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Equivalence and non-discrimination – guidance on the Commission's approach for telecommunications regulation

Response to submissions on the draft guidance

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Associated documents

Publication date	Title
18 October 2019	Equivalence and non-discrimination in New Zealand telecommunications markets – Ingo Vogelsang report – 16 October 2019
4 March 2020	[DRAFT] Equivalence and non-discrimination - guidance on the Commission's approach for telecommunications regulation
2 April 2020	Fixed line telecommunications regulation overview – Context of the regulatory framework
2 April 2020	Equivalence and non-discrimination in New Zealand telecommunications markets – Ingo Vogelsang report – Response to submissions
30 September 2020	Equivalence and non-discrimination - guidance on the Commission's approach for telecommunications regulation

Index of submissions and cross-submissions

Publication date	Title	Referred to in this document as
	Submissions	
4 June 2020	Chorus – Submission on Unbundled layer 1 fibre service – Draft guidance – 2 June 2020	Chorus, sub, […]
4 June 2020	Enable Networks Limited and Ultrafast Fibre Limited – Submission on Unbundled layer 1 fibre service – Draft guidance – 2 June 2020	Enable / UFF, sub, […]
4 June 2020	Spark – Submission on Unbundled layer 1 fibre service – Draft guidance – 2 June 2020	Spark, sub, […]
4 June 2020	Trustpower – Submission on Unbundled layer 1 fibre service – Draft guidance – 2 June 2020	Trustpower, sub, […]
4 June 2020	Vector Fibre – Submission on Unbundled layer 1 fibre service – Draft guidance – 2 June 2020	Vector, sub, […]
4 June 2020	Vocus and Vodafone – Submission on Unbundled layer 1 fibre service – Draft guidance – 2 June 2020	Vodafone / Vocus, sub, […]
4 June 2020	WIK-Consult on behalf of Enable Networks Limited and Ultrafast Fibre Limited – Submission on Unbundled layer 1 fibre service – Draft guidance – 2 June 2020	WIK (Enable / UFF), sub, […]
	Cross-submissions	
24 June 2020	Chorus – Cross-submission on Unbundled layer 1 fibre service – Draft guidance – 23 June 2020	Chorus, cross-sub, […]
24 June 2020	Enable Networks Limited and Ultrafast Fibre Limited – Cross-submission on Unbundled layer 1 fibre service – Draft guidance – 23 June 2020	Enable / UFF, cross-sub, […]
24 June 2020	Spark – Cross-submission on Unbundled layer 1 fibre service – Draft guidance – 23 June 2020	Spark, cross-sub, […]
24 June 2020	Vector Fibre – Cross-submission on Unbundled layer 1 fibre service - Draft guidance – 23 June 2020	Vector, cross-sub, […]
24 June 2020	Vocus and Vodafone – Cross-submission on Unbundled layer 1 fibre service – Draft guidance – 23 June 2020	Vodafone / Vocus, cross-sub, […]

Introduction

Preliminary statement

1. All abbreviations and terms used in this document are either defined, or have the same meaning as, in our *Equivalence and non-discrimination – guidance on the Commission's approach for telecommunications regulation* (referred to in this document as the 'guidance').[1]

Purpose of this paper

2. We published our guidance on 30 September 2020.[2] The guidance is intended to assist interested parties to understand our approach to equivalence and non-discrimination obligations when exercising our monitoring and enforcement powers under the Telecommunications Act 2001 (the 'Act').

3. We indicated when we published the guidance that we would publish our response to submissions on the draft guidance later in the year.

4. This paper sets out our responses to points raised in submissions and cross-submissions on our draft guidance, published on 4 March 2020.[3] Stakeholder submissions and cross-submissions on the draft guidance assisted us to develop, in a transparent way, our views on the interpretation and application of equivalence and non-discrimination obligations in telecommunications market regulation in New Zealand.

5. We are not seeking submissions on this paper. However, we expect that the responses provided here to arguments raised in submissions and cross-submissions on the draft guidance will assist stakeholders in understanding the Commission's position on certain topics.

6. Readers should bear the following in mind.

    6.1 We have not attempted to respond to every point made in submissions or cross-submissions. Instead, this document intends to provide a summary of our views on the main substantive points raised by stakeholders.

