectly to facilitate these retail services.
- 2.30 The extent to which alternate voice and broadband services, and associated networks, represent a competitive constraint on FFLAS will depend on a number of factors, including:
 - 2.30.1 whether services offered over such alternative networks indirectly rely on FFLAS;
 - 2.30.2 whether such alternative networks are physically present and available to FFLAS-based connections (the geographic footprint of the alternatives);
 - 2.30.3 whether such alternative networks have sufficient capacity to serve new demand; and
 - 2.30.4 whether retail services offered over the alternative networks represent a close economic substitute to FFLAS-based services (for example, in terms of pricing (both recurring and non-recurring prices), speed, data allowances, and latency and other performance characteristics).

- 2.31 We intend to consider any changes in competitive constraints that operate at the retail level to assess the extent to which competition in the retail market relies on access to the FFLAS or an alternative wholesale service. Ultimately, this consideration informs our decision about how one or more FFLAS are regulated in order to best give, or likely to best give, effect to the purpose of s 162 and, where relevant, to the promotion of competition for the long-term benefit of end-users.
- 2.32 We then consider each of the FFLAS. In each case, we are interested in examining the change in competitive constraints that have occurred, including:
- 2.32.1 the existence of any direct substitutes for the FFLAS. For example, where access seekers are using FFLAS, we will consider whether there are wholesale alternatives they can switch to if the price of FFLAS increased.¹⁶ If so, we will consider the extent that access seekers have actually switched or are threatening to switch between wholesale services;
 - 2.32.2 the extent to which any direct substitutes have acted as genuine competitive constraint on a FFLAS. If direct substitutes are supplied by the same access provider, these are unlikely to represent a sufficient constraint on the FFLAS (unless the direct substitute is also regulated);¹⁷ and
 - 2.32.3 whether there are any constraints that have operated indirectly through the retail level (from which demand for the FFLAS was derived). For example, an increase in the FFLAS price may be passed through to the retail price of the service supplied to end-users using the FFLAS input. If such an increase in the retail price were to induce end-users to switch to other retail services that do not rely on the FFLAS input, such switching of demand away from the FFLAS input may indirectly constrain the access provider. This will depend on the factors outlined in paragraph 2.29 above, such as the availability and capacity of alternative networks, and the extent to which other retail services, which do not rely on the FFLAS input, are viewed by end-users as being close economic substitutes to FFLAS-based retail services.
- 2.33 We also take current market conditions (such as market share, price, and quality) and developments into account in assessing whether there are reasonable grounds for a deregulation review.

¹⁶ As one example, an access seeker using a regulated layer 2 Bitstream PON service to supply retail broadband services might also be able to purchase wholesale services offered over competing alternative networks such as FWA. Another example might be transport services, where an access seeker using a FFLAS transport service might be able to purchase transport from a third party.

¹⁷ For example, this is likely to be relevant when considering services offered over FWA which rely on access to layer 1 fibre services (such as DFAS).

- 2.34 As well as considering changes in competitive conditions, the costs and benefits that may result from deregulation will be relevant considerations. We may have regard to any evidence of these costs and benefits when considering whether there are reasonable grounds to consider how FFLAS are regulated.

Chapter 3 Service definitions

Purpose

- 3.1 The purpose of this chapter is to set out our proposed description of FFLAS for the purpose of our reasonable grounds assessment under s 210 of the Act and how the regulated service is used to offer retail services to end-users.

FFLAS service definitions

- 3.2 We must assess whether there are reasonable grounds to start a review before the start of each regulatory period.
- 3.3 If reasonable grounds exist, the Commission may review how 1 or more FFLAS are regulated under Part 6 of the Act, specifically whether the services should no longer be regulated under Part 6, or should no longer be subject to PQ regulation under this Part.
- 3.4 As set out earlier in this paper, the definition of FFLAS in s 5 incorporates the broad definition of telecommunications service, which includes goods, services, equipment and facilities that both enable and facilitate telecommunications.¹⁸
- 3.5 The definition of FFLAS is also qualified by the requirement that the telecommunications service enables access to, and interconnection with, a regulated provider's fibre network. Therefore, FFLAS are limited to services that relate to the fibre network of a regulated provider who is declared in regulations under s 226 of the Act to be subject to PQ or ID regulation, or both.¹⁹
- 3.6 In our final reasons paper for Chorus's first PQ path, we set out a full list of the service categories we consider fall within the scope of FFLAS.²⁰

Analysis

- 3.7 In undertaking our consideration of whether reasonable grounds exist to start a review, we will assess whether there are reasonable grounds in relation to each of the services that are currently regulated.
- 3.8 It is important to define the various FFLAS to enable us to meaningfully examine the state of competition and whether regulated providers are able to exercise significant market power.

