

**IN THE MATTER**

of the Resource Management Act 1991 ("**RMA**")

**AND**

**IN THE MATTER**

of the Proposed Otago Regional Policy Statement  
2021 ("**PORPS**")

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**LEGAL SUBMISSIONS ON BEHALF OF CHORUS NEW ZEALAND LTD,  
VODAFONE NEW ZEALAND LTD AND SPARK NEW ZEALAND TRADING LTD**

**PART 2 – EIT**

**16 MARCH 2023**

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## 1. INTRODUCTION

- 1.1 These legal submissions are presented on behalf of Spark New Zealand Trading Limited, Vodafone New Zealand Limited<sup>1</sup> and Chorus New Zealand Limited (together referred to as the "**Telecommunication Companies**").
- 1.2 As set out in our legal submissions on the SRMR and HCV chapter, the Telecommunication Companies are interested in the PORPS insofar as the proposed provisions impact on the ability to maintain, upgrade and provide telecommunications infrastructure in the Otago Region. An enabling planning framework for telecommunications infrastructure is critical to ensuring the Telecommunication Companies can continue to provide and upgrade telecommunications infrastructure in the Otago Region. Given this, the primary focus of the Telecommunication Companies' submissions on the PORPS and independent planning evidence is to ensure that the provisions appropriately recognise and provide for critical infrastructure such as the telecommunication network.
- 1.3 The Telecommunication Companies filed a broad submission, seeking a number of amendments. However, in accordance with the direction from the Hearing Commissioners,<sup>2</sup> these submissions only address matters related to Energy, Infrastructure and Technology ("**EIT**").
- 1.4 It is critical that an entirety approach is taken to infrastructure. A lack of clear guidelines will increase in compliance costs and investment risk for infrastructure providers.
- 1.5 These legal submissions address:
- (a) Telecommunications networks and their regulatory framework;
  - (b) The definition of *Regionally Significant Infrastructure* and consequential amendments;
  - (c) The changes needed to Policies EIT-INF-P11 and EIT-INF-P13 if the definition of Regionally Significant Infrastructure is not changed; and
  - (d) Objective EIT-INF-04.

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<sup>1</sup> Vodafone is changing its name to One New Zealand in early 2023.

<sup>2</sup> Dated 3 October 2022.

## **2. TELECOMMUNICATIONS NETWORKS AND THEIR REGULATORY FRAMEWORK**

- 2.1 In our previous legal submissions on Significant Resource Management Issues for the Region ("**SRMR**") dated 8 February 2023, we provided a detailed overview on the nature, role and importance of the telecommunications network. We do not intend to repeat that and instead wish to focus on the key points for the EIT topic.
- 2.2 Telecommunications infrastructure is both nationally and regionally significant infrastructure that provides important social and economic benefits by enabling and improving connectivity for homes and businesses across New Zealand.
- 2.3 As set out in the corporate evidence for the Telecommunication Companies, the benefits of telecommunications infrastructure are multifaceted.<sup>3</sup> In particular, the digital connectivity and services provided by the Telecommunication Companies underpin a range of services which contribute to the social and economic wellbeing of people and communities.<sup>4</sup> Crucially, it operates a network and is only as strong as its weakest link.

### **National Environmental Standards for Telecommunications Facilities 2016**

- 2.4 Telecommunications infrastructure is regulated by a number of planning frameworks under the RMA, the most significant being the National Environmental Standards for Telecommunication Facilities ("**NES-TF**"). The Telecommunications Companies primarily rely on the NES-TF to upgrade its existing infrastructure and to provide new infrastructure.<sup>5</sup>
- 2.5 The NES-TF provides for significant elements of the telecommunications network as permitted activities, for example telecommunications cabinets in all locations, underground telecommunication lines, and radio frequency exposures in all locations. However, regulated activities that do not meet the relevant permitted activity standards remain subject to the relevant district plan. This is because regulation 12 provides that where a resulting activity is not a permitted activity then the status of the activity is to be determined under regulations 14 to 18, which in turn cross refer to the relevant district plan.<sup>6</sup> The

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<sup>3</sup> Evidence of Messrs Clune, McCarrison and Kantor dated 23 November 2022 at [3].

<sup>4</sup> Evidence of Messrs Clune, McCarrison and Kantor dated 23 November 2022 at [3.7].