    6.2 To the extent relevant, we have provided cross-references to paragraphs of the guidance where our views on particular points have been expressed.

    6.3 Many of the comments made by submitters on our draft guidance focussed on the application of the equivalence and non-discrimination obligations in the particular context of PONFAS. We received a number of requests from

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1 Commerce Commission "Equivalence and non-discrimination – guidance on the Commission's approach for telecommunication regulation" (30 September 2020).

2 Commerce Commission "Equivalence and non-discrimination – guidance on the Commission's approach for telecommunication regulation" (30 September 2020).

3 Commerce Commission "[DRAFT] Equivalence and non-discrimination – guidance on the Commissions' approach for telecommunication regulation" (4 March 2020), herein after 'draft guidance'.

stakeholders to provide clarity on how we would approach a compliance assessment in relation to PONFAS. The guidance is intended to be of general application to all telecommunications services subject to the equivalence and non-discrimination obligations, and thus we did not consider it appropriate to address the application of those obligations to specific services, such as PONFAS, in the guidance.

6.4 Since the guidance is intended to provide our views on the interpretation of these obligations in principle, the scope of the guidance does not extend to outlining a compliance assessment of the LFCs' current PONFAS offers. A compliance assessment requires a separate process on the part of the Commission, and an analysis of evidence provided by the LFCs and potential PONFAS customers.

6.5 We are therefore not drawing any conclusions on the LFCs' PONFAS offers in this response to submissions.

6.6 We informed stakeholders on 29 May 2020 that we were commencing a compliance assessment of the non-price terms of the LFCs' PONFAS offers, and outlined the process we would follow in conducting the assessment.[4]

7. Several stakeholders expressed support in their submissions for an industry workshop or webinar to be held prior to the guidance being published. We were not able to meet this request, in part due to Covid-19 restrictions. However, we consider that the written submissions process gave interested parties sufficient opportunity to be heard and provided us with enough information to develop the guidance.

8. Further, to assist industry participants in understanding the equivalence and non-discrimination obligations, we are publishing a set of information sheets that summarise the main points of the guidance.[5]

9. We thank stakeholders for their submissions and engagement in the process of developing our guidance.

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4 The letter can be read on our case register at: https://comcom.govt.nz/case-register/case-register-entries/Chorus-Limited,-Enable-Networks-Limited,-Northpower-Fibre-Limited,-Northpower-LFC2-Limited-and-Ultrafast-Fibre-Limited/timeline/date-opened.

5 The information sheets on the equivalence and non-discrimination obligations can be found at: https://comcom.govt.nz/regulated-industries/telecommunications/regulated-services.

COMMERCE COMMISSION NEW ZEALAND
Te Komihana Tauhokohoko

Response to submissions and cross-submissions

Row #	Overall theme	Submitter	Reference	Main submission arguments	Changes from draft guidance	Response
1.	Commission's powers	Chorus	sub, paras 12-14	*"…The Act sets out certain minimum requirements for the Deeds, including that they must provide for equivalence and non-discrimination. However, the obligation to comply with equivalence and non-discrimination arises from the Deeds rather than from the Act….The task here, in determining the scope of the equivalence and non-discrimination obligations, is to interpret the words of the Deeds as bilateral instruments between LFCs and the Crown. The Deeds do not empower the Commission to make determinations of regulatory policy based on the underlying purposes in sections 69W and 156AC of the Act. The Commission's role is to enforce the Deeds, which it may do so only through the Court. Ultimately, it is for the Court to determine whether the Deeds have been breached."*	No change	We agree that the equivalence and non-discrimination obligations are located in the deeds. However, the concepts of equivalence and non-discrimination are defined in the Act, and influence our interpretation of the content of these concepts as they appear in the deeds. Our guidance explains how we will exercise our monitoring and enforcement powers under the Act. As stated in our guidance at paragraph 1.9, we agree that only the courts can decide whether obligations in the deeds have been breached.
2.	Commission's powers	Chorus	sub, p 3 second	*"An interpretation of the obligations that means compliance can only ever be assessed ex-post undermines the rule of*	No change	As stated in our guidance at paragraph 1.9, only the courts can decide whether obligations in the deeds have

