Fibre deregulation: draft framework and recommendation

Submission | Commerce Commission

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Introduction

1. Thank you for the opportunity to provide feedback on the Commission's:

    a. Draft recommendation that Voice FFLAS should continue to be regulated under Part 6 of the Telecommunications Act 2001 (Act).

    We support the Commission's draft recommendation that Voice FFLAS should continue to be regulated.

    b. Draft legal and economic framework for fibre deregulation reviews under section 210 of the Act.

    In our view, the Commission's proposed economic framework should ensure that it has sufficient regard to the interdependent, multi-service nature and national importance of the fibre network.

Framework

2. The Commission proposes to apply a four-step economic framework to a deregulation review:

    a. Describing the product or service, including whether the geographic dimension of the relevant market should be considered at a national, regional, or more granular level.

    b. Identifying alternatives that could provide direct and indirect competitive constraints to the service, including in adjacent and downstream retail markets

    c. Considering the effectiveness of competition in the relevant markets including the effect of competition on substantial market power, and

    d. Applying the legal framework, including testing alignment with the purpose statement in section 162.

3. The framework seeks to identify competitive and other constraints on the regulated provider. We agree that understanding how the service is used, and competitive constraints, is a useful starting point for a deregulation review.

4. However, in our view, the proposed framework, which implies a focus on a single service only, is unlikely to expose the competition and regulatory complexities associated with the multi-product Chorus and LFC fibre network that sits at the centre of the telecommunications sector. Competition analysis would typically start with a robust determination of the relevant market rather than a product service description.

5. Further, fibre network inputs and costs are shared across multiple products and a revenue capped provider's pricing decisions - pricing up to what the market will bear at a portfolio level - may give the appearance of a competitive constraint whereas efficient pricing closer to incremental costs would suggest a lack of competitive constraint. A focus on a single variant (fibre service) facing competitive constraints can leave underlying market power and the sector's reliance on the fibre network untouched.

6. Further, there is significant risk of error when comparing prevailing prices of a single variant (firms have a natural incentive to price up to the next alternative) rather than an efficient price or investment that would otherwise best meet the s162 purpose. The bitstream reasonable grounds review further highlighted that the regulatory framework can lead to excessive prices above competitive levels in single regulatory periods that are unreflective of medium-term costs or returns. In other words, the Commission should consider the counterfactual of what an efficient outcome might be and whether deregulation brings outcomes closer to that point than the regulated approach.

7. To mitigate the risk of a fragmented approach, as set out in our earlier submissions, the Commission should:

    a. Consider the nature of competition across several related services and the totality of the effects in the market of deregulating a subset of services in considering whether deregulation is warranted.

    b. Consider whether deregulation of a service or variant will – across the RAB or the relevant network or platform (rather than for that specific service) – better promote section 162 outcomes than the counterfactual. In other words, whether deregulation of a specific service better promotes s162/168 in the context of the overall fibre network and regulatory framework.

8. As set out in our earlier submissions on the reasonable grounds assessment, it is also open to the Commission to promote certainty by providing advice on the competition outcomes it's seeking to achieve through Part 6 regulation along the lines set out in Vogelsang and Cave report to the Commission[1]. The risk is that - without the Commission setting out a clear view of competition outcomes it is seeking and recognising the path dependency Richard Feasey notes in his report[2] – competition outcomes will be the product of Chorus decisions rather than the Commission.

Voice services recommendation

9. We support the Commission's draft recommendation that Voice FFLAS should continue to be regulated.

10. As noted in the draft recommendation, there is significant competition for voice services across fixed line, mobile and OTT providers.

11. However, when you consider overall s162 outcomes from regulating the fibre provider, there are likely to be countervailing costs the Commission's current approach doesn't capture. Chorus and LFCs already has significant flexibility to set technical specifications of service variants and price FFLAS services - save for specific anchor services – and deregulation of a bitstream variant such as a voice access on its own is unlikely to provide them with materially greater flexibility or incentives to innovate or respond to competitive alternatives.

[1] See report for the Commerce Commission: *Framework for promoting competition, Ingo Vogelsang & Martin Cave, November 19, 2019*

[2] https://www.comcom.govt.nz/assets/pdf_file/0026/366326/Feasey-NZ-fibre-regime-final-report-20-February-2025.pdf

12. Anchor services have different consumer protection purpose– such as ensuring the availability of an affordable fixed landline service over the fibre network – which would be subject to separate evaluation. To the degree that the Commission wishes to promote flexibility, it can consider this through an anchor service review.

13. We further agree that unpicking the regulatory cost model and framework would be a significant exercise, increasing the complexity of regulating the remaining FFLAS services. In addition, in our view, splitting the regulatory model is likely to deliver worse s162 outcomes overall than retaining the voice service variant with other bitstream services in the model. For example, relatively arbitrary cost allocations would determine voice service outcomes and potentially facilitate regulatory gaming by regulated providers.

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