<sup>5</sup> Evidence of Messrs Clune, McCarrison and Kantor dated 23 November 2022 at [4.1].

<sup>6</sup> Resource Management (National Environmental Standards for Telecommunication Facilities) Regulations 2016, regulation 12, 14 - 18.

NES-TF also provides that certain types of district plan rules relating to sensitive natural and built environments (eg historic heritage, natural features and landscapes and significant habitats for indigenous fauna and vegetation) still apply to regulated activities.<sup>7</sup> As a result, the NES-TF is important, but it is not a full answer for telecommunications infrastructure.

- 2.6 It is our submission that PORPS will need to set out a workable and enabling framework for telecommunications infrastructure to ensure that the Telecommunication Companies can continue to improve, maintain and install new infrastructure in the Otago region (even where that infrastructure is required to be located in sensitive environments). The PORPS needs to recognise that there are circumstances where there is a functional or operational need to locate telecommunications infrastructure in sensitive areas.
- 2.7 As currently drafted, the relevant planning framework includes strong avoid adverse effects directives with no exception or consenting pathway for telecommunications infrastructure. Ultimately an avoidance approach in the relevant planning framework can compromise the ability for the Telecommunication Companies to service communities where there are functional and operational needs to locate infrastructure in sensitive areas.
- 2.8 It is therefore essential that the PORPS include an enabling framework for infrastructure to ensure that the Telecommunication Companies can continue to maintain, operate and provide telecommunication services to people and communities in the Otago Region.

### **3. DEFINITIONS IN THE PORPS**

- 3.1 The Telecommunications Companies in their submission sought the following:
- (a) amendments to the definition of *Nationally Significant Infrastructure*; and
  - (b) either an amendment to the definition of *Regionally Significant Infrastructure*; or
  - (c) a new definition for the sub-term *Telecommunication and Radiocommunication Facility*.

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<sup>7</sup> Resource Management (National Environmental Standards for Telecommunication Facilities) Regulations 2016, regulation 44 – 52.

- 3.2 The focus of this submission is on the definition of *Regionally Significant Infrastructure* in support of the section 42A author's definition.

**Definition for regionally significant infrastructure**

- 3.3 Under the current proposed wording, *Telecommunication and Radiocommunication Facilities* is included in the notified definition of *Regionally Significant Infrastructure*.

- 3.4 Initially, the section 42A author did not agree with the amendment suggested by the Telecommunication Companies<sup>8</sup> and instead recommended the following amendment to the definition:

Clause 4: telecommunication and radiocommunication facilities as respectively defined in section 5 of the Telecommunications Act 2001 and in section 2 of the Radiocommunications Act 1989.

- 3.5 Following pre-hearing discussions, the section 42A author updated his position and recommended an amendment to the definition of *Regionally Significant Infrastructure* as follows:<sup>9</sup>

telecommunications and radiocommunications networks

- 3.6 The Telecommunication Companies support this amendment because the reference to "networks" rather than "facilities" provides greater clarity that telecommunication networks in their entirety are considered regionally significant Infrastructure. Without that change, due to there being little guidance on what "facility" means, it is unclear if for example a cable distribution network such as fibre would fall within the definition of "facility". As a result, such infrastructure may not be considered *Nationally Significant Infrastructure* in PORPS, and therefore not fall within *Regionally Significant Infrastructure*.<sup>10</sup> This would result in key networks not having the benefit of the enabling framework and therefore potentially not able to be provided in some areas, despite the need.

- 3.7 As a result, and as discussed in the HCV topic and other parts in the RPS, if the use of "facilities" were to remain in the definition, in our submission there would be the need for a range of changes to other aspects of the RPS to

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<sup>8</sup> In their submission, the Telecommunication Companies sought either (a) A new definition of *Telecommunication and Radiocommunication Facilities* is included that encompasses all lines and wireless networks or (b) Amendment to the definition of *Regionally Significant Infrastructure* to reference "**Networks**" rather than "Facilities".

<sup>9</sup> Supplementary evidence of Marcus Langham at [45].

<sup>10</sup> Evidence of Christopher Horne (EIT) dated 23 November 2022 at [5.5].

address that gap. By contrast, the section 42A author's proposal is simple, elegant and effective.