¹⁸ Commerce Commission "Chorus' price-quality path from 1 January 2022, Final decision - Reasons Paper" (16 December 2021), Attachment D.

¹⁹ Telecommunications (Regulated Fibre Service Providers) Regulations 2019, regulations 5 and 6.

²⁰ Commerce Commission "Chorus' price-quality path from 1 January 2022, Final decision - Reasons paper" (16 December 2021), Attachment D.

3.9 We are required to make a decision that best gives, or is likely to best give, effect to the s 162 purpose and, where relevant, promote competition for the long-term benefit of end-users in markets for FFLAS.

3.10 To apply our proposed economic framework, we propose to consider FFLAS in the following ways (consistent with the definitions from our PQP1 decision):

3.10.1 Firstly, from a technical perspective (consistent with s 210(2)(d)); and

3.10.2 Secondly, we have provided more detailed examples from a retail-side/end-user perspective, which we have developed from Chorus' product information (consistent with s 201(2)(b)).²¹

3.11 The descriptions are outlined in Table 3.1 below.

Table 3.1 Emerging view on FFLAS descriptions

Service type	Technical	Retail-side/End-user
Voice services	Services to enable the delivery of telephony and low speed data services over a fibre network (including, but not limited to, anchor services, baseband, ATA voice).	
Bitstream PON services	Single or multi-class point-to-multipoint fibre access services (including, but not limited to, anchor services, Bitstream services, Bitstream 2, 3, 3A, Bitstream accelerate services, 10GPON, NGPON and multicast).	<p>Bitstream 2 product gives RSPs a fast and reliable connection so end-users can watch, listen, play, post and chat without interruption or slowing down.</p> <p>Bitstream 3 provides RSPs business customers with a business grade internet connection that supports multiple locations, delivering high levels of guaranteed bandwidth to support business critical applications like voice, video-conferencing and cloud-based apps.</p>
Unbundled PON services	Point-to-multipoint layer 1 fibre access services (including, but not limited to, PON fibre access services (PONFAS) and unbundled fibre services).	PONFAS allows RSPs to put their own electronics at each end of a fibre circuit, which can then be used to create innovative new products or services.

²¹ <https://sp.chorus.co.nz/products>

Service type	Technical	Retail-side/End-user
Point-to-point services	Single, multi-class or layer 1 point-to-point fibre access services (including, but not limited to, Bitstream 4, enhanced Bitstream 4, HSNS, BFAS and DFAS).	<p>Bitstream 4 provides RSPs business customers with similar benefits to Bitstream 3, but over a dedicated fibre, which offers the speed and security required by large organisations.</p> <p>DFAS provides dark fibre access that gives RSPs the ability to develop complex services and products to high-value customers requiring tailored equipment configurations.</p>
Transport services	Layer 1 or managed throughput fibre services provided over the fibre network, to transport voice and data traffic between central offices, including central offices that are also POIs (including, but not limited to ICABS, TES and inter-CO fibre services; but excluding national / inter-candidate area backhaul services such as CRT).	<p>ICABS provides RSPs with dark fibre connectivity between exchanges within the same candidate area – can be used with other Chorus access products to achieve end-to-end and infrastructure solutions.</p> <p>Mobile Access service provides RSPs with a high speed, high traffic class point-to-point bitstream service suitable for connectivity to mobile cell sites and other similar non-building access point (NBAP).</p>
Co-location and interconnected services	Network equipment accommodation and management services including network interconnection services (including, but not limited to, central office and POI co-location services, handover connections, Ethernet handover connections, tie cables and jumpering).	Central Office and POI co-location allows RSPs to install equipment in Chorus exchanges. Chorus' property services include a range of options for electricity, back-up power, seismic support and air conditioning, depending on the exchange.
Connection services	Services to install and enable FFLAS between communal fibre network infrastructure and an end-user's premises, building or other access point (including, but not limited to, pre-wiring, cable and duct fit-out).	

