ENABLE NETWORKS LIMITED AND ULTRAFAST FIBRE LIMITED

SUBMISSION ON FIBRE INPUT METHODOLOGIES FURTHER CONSULTATION DRAFT – REASONS PAPER 23 JULY 2020

13 AUGUST 2020

1. Introduction

1.1 This submission is made by Enable Networks Limited (**Enable**) and Ultrafast Fibre Limited (**UFF**) in response to the Commission's *Fibre input methodologies further consultation draft - reasons paper* dated 23 July 2020 (**Further Consultation Reasons Paper**).

1.2 We are pleased that the Commission has taken account of our previous submissions in relation to regulatory balance dates for ID, the minimum level of asset specificity in the pre-implementation period and the application of a materiality threshold on shared costs. These changes will ensure proportionality in the implementation of ID regulation.

1.3 This submission addresses only the proposed changed decisions set out in the Further Consultation Reasons Paper.

2. Geographic area

2.1 We agree that the Commission must identify "a geographic area where a regulated fibre service provider (other than Chorus) has installed a fibre network as part of the UFB initiative" in order to delineate the areas in which Chorus' FFLAS will be subject to ID regulation only.

2.2 The Commission acknowledges that "the coverage areas in the UFB contracts would be a useful starting point"[1] for this assessment, and that it will draw on the data used in its SFA determination in this process.

2.3 In our view the Commission should define the geographic areas for the purposes of regulation 6 as the coverage areas in the UFB contracts. We cannot see any benefit in the Commission applying a more granular approach, which can only increase the cost and uncertainty of the regulatory process, whereas the UFB coverage areas are clearly defined and objectively identifiable.

3. Definition of FFLAS services

3.1 The Act defines FFLAS as "a telecommunications service that enables access to, and interconnection with, a regulated fibre service provider's fibre network". We said in our submission on the Draft Decision Reasons Paper that while we agreed that what the Commission now describes as "transport services" were regulated services, "the case for including network services or property development services within the scope of the regulated service is less clear cut. While these services may support the provision of FFLAS, it is arguable that they do not "enable" access to, and interconnection with, the fibre network".[2]

3.2 In our cross-submission on the Draft Decision Reasons Paper we noted that while the Commission had in the Draft Decision included in the scope of regulated FFLAS "connection services on the basis that they were "necessary and proximate to the fibre network"[3] we doubted that either network design or property development services were sufficiently necessary and proximate to fall under the regulatory umbrella.[4]

3.3 In its further consultation, the Commission has determined that property development services should be included in the definition of FFLAS but network services should be excluded, on the basis (it appears) that network services "are not generally associated with a particular property

[1] Further Consultation Reasons Paper [2.27]

[2] Enable and UFF *Submission on NZCC Fibre input methodologies – draft decision – reasons paper* 28 January 2020 [3.2]

[3] NZCC *Fibre input methodologies – draft decision – reasons paper* 28 January 2020 (Draft Decision) [2.61]

[4] Enable and UFF *Cross Submission on NZCC Fibre input methodologies – draft decision – reasons paper* 17 February 2020 [9.3]

and largely consist of charges to third parties in connection with work near, or damage to, Chorus' network". [5]

3.4 This distinction between property development services and network services makes no sense. Whether a service is related to a specific property, or relates to communal infrastructure, has no relevance to the statutory test. In addition, the Commission's reference to Chorus' network suggests the Commission has overlooked the fact that the definition applies equally to the other LFCs.

3.5 The Commission appears to have conflated the definitions in the Telecommunications Act 2001 (**Act**) of a telecommunications service ("a service that enables or facilitates the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal etc) and a fibre fixed line access service (a telecommunications service that enables access to, and interconnection with, a regulated fibre service providers fibre network).

3.6 The Act requires a two part test to be applied:

(a) does the service enable or facilitate the conveyance by electromagnetic means of signs, signals, etc; and

(b) if yes, does the service enable access to or interconnection with the fibre network.

3.7 As Chorus submitted, a property development service is not a telecommunications service.[6] It is too far removed from a service which enables or facilitates the conveyance of signals by electromagnetic means and its inclusion "would make the boundaries of the regulated service definition vague and unpredictable".[7]

3.8 While a network service may be more likely to fall with the first limb of the test (telecommunications services") it does not satisfy the second limb of the test as it does not enable interconnection with the fibre network. The Commission acknowledged in the Draft Decision that the use of the word "enable" alone in the FFLAS definition was narrower in scope than "enable or facilitate" used in the definition of telecommunications service and denoted a subset of telecommunications services.[8]

3.9 As neither property development services nor network services enable ("make possible") access to or interconnection with the fibre network, they do not fall within the subset of telecommunications services that comprise FFLAS.

3.10 On that basis, neither property development services nor network services fall within the definition of FFLAS in the Act.

4. Crown financing

4.1 We support the proposal that the financing rate for Crown financing for information disclosure (ID) regulation will, for both pre and post implementation periods, be calculated applying:

(a) the regulatory cost of debt where financing has the characteristics of debt;

(b) the regulatory cost of equity where financing has the characteristics of equity;

(c) the regulatory weighted average cost of capital (WACC) where financing is a mixture of debt and equity.