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			table, and paras 20-22	*law; and the test for compliance (i.e. what the obligations require of Chorus and other LFCs) cannot be subject to the Commission's exercise of discretion, or subjective judgement of the appropriate standard of compliance under the circumstances."* Chorus further argued that elements of the draft guidance imply that different market conditions would prompt different tests for equivalence and non-discrimination (eg, different cost standards for the avoidable downstream costs) and that this implies that the legal test for compliance would depend on the conduct that is most likely to maximise competitive outcomes. Chorus submitted that such an approach is unworkable for compliance standards as it would "*rely on the exercise of judgement in relation to matters on which there could reasonably be disagreement*".		been breached. Whether there has been a breach of equivalence or non-discrimination obligations will always turn on the facts of a case. We have published the guidance to provide more certainty to market participants, and to assist them to understand our approach to equivalence and non-discrimination obligations; in particular how we will exercise our monitoring and enforcement powers.
3.	Commission's powers	Chorus	cross-sub, paras 12 - 13	*"Some RSPs are trying to use this process to push for additional rule-making by the Commission and in some cases, seeking to duplicate obligations that are already covered by other parts of the Telecommunications Act and the Commerce Act. For example, Vodafone and*	No change	We note that subpart 3 of Part 4AA sets out the Commission's functions in relation to information disclosure, including certification requirements. The deeds also set out information disclosure requirements. The guidance does not suggest that the deeds give

Row #	Overall theme	Submitter	Reference	Main submission arguments	Changes from draft guidance	Response
				Vocus ask for the introduction of additional information disclosure and certification requirements. […] The Commission doesn't have the power to introduce further disclosure and certification requirements into the Deeds."		the Commission a general power to introduce further disclosure and certification requirements. See also our response to the Vodafone / Vocus submission at row #15.
4.	Commission's powers	Chorus	cross-sub, para 16	*"[T]he Deeds articulate specific tests for equivalence and non-discrimination that require LFCs to treat RSPs the same as their own downstream business. The Deeds do not give the Commission a general power to proscribe exclusionary conduct; that is the role of the Commerce Act."*	No change	The guidance does not suggest that the deeds give the Commission a general power to proscribe exclusionary conduct. We would approach and assess the (price and non-price) terms of supply in accordance with the concepts of equivalence and non-discrimination we discuss in the guidance.
5.	Commission's powers	Enable / UFF	cross-sub, paras 2.1 to 2.6	Enable and UFF agreed with Chorus that: - the Commission cannot make determinations of regulatory policy when it applies equivalence and non-discrimination; - regulatory policies in other jurisdictions cannot override the words of the Deeds; - the test for compliance cannot vary depending on the Commission's view of what conduct would be most likely to maximise competitive outcomes in the market conditions then prevailing.	No change	The guidance explains our interpretation of the concepts of equivalence and non-discrimination and provides guidance on how we approach our monitoring and enforcement powers under the Act. As set out in the guidance at paragraph 1.9, whether there is a breach of equivalence or non-discrimination under the deeds is a matter for the courts.

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6.	Purpose statements	Chorus	sub, paras 15-18	Chorus submitted that: - the Commission should have regard to New Zealand competition case law (s 36 of the Commerce Act); and - European policy has no immediate relevance to the interpretation of the Deeds. Chorus also argued this position is consistent with views expressed by the Commission in the *Loyalty Offers* case.[6]	No change	We agree with Chorus in that, in interpreting the equivalence and non-discrimination obligations, we should have regard to New Zealand case law, but only if relevant. We set out our view of the relationship between the Commerce Act and the undertakings regimes in chapter 2 of our guidance, starting at paragraph 2.90. We do not agree that international case law has no immediate relevance to the interpretation of the deeds. For example, at paragraphs 3.6-3.9 of the guidance we explain how international experience has influenced the formulation of the equivalence obligation in the Act and the deeds. In our view, international case law may be relevant, but applicable NZ case law will likely be of more value and carry greater weight. This is consistent with the position taken in the *Loyalty Offers* case.
7.	Purpose statements	Vodafone / Vocus	sub, p 8	*"The Part 4 Commerce Act Input Methodologies Merit Appeal decision*	No change	We discuss the purpose statements of the undertakings and our

6 Commerce Commission "Consultation on the non-discrimination and EOI obligations under the Telecom Separation Undertaking requirements with respect to the complaints concerning the Telecom Wholesale Loyalty offers" (16 October 2009), paragraph 72.