#### **4. CHANGES TO POLICIES EIT-INF-P11 AND EIT-INF-P13 IF DEFINITION OF REGIONALLY SIGNIFICANT INFRASTRUCTURE IS NOT CHANGED**

4.1 As outlined earlier in these submissions, if the amended definition to the definition of Regionally Significant Infrastructure is not adopted by the Commissioners, there are a range of changes needed to other parts of the PORPS to ensure that telecommunications infrastructure is appropriately provided for. Two examples sit within the policies of the EIT chapter, with Policies EIT-INF-P11 and EIT-INF-P13. These alternative amendments are detailed below.

##### **Policy EIT-INF-P11**

4.2 In their submission, the Telecommunication Companies sought to broaden Policy EIT-INF-P11 by deleting reference to "*nationally and regionally significant*" infrastructure. The section 42A author disagrees that the policy needs to be broadened, but fails to provide any analysis as to why this might be the case.

4.3 If parts of the telecommunications infrastructure network fall outside the definition of Regionally Significant Infrastructure, then the Telecommunication Companies continue to seek changes to this policy, as described by Mr Horne, to ensure that telecommunications/fibre lines networks can be located in sensitive environments such as Significant Natural Areas where access to undertake maintenance may be required.<sup>11</sup>

##### **Policy EIT-INF-P13**

4.4 In its primary submission, the Telecommunication Companies sought amendment to clause 2(a) of policy EIT-INF-P13 so that the effects management regime applies to all infrastructure.

4.5 The section 42A author does not agree with the Telecommunication Companies on the basis that the provision is intentionally targeted at *nationally and regionally significant infrastructure* due to its importance and considered it inappropriate to broaden its application to infrastructure more generally.<sup>12</sup>

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<sup>11</sup> Evidence of Christopher Horne (EIT) dated 23 November 2022 at [7.8].

<sup>12</sup> Section 42A Hearing Report (EIT) dated 18 May 2022 at [730].

However, strict avoidance of effects may have unintended consequences for infrastructure serving the needs of people and communities.<sup>13</sup>

4.6 Again, if the Telecommunications Companies' primary relief in relation to the definition of Regionally Significant Infrastructure is not accepted, they seek that this policy is amended to ensure that it is workable. In particular, the Telecommunication Companies seek an amendment to Policy EIT-INF-P13(2) to:

- (a) ensure all infrastructure is subject to the management approach in EIT-INF-P13(2)(a);
- (b) remove the avoidance of effects requirement in subclause which applies to other infrastructure under clause 2(b);<sup>14</sup> and
- (c) replace the word "possible" with "demonstrably practical".<sup>15</sup>

## 5. OBJECTIVE EIT-INF-O4

5.1 The purpose of Objective EIT-INF-O4 is to provide for effective, efficient and resilient infrastructure that enables communities across the Otago region to provide for their health, safety and wellbeing.

5.2 The section 42A author considers the phrase "environmental limits" to be appropriate for the purpose of providing clarity to a range of bottom lines and recommends the removal of "within environmental limits".<sup>16</sup>

5.3 In the supplementary evidence of Ms Boyd, it was recommended that "Environment Limit" was changed to "Limit" as this reflects what is currently in the *National Policy Statement for Freshwater Management 2020*.

5.4 The Telecommunication Companies are not satisfied that this amendment resolves their concerns. It appears that the phrase "*within environmental limits*" was introduced following the release of the exposure draft to the Natural and Built Environment Bill last year where that phrase was used. As the proposed RPS is notified under the RMA, it should use terminology more consistent with the current RMA framework. It is not good practice to rely on terminology that is not conditioned or well understood in an RMA context.

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<sup>13</sup> Evidence of Christopher Horne (EIT) dated 23 November 2022 at [8.7].

<sup>14</sup> Evidence of Christopher Horne (EIT) dated 23 November 2022 at [8.12].

<sup>15</sup> Evidence of Christopher Horne (EIT) dated 23 November 2022 at [8.10].

<sup>16</sup> Section 42A Hearing Report (EIT) dated 18 May 2022 at [575] and [576].

Given the PORPS will be applied under the RMA, in our submission it should use RMA-familiar wording, as provided in Mr Horne's evidence.<sup>17</sup>

**Dated** 16 March 2023

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<sup>17</sup> Evidence of Christopher Horne (EIT) dated 23 November 2022 at [6.14].