Chapter 4 Geographic area in which service is supplied

Purpose

- 4.1 The purpose of this chapter is to set out our proposed description of the geographic area in which the FFLAS is supplied for the purpose of our reasonable grounds assessment under s 210.

Background

- 4.2 Section 210(2)(a) provides that, for the purpose of a review of how one or more FFLAS are regulated, a service may be described with reference to “the geographic area in which the service is supplied”.²²
- 4.3 Describing the geographic areas in which we will assess whether FFLAS competition has changed will allow us to compare different FFLAS markets across New Zealand. This will enable us to compare the state of competition and the exercise of market power across different geographic locations where FFLAS is supplied. The ability to compare the state of competition and market power will assist in determining whether reasonable grounds exist to start a review. As such, we are proposing in this chapter how we conceive of the geographic areas in which FFLAS is supplied.
- 4.4 The potential scope of FFLAS is anywhere a regulated fibre provider has installed a fibre network. Describing a geographic area in which FFLAS is supplied enables us to conduct the reasonable grounds assessment.
- 4.5 The roll out of the Ultra-Fast Broadband (UFB) network means there are differing levels of competition across different parts of New Zealand. While the majority of Chorus’ fibre network was built pursuant to the UFB contracts, some of that infrastructure has been built independently of the UFB initiative in areas where another LFC secured the UFB contract. It is foreseeable that Chorus will construct further fibre infrastructure in those areas on a commercial basis. This means the level of competition in the market is dynamic.
- 4.6 This is reflected in Regulation 6, which stipulates that Chorus is the only LFC subjected to PQ regulation and that Chorus is subject to PQ regulation for all FFLAS, except to the extent that a service is provide in a geographic area where a regulated fibre service provider (other than Chorus) has installed a fibre network as a part of the UFB initiative.²³

²² Telecommunications Act 2001, section 210(2)(a).

²³ Telecommunications (Regulated Fibre Service Providers) Regulations 2019, Regulation 6.

Analysis

- 4.7 There is an inherent trade-off between precision and practicality when defining a market with reference to a geographic area. Defining the geographic area too narrowly is impractical while defining the geographic area too widely is imprecise.
- 4.8 The different options available for defining a geographic area in which FFLAS is supplied can be thought of as being on a continuum from narrow to wide. The options from narrow to wide are describing at:
- 4.8.1 the Specified Fibre Area (SFA) level which includes a property-by-property analysis;
 - 4.8.2 candidate/exchange/point of interconnection (POI) area level;
 - 4.8.3 LFC plus Chorus PQ/ID level; or
 - 4.8.4 nationwide markets.
- 4.9 We consider that the nature of the FFLAS market in New Zealand should influence how we describe a geographic area in which FFLAS is supplied for the reasonable grounds assessment.
- 4.10 The Regulations were issued under s 226 of the Act. Section 226(3) provides guidance on how the regulations prescribed by s 226 may be described. Specifically, s 226(3)(a) sets out that the regulations may describe a service by reference to the geographic area in which the service is supplied. This is the same as s 210(2)(a). We propose that it would be sensible for the geographic area for both to be the same.
- 4.11 Furthermore, Regulations 5 and 6 of the Regulations define how FFLAS is currently regulated and which LFCs are subjected to PQ regulation, ID regulation, or both.²⁴ If we were to conduct a substantive deregulation review, our recommendation to the Minister could result in changes to Regulation 6. As such, we propose that the geographic areas utilised for Regulation 6 are a good starting point for the purpose of describing a geographic area in which FFLAS is supplied for the reasonable grounds assessment. We consider that using the same geographic areas as in the Regulations provides useful consistency.
- 4.12 We propose that for the reasonable grounds assessment, the geographic area in which FFLAS is supplied for the purpose of s 210 of the Act should be described by reference to areas containing three components:
- 4.12.1 Chorus PQ;

²⁴ Telecommunications (Regulated Fibre Service Providers) Regulations 2019, Regulation 6.

4.12.2 Chorus ID-only; and

4.12.3 LFC (Northpower, Tuatahi and Enable).

4.13 We propose they should be described the geographic area in which FFLAS is supplied in this way for two reasons:

4.13.1 given the similarities between ss 210(2) and 226(3) of the Act, it is logical to have the same geographic description of service; and

4.13.2 it strikes a workable balance between the precision required for a meaningful analysis and practicality.

