By email: Communicationspolicy@mbie.govt.nz

Communications Policy Team
Ministry of Business, Innovation & Employment
Wellington

LFC supplementary submission on *Exposure draft of regulations to be made under section 226 of the Telecommunications Act 2001*

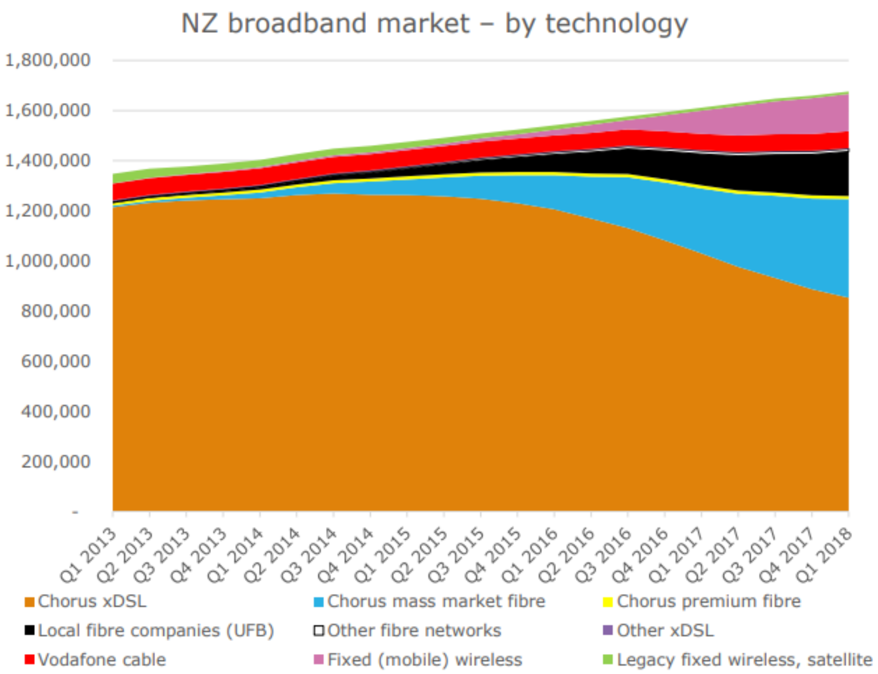
1. This supplementary submission is made jointly by Enable Networks Ltd and Ultrafast Fibre Ltd (**LFCs**).

2. We have been asked to provide our views on a possible modification to the regulations so that only Information Disclosure regulation applies to Chorus in respect to FFLAS that it provides in our respective UFB geographic areas.

3. We are advised that the rationale for this suggested change is that it would be disproportionate to apply PQ regulation to Chorus in our UFB areas where we have the largest fibre market share but are subject to ID regulation only.

4. This analysis is short-sighted. It ignores Chorus' scale and market power. Chorus operates the national copper network, the fibre to the premises fibre network in more than 70% of the national UFB coverage area, an extensive national fibre backhaul network including in LFC areas, copper and non-UFB fibre networks in commercial areas, a dense metro backhaul fibre network, fibre to the majority of cell sites, and fibre to the premises networks in residential and business greenfield sites, all in LFC UFB areas.

5. The extent of Chorus' commanding market position is demonstrated in the table below, taken from Appendix B of Chorus' 14 November 2018 Bond Offer:



Source: IDC

6. Chorus has the incentive to use its market power to seek to undermine the business case for the LFCs' fibre investment. It is currently doing so with its copper services. Chorus has invested $20 million to upgrade its copper services to VDSL2 vectoring technology in LFC UFB areas but not its

own UFB areas. Chorus has not however increased the price that it charges retailers for this upgraded service; these costs are borne across its national network, creating a cross subsidy from revenues earned outside the LFC areas to support the investment in LFC areas.

7. Chorus has acknowledged that this strategy was specifically adopted to impede migration of customers from its copper network to LFC fibre networks, and that the strategy has been successful. In our view this a clear case of abuse of market power.

8. Vector, in its submission on the Commerce Commission's Fibre Regulation Emerging Views Technical Paper, refers to this tactical behaviour by Chorus in LFC areas:

   We observe that Chorus is prepared to compete aggressively with other LFC networks when it has the opportunity. In this case, Chorus overbuilds the other LFCs with copper upgrades with VDSL vectoring, which further suppresses the uptake of UFB in those LFC areas. Chorus also offers lower DFAS pricing in those candidate areas where it is not the incumbent LFC. Again, the Crown's investment in UFB is undermined.

   Other LFCs will continue to be under pressure from Chorus' tactical behaviour, compromising the investment provided by the communities in those LFC areas in their networks.

9. The removal of PQ regulatory obligations on Chorus fibre services in LFC areas would provide Chorus with the ability to further extend the leverage of its market power into fibre services. If Chorus were not subject to PQ regulation in LFC areas it is likely that section 201 (geographically consistent pricing) would not apply in our areas. Chorus would therefore be free to cross subsidise lower prices in our areas from the higher prices it charges in its own UFB areas. This is inconsistent with one of the fundamental objectives of the fibre regime (as it was for copper) that Chorus charge a single geographically averaged price across the country.

10. A feature of the UFB Initiative was that LFCs were required to build a network to service 100% of the coverage area, and to charge the same price across the coverage area; it was recognised that this involved a cross-subsidy from the less expensive to serve densely populated areas to the more expensive to serve less dense areas.

11. If Chorus is able to cherry-pick and pocket price in denser lower cost-to-serve LFC areas, the business case for our UFB investments will be completely undermined, and our ability to earn sufficient income to cover our efficient operating costs and a normal return on, and recovery of, our invested capital will be frustrated.

12. We are firmly of the belief that it is the responsibility of the Minister to ensure, when recommending regulation under section 226, that revenues we receive over the life of our fibre assets are sufficient to cover our efficient operating costs and a normal return on, and recovery of, our capital invested. This was the promise set out in the Government's 2011 *Statement to the Commerce Commission Concerning Incentives for Businesses to Invest in Ultra-fast Broadband Infrastructure.*

13. PQ regulation must be applied to Chorus nationally so it does not have the ability to leverage its market power as discussed above into LFC fibre areas.

2 August 2019

Steve Fuller
CEO, **Enable Networks Limited**

John Hanna
CEO, **Ultrafast Fibre Networks**