

Cross submission on the Draft Clarification of the Deeds of Open Access Undertakings dated 3 August 2018

31 August 2018

1. This cross submission is made by Enable Networks Limited, Ultrafast Fibre Limited, Northpower Fibre Limited and Northpower LFC2 Limited in response to the submission dated 17 August 2018 by Spark (**Submission**).

2. The Submission asserts that:¹

...the Act expressly anticipates undertakings that relate to an LFC's wider fibre optic communications network...

While some elements of the legislative framework for undertakings make specific reference to a fibre to the premises access network or relevant services, a number of the requirements relate to the LFC.

3. The Submission does not refer to section 156AD(5) of the Act which provides that “an undertaking must not provide for rules or obligations in respect of services that are not relevant services (including layer 1 services)”. A relevant service, as explained in the Clarification Request, is a wholesale telecommunications that is provided using, or that provides access to unbundled elements of, a fibre to the premises access network that is owned or operated by an LFC.

4. It follows that the Act does not, as argued in the Submission, anticipate “undertakings that relate to an LFC's wider fibre optic communications network”, but to the contrary, specifically prohibits such undertakings.

5. The Submission states that “it remains unclear what practical concern the proposal is seeking to address”.² The concern is clearly set out in clause 4.6 of the Clarification Request:

Each Applicant's Undertaking, by purporting to provide for rules or obligations in respect of services which are not relevant services, breaches section 156AD(5)(a) of the Act. As a consequence, those rules or obligations are ultra vires and of no effect.

6. The clarification is not material, for the reasons set out in paragraph 6.2 of the Clarification Request, and referred to in clause 36 of the Draft Clarification. The proposed clarification:

- (a) “gives effect to the true intent of each of the Deeds (The Deeds state in the first sentence “the Undertakings are given in accordance with, and are Undertakings for the purposes of part 4AA of the ...Act”);
- (b) bring the Deeds within the scope of the Act (‘the primary enabling legislation’); and
- (c) makes the Applicants' obligations consistent with Chorus Limited' obligations under its equivalent deed of undertaking.”

ENDS

¹ Spark *Proposed clarification of LFC Fibre Deeds: Submission* (17 August 2018) at paragraphs 12 and 13 respectively.

² At paragraph 6.