Chapter 5 Evidence for reasonable grounds

Purpose and background

- 5.1 This chapter sets out the type of evidence we propose to consider when doing the reasonable grounds assessment.
- 5.2 This will be the first reasonable grounds assessment under s 210 of the Act, and we are seeking stakeholder comment on the types of evidence set out below.

Types of evidence

- 5.3 We propose to consider the evidence that allows us to undertake a reasonable grounds assessment consistent with our legal and economic frameworks (outlined in Chapter 2).
- 5.4 As outlined in Chapter 2, the first reasonable grounds assessment under s 210 of the Act will compare any changes in circumstances faced by regulated providers of FFLAS since the date at which PQ regulation came into effect (1 January 2022).
- 5.5 In considering whether competition to 1 or more FFLAS has increased or decreased since the date of comparison, we are interested in the emergence and expansion of alternative networks offering services that may represent a competitive constraint on services that are offered using FFLAS. In this regard, as discussed in Chapter 2, evidence relating to the following will assist in our assessment of reasonable grounds:
 - 5.5.1 the availability of alternative networks and whether they are physically present in areas covered by FFLAS-based services, and whether those alternative networks rely on access to FFLAS to deliver services;
 - 5.5.2 the capacity of alternative networks to serve new demand (in the event that end-users wanted to switch away from FFLAS-based services);
 - 5.5.3 whether retail services offered over the alternative networks represent a 'close economic substitute' to FFLAS-based services (in terms of key price and non-price features); and
 - 5.5.4 actual uptake (market shares) of FFLAS-based services and services on alternative networks.
- 5.6 For each of the areas listed above, we are interested in evidence relating to non-FFLAS fibre, wireless broadband (including 4G and 5G), and satellite-based services.

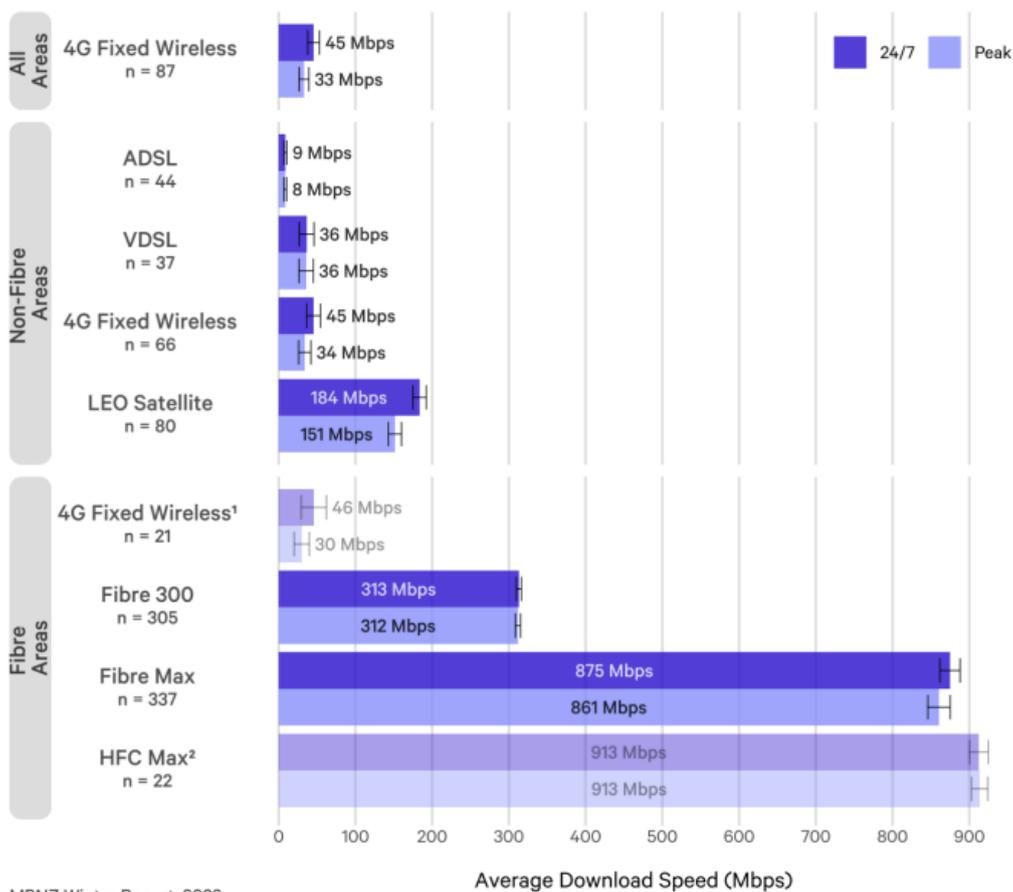
Examples of evidence we are likely to consider

- 5.7 We collect a range of information (MBNZ report, Rural Connectivity Study) that we propose to use when doing our reasonable grounds assessment.