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				provides relevant precedent for statutory interpretation. […] The High Court decision drew on "the large body of theoretical literature" to determine how terms such as "workable competition" and "efficiency" should be interpreted. *It is notable also the High Court commented that the Commission's explanation of "the relationship between the s 52A(1) purpose and outcomes, and economic principles stemming from the three dimensions of economic efficiency – allocative, productive and dynamic – which the s 52A(1) outcomes both reflect and are designed to promote" is "non-controversial".* *The Chorus position* [that the interpretation of the equivalence and non-discrimination obligations is principally a question of law – not one of discretionary decision-making in which economic analysis or regulatory policy is directly implemented] *would limit the interpretation of "efficiency" narrowly to "the quality of doing something well with no waste of time or money" which is, at best, a productive efficiency concept."*		interpretation of these from paragraph 2.32 of the guidance. In particular, we state that we will take the purposes into consideration when exercising our monitoring and enforcement powers in relation to the undertakings regimes. However, the purposes do not create a separate or independent test for compliance with the deeds and the Act. In many cases, consideration of the purposes will depend on the facts of the case.

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8.	Purpose statements	Vector	sub, para 10	*"Part 4AA and the Deeds were implemented by the government with the specific purpose to counter any incentive for Chorus and LFCs to favour their own wholesale business operation at the expense of customers only wishing to acquire the layer 1 access input from them. Therefore, any interpretation of the Deeds and Part 4AA must be consistent with this purpose. Any other interpretation would undermine the validity of the whole regime."*	No change	The purpose statements under Part 4AA address a number of matters, namely to: (a) promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand; and (b) require transparency, non-discrimination, and equivalence of supply in relation to certain telecommunications services; and (c) facilitate efficient investment in telecommunications infrastructure and services. As stated in paragraphs 2.34-2.35 of the guidance, we interpret the requirements of the Act and the deeds in accordance with, and to give effect to, these purposes. However, the purposes do not create a separate or independent test for compliance with the deeds and the Act. In many cases, consideration of the purposes will depend on the facts of the matter.
9.	Purpose statements	Spark	sub, paras 25-30	*"We doubt that the default* [cost] *standard can be consistent with the ex ante*	No change	As stated in paragraphs 2.34-2.35 of the guidance, we consider that we

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				regulatory objectives to promote competition and dynamic efficiency and an alternative standard will inevitably emerge from any investigation in to access provider practices. The draft [guidance] *rightly recognises that the appropriate standard depends on the regulatory purposes and context within which the test is being applied […]* *[T]he draft guideline default standard is based on parameters more commonly applied to ex post competition law purposes and would be considered an outlier approach for the ex ante regulatory implementation.* *This approach does not sit well with our legislation, which clearly anticipates the Commission applying an ex ante framework."* Spark also pointed to materials from BEREC that summarised the key differences between *ex post* margin squeeze analysis and *ex ante* regulation and referred to analysis from Oxera that noted the different cost standards used in *ex ante* vs *ex post* implementation contexts.		have interpreted the equivalence and non-discrimination obligations in accordance with the purposes in the deeds and at s 156AC of the Act. The purposes do not create a separate or independent test for compliance, but we note that when exercising our monitoring and enforcement powers we may have to make decisions that seek to balance the different limbs of the purposes. With respect to the points raised on the appropriate cost standard in *ex ante* regulation, we note that the equivalence obligation does not imply a specific cost standard or methodology (see paragraphs 3.28-3.30 in the guidance). The guidance does not set a "default" cost standard – rather, it interprets EOP to mean that the margin available between the upstream and downstream prices has to satisfy ERT (see paragraph 3.32 of the guidance). While the guidance (at paragraphs 3.45-3.48) outlines a 'minimum downstream cost standard' requirement in the application of ERT, it also notes that applying this