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[5] Further Consultation Reasons Paper [2.73.2.74]

[6] Draft Decision [2.71.1]

[7] Draft decision [2.71]

[8] Draft Decision [2.60]

5. Non-standard lead-ins

5.1 We note that no part of the Enable or UFF fibre network were constructed as part of a liquidated damages settlement with CIP, so this determination relates only to Chorus.

6. Asset specificity

6.1 The minimum level of asset specificity has been reduced to better align with the information held by suppliers of FFLAS (at para 3.105). Schedule A of the updated draft determination adopts a more principle-based approach and specifies that assets in the RAB must be able to be described based on:

(a) network layer (layer 1 or 2);

(b) asset class (based on GAAP reporting);

(c) geographic location (as recorded in a supplier's asset management or GIS systems);

(d) shared with other parties (for the purpose of applying the cost allocation IM to assets and opex and reporting right of use (ROU) asset values); and

(e) shared with other services (for the purpose of applying the cost allocation IM).

6.2 We support this improved drafting. It better reflects the information which we have available about our assets and is more consistent with internal recording processes and systems than the original draft decision which specified more granularity. This principle-based approach is consistent with minimising cost and complexity. It avoids the need for us to attempt to restate historical information; a process which would have been a costly and possibly arbitrary exercise.

6.3 Schedule A also includes a requirement to retain information about 'additional RABs' which may be specified by the Commission. Examples include subsets of the ID or PQ RABs, or fibre assets which were not part of the UFB initiative. We have concerns that it may not be possible to comply with this requirement on an ex-post basis and therefore it is inconsistent with promoting regulatory certainty. Given the requirement to maintain asset information by layer, asset class and geographic location, this 'additional RAB' requirement appears to be superfluous. We submit that it is deleted from the determination.

7. Other amendments to the asset valuation IM

7.1 There are several other proposed refinements to the asset valuation IM which we support. These include:

(a) transitional provisions for the price-quality (PQ) regulatory asset base (RAB) for the first regulatory period (at para 3.75). This is a pragmatic approach which is necessary for implementing the first PQ determination at implementation date;

(b) allowing assets to enter the RAB once they are available for use (at para 3.65). The recognises the fact that assets are constructed and made available for use prior to uptake;

(c) allocating the financial loss asset to UFB-related core fibre assets for the purpose of deregulation or sale adjustments which may occur after implementation date and clarifying how this applies to geographies subject to ID regulation only, or ID and PQ regulation (at para 3.89). This is consistent with the policy intent which recognises that the ability to recover the financial loss asset is aligned to the core RAB which falls within the definition of the regulated FFLAS service;

(d) allowing the ID depreciation rules which apply to the LFCs subject only to ID regulation to also apply to those geographic areas supplied by Chorus which are not subject to PQ regulation (at para 3.101). This ensures consistency in the asset valuation IM for ID purposes which enhances regulatory certainty; and

(e) the quantity of network spares included in the RAB to reflect good industry practice rather than historical reliability (at para 3.126). We agree that historical reliability is not a suitable measure for relatively new networks.

8. Cost allocation IM

8.1 The updated draft determination introduces a two-step process for the allocation of operating costs and assets (at para 3.137). It is proposed to firstly allocate to regulated FFLAS, and secondly to allocate between classes of regulated FFLAS, i.e. ID and PQ. We support this proposal which improves the transparency of the cost allocation IM, while retaining a principle-based approach.

8.2 We also note the provision for the Commission to specify other FFLAS classes, and to extend the cost allocation IM to the 'additional FFLAS class' using the same allocation approach to be applied to ID or PQ classes. Cost and asset allocators are not to be prescribed in the IM. We agree that the cost allocation IM should be applied in a consistent manner across all classes of FFLAS and note that the principle-based approach adopted for this IM is well suited to this purpose.

8.3 The draft decision proposed a cap on shared costs equivalent to the unavoidable costs that would be incurred if services that are not regulated FFLAS were not supplied. The updated draft decision is that this cap is to apply to shared assets or costs that would have a material effect on the total costs of regulated FFLAS (at para 3.168). We acknowledge that regulatory disclosures are expected to reflect the materiality considerations of regulated suppliers and their auditors. We therefore support this amendment which is consistent with a proportionate approach to regulation.

9. Regulatory balance date

9.1 We agree with the proposal that it is not necessary to specify a regulatory balance date in the IMs for ID regulation, and that the balance date for each supplier subject to ID only will be specified in the s170 ID determination for that supplier.

9.2 As we noted in our submission on the draft decision, imposing a regulatory balance date which differed from our financial reporting balance dates would have added considerable cost and complexity to our businesses, and be inconsistent with the proportionate regulation principle. We appreciate the Commission's acknowledgement of these issues in the updated draft decision.

10. Aligning Part 4 and Part 6 cost of capital IM reviews

10.1 We support the proposal to align the cost of capital IM review for the TAMRP with the Part 6 review because this will promote regulatory certainty.

10.2 The current lack of alignment creates regulatory uncertainty. It would be unhelpful if there were changes to the IM under one Part of the Act which are not replicated in the other Part. This is currently the case with the draft decision of the TAMRP under Part 6, which differs to the prevailing TAMRP under Part 4.

11. Impact of Covid-19

11.1 We agree with the Commission that no changes to the IMs are required at this stage arising from the Covid-19 pandemic.

13 August 2020