- 5.8 In considering whether retail services are economic substitutes, evidence around retail prices (including recurring monthly prices, as well as any non-recurring charges for customer equipment) will be important.
- 5.9 Non-price features of retail services, such as data allowances, speeds, latency and other performance characteristics will also be important.
- 5.10 Our quarterly Measuring Broadband New Zealand report (MBNZ report) measures the quality of New Zealand's in-home internet performance across different providers, plans and technologies. The MBNZ report compares key service performance metrics for FFLAS, xDSL, wireless broadband, and satellite technologies.
- 5.11 We propose that we would consider the data from the latest MBNZ report and compare this against the data from the Summer 2021 MBNZ report for the purposes of a reasonable grounds assessment. The data for the Summer 2022 MBNZ report was collected between 1 and 31 December 2021. This is the closest data collection to our date of comparison of 1 January 2022.
- 5.12 The relevant metrics from the MBNZ report to consider whether alternatives are close substitutes are:
- 5.12.1 median hourly disconnection rates;
 - 5.12.2 download speeds;
 - 5.12.3 upload speeds;
 - 5.12.4 latency; and
 - 5.12.5 latency under load.
- 5.13 These are key non-price features of retail broadband plans which are likely to be important considerations, along with pricing, when an end-user is choosing a broadband plan.
- 5.14 Figures 5.1 and 5.2 below show the results from our latest MBNZ report for download and upload speeds.

Figure 5.1 Average download speeds from MBNZ report²⁵

Average of monthly household weighted averages. Peak hours are Monday - Friday, 7pm - 11pm.
 The number of Whiteboxes contributing to each result is shown under each plan name (eg n = 87).
 Error bars show 95% confidence intervals of the mean.