Row #	Overall theme	Submitter	Reference	Main submission arguments	Changes from draft guidance	Response
						standard does not guarantee that ERT would be met (see paragraph 3.39 of the guidance). We consider that this approach is broadly consistent with the Oxera analysis cited by Spark, which noted that from an *ex post* competition perspective, the set of common principles applied by the European Commission (and endorsed by the CFI) *"provide sufficient flexibility to competition authorities to vary the nature of the test".*
10.	Purpose statements	Spark	cross-sub, p 2 and paras 24-25. See also p 1-2, and paras 9-14 & 21-27	*"Part 4AA has a specific and important purpose in the regulatory framework to provide for open access to* [state funded fibre] *networks on an equivalent and non-discriminatory basis."* *"Chorus' proposed approach, asks the Commission to place insufficient weight on the Part 4AA requirements on the basis that the deeds already provide enough that reflects the open access objectives of the regulatory framework. Part 4AA and Part 6, and other provisions of the Act such as the line of business protections, all contribute to a regulatory framework that seeks to*	No change	As stated in paragraphs 2.34-2.35 of the guidance, we consider that we have interpreted the equivalence and non-discrimination obligations in accordance with the purposes in the deeds and at s 156AC of the Act. When exercising our monitoring and enforcement powers in relation to the undertakings regimes we may have to make decisions that seek to balance the different limbs of the purposes. Any enforcement action we take will consider the wider regulatory framework in which the Commission operates.

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				both promote competition and recognise LFCs power. *While the Commission should be conscious of the other elements of the framework, it must ensure that its guidelines promote the legislative outcomes of Part 4AA in its own right."*		
11.	Purpose statements	Vector	cross-sub, paras 6-7	*"Vector Fibre does not share Chorus' view that the Commission's Guidance for Part 4AA enforcement is limited by the text of the Deed. Rather, the Deed itself is a binding commitment under Part 4AA of the Act […]* *The Deed obligations must be interpreted within the context of the Part 4AA framework. Vector Fibre does not believe conduct (such as conditions of product offers) which make the commercial use or consumption of the layer 1 input an inferior experience to the Chorus or LFC bitstream product experience as being permitted by the Deed and Part 4AA."*	No change	Our guidance provides our views on the interpretation of the concepts of equivalence and non-discrimination as defined in the Act, and explains how we will exercise our monitoring and enforcement powers.
12.	Part 6	Chorus	sub, first table p 3 and para 10	*"Equivalence and non-discrimination are part of an integrated suite of regulatory mechanisms, which collectively achieve the relevant purposes of the Telco Act. When interpreting the equivalence and non-discrimination obligations, it is important*	No change	We generally agree with this high-level observation. However, it is specifically the purposes in s 69W in Part 2A and s 156AC in Part 4AA that we will consider when exercising our monitoring and enforcement powers

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				to bear in mind the overall regulatory framework in which they operate. *[…]* *The overall aim of these regulatory constraints is to make Chorus behave as if it were in a market with competition (Part 2), and to promote outcomes consistent with workable competition (Part 6), limiting the risk of excessive profits for either copper or fibre services."*		in relation to the undertakings regimes.
13.	Part 6	Trustpower	sub, paras 3.3.2 - 3.3.4	*"Layer 2 products are fairly simple, differentiated primarily based on speed, and Chorus is already introducing higher speed FFLAS products in the market (Gbps). We do not expect that layer 1 unbundlers will look to strongly compete on service quality. If this is correct, then any dynamic efficiency benefits must come from price competition.* *However, if an unbundler is able to compete with LFCs on price, it is likely to be only through subsidisation by LFCs and any such subsidisation would be recovered by LFCs in other ways under the new regulatory framework and ultimately borne by downstream consumers. If that is the case, then the extent of any dynamic efficiency benefits may be small."*	No change	As explained at paragraphs 6.3-6.4 above, the guidance is intended to provide our views on the interpretation of the equivalence and non-discrimination obligations in principle. The scope of the guidance therefore does not extend to assessing individual markets or offers. Specifically, our guidance recognises that while the concepts of equivalence and non-discrimination have the same meaning in the deeds and the Act and should be implemented in a similar way, any assessment of whether the obligations are met will depend on the factual context (see paragraph 2.39 of the guidance and also paragraphs 3.57-3.58 and 4.28).