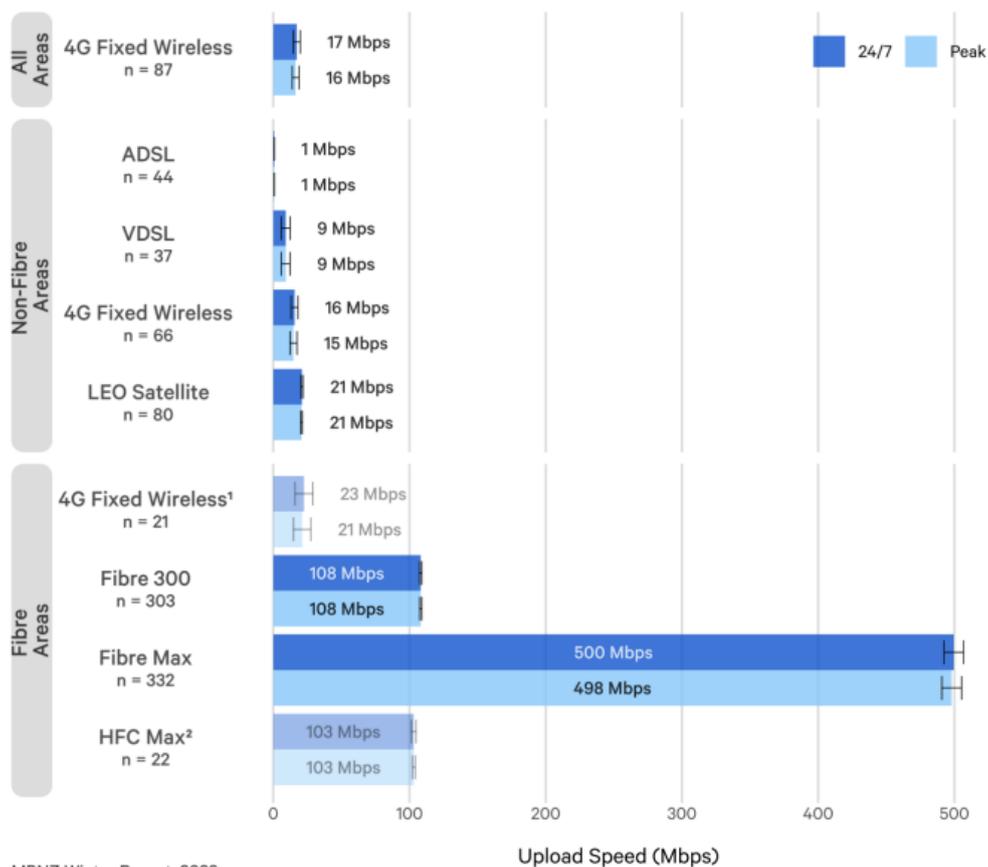


MBNZ Winter Report, 2023

²⁵ Commerce Commission “Measuring Broadband New Zealand – Winter Report” (28 September 2023), at Figure 10.

Figure 5.2 Average upload speeds from MBNZ report²⁶

Average (24/7) of monthly household weighted averages. Peak hours are Monday - Friday, 7pm - 11pm. The number of Whiteboxes contributing to each result is shown under each plan name (eg n = 87). Error bars show 95% confidence intervals of the mean.



5.15 The data in Figures 5.1 and 5.2 indicates that average download and upload speeds for fibre services remain significantly higher than those provided for by other existing technologies.

²⁶ Commerce Commission “Measuring Broadband New Zealand – Winter Report” (28 September 2023), at Figure 14.

- 5.16 In May 2023, the government announced that it had awarded spectrum in the 3.5GHz band to the three mobile network operators (Spark, OneNZ, and 2degrees) to support 5G deployment, with long-term (20-year) rights coming into effect from 1 July 2023.²⁷ 5G technology is expected to support higher speed, lower latency wireless broadband services. However, the mobile network operators are in the early stages of their deployment of 5G technology,²⁸ and any competitive impact of 5G fixed wireless appears to remain uncertain at this stage.
- 5.17 In our assessment of reasonable grounds, we will also consider factors like the entry or exit (or proposed entry/exit) of different providers, and other significant developments such as regulatory changes (including the proposed removal of geographic restrictions on LFCs other than Chorus).

Process and approach paper submissions

- 5.18 On 31 August 2023, we published a process and approach paper for PQP2.²⁹ We outlined that we intended to consider whether there are reasonable grounds to conduct a deregulation review in 2024 and that we intended to release an emerging views paper on which we would invite submissions.³⁰
- 5.19 The process and approach paper indicated that the process relating to any deregulation review under s 210 of the Act was out of scope for the process and approach paper and that we would consult on the deregulation review in a separate paper (this paper).³¹ Two submitters on the process and approach paper gave their views on the s 210 deregulation review.

Submissions

- 5.20 One NZ submitted that there is no basis for deregulation of any fibre service or PQ regulation being removed.³²

²⁷ Hon G Andersen, Minister of Digital Economy and Communications “Govt to speed up 5G rollout to regional towns” (press release, 12 May 2023). Each of the MNOs was awarded 80MHz, which is sufficient to operate nationwide 5G networks, and a further 100MHz was awarded to the Interim Māori Spectrum Commission.

²⁸ For example, our 2022 annual telecommunications monitoring report notes that there were around 3,000 wireless broadband connections on 5G (page 7), and 5G population coverage was 18% (page 9).

²⁹ Commerce Commission “Fibre price-quality regulation – Proposed process and approach paper for the 2025-2028 regulatory period” (31 August 2023).

³⁰ Commerce Commission “Fibre price-quality regulation – Proposed process and approach paper for the 2025-2028 regulatory period” (31 August 2023), at [2.9].

³¹ Commerce Commission “Fibre price-quality regulation – Proposed process and approach paper for the 2025-2028 regulatory period” (31 August 2023), at [2.7.1].

³² One NZ “One NZ submission on fibre price-quality regulation: proposed process and approach for the 2025-2028 regulatory period” (28 September 2023), at [6].

- 5.21 Chorus submitted it was concerned with the timing of any potential deregulation review and how this will affect the PQ path setting exercise for PQP2.³³ Chorus submitted that “before the start of each regulatory period” in s 210(3) indicates that the intention of Parliament was that the Commission should consider the appropriate scope of FFLAS regulation for each regulatory period so that any revised scope could take effect for the upcoming regulatory period.³⁴
- 5.22 We intend to respond to these submissions at a later date.

³³ Chorus “PQP2 Process and Approach submission” (28 September 2023), at [138].

³⁴ Chorus “PQP2 Process and Approach submission” (28 September 2023), at [140].