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						We acknowledge Trustpower's concerns that in the specific context of fibre unbundling, the benefits to telecommunications end-users arising from dynamic efficiency may be small because unbundlers may compete with LFCs on price, rather than on service quality, and LFCs would be able to subsidise the prices in competitive areas and recover the costs elsewhere. In response, we make the following observations. - The UFB areas of LFCs other than Chorus are geographically limited and it is unlikely that other LFCs will have much scope for subsidising the prices at central offices where unbundling has occurred within their UFB areas. - Chorus' ability to engage in such a strategy is limited by the obligation under s 201 of the Act to charge geographically-consistent prices in the areas where it is subject to PQ regulation. This could reduce the likelihood of any such subsidisation by Chorus . - Dynamic efficiency is usually linked to cost savings through the

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						adoption of innovative processes or products and to the extent that fibre unbundling results in LFCs improving their L2 processes (or products) in order to compete with unbundlers on price, this is likely to result in benefits to telecommunications end-users. See also response in row #14 below.
14.	Part 6	Trustpower	sub, paras 3.4.1 - 3.4.4	*"In principle, we may see increased competition between the larger RSPs and the LFCs for the provision of layer 2 services to RSPs.* *However [...] we are not convinced that the larger RSPs that seek to unbundle at layer 1 are likely to strongly compete with LFCs in providing layer 2 services to RSPs. These larger RSPs are at least as likely to use those inputs solely for the purpose of providing retail FFLAS services to their own customers.* *The LFCs would not need to respond, as the smaller RSPs would have no choice but to continue to acquire services from the LFCs and the larger RSPs are unlikely to be tempted back, so there is no point in LFCs offering more attractive terms to smaller RSPs.*	No change	With respect to the scope of the guidance, see response in row #13 above. We note Trustpower's concerns that, in the specific context of fibre unbundling, the larger RSPs may unbundle L2 services only to self-supply, rather than to compete with LFCs in the provision of L2 services to third parties. Trustpower notes that such a strategy, were it to eventuate, may not be to the long term benefit of telecommunications end-users, given the additional investments required. While the scenario described by Trustpower is one possible outcome in the market, we note that:

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				If that is the case, then there would be minimal dynamic efficiency benefits in upstream FFLAS markets."		- once an access seeker has made the investments required to unbundle, they have an incentive to utilise the maximum capacity in which they have invested and are likely to compete vigorously for end-users, including through the provision of L2 services to third parties, rather than choose to self-supply only; and - even if access seekers that unbundle choose only to self-supply L2 services, they will compete with LFCs for end-users and any innovative products unbundlers introduce as a result of this competition are likely to provide additional incentives on LFCs to innovate in the L2 market, which in turn will benefit all RSPs and, ultimately, end-users.
15.	Part 6	Vodafone / Vocus	sub, p 7	*"Vocus and Vodafone consider that the Guidelines should be complemented by supporting Information Disclosure Requirements to help provide transparency about whether the equivalence and non-discrimination requirements have been, and are being, met.* *[…]*	No change	There are reporting and information disclosure obligations in the deeds as well as in the Act. From 1 January 2022, information disclosure regulations will apply to providers of fibre fixed line access services that are regulated under Part 6 of the Act. We intend to consult on our draft

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				Adoption of compliance reporting requirements would provide greater regulatory certainty for Access Providers and Access Seekers and to help ensure a greater level of compliance with the equivalence and non-discrimination obligations. The Commission may want to consider how such requirements would best fit into the overall regulatory framework."		decisions for PQ and ID regulation under Part 6 during 2021. We encourage Vodafone / Vocus to engage in that process.
16.	Part 6	Spark	cross-sub, paras 6, 6(c)	*"The LFCs proposed approach […] invites the Commission to assess Part 4AA obligations so that they are subsidiary or support Part 6 fibre settings. For example, that the Commission should assess the price squeeze margin in the potentially competition [sic] layer 2 services in a way so that it preserves the guaranteed expected returns of a Part 6 model. In the long run, no new entrant can compete against a firm whose returns are guaranteed by the BBM model."*	No change	Part 4AA and Part 6 have different roles and functions under the Act. However, in our view these Parts should be complementary and not inconsistent. We set out the regulatory regimes under the Act and discuss their relationship with the undertakings regimes in chapter 2 of the guidance (at paragraphs 2.62 and following).
17.	Part 6	Spark	cross-sub, paras 15-17	Spark noted that the Government agreed to forbear layer 1 unbundling until 31 December 2019.	No change	The guidance includes this information in Appendix A, including the forbearance period (paragraph A28). In our view our guidance is consistent with the context of the UFB initiative.
18.	Interaction between	Chorus	sub, paras 77, 79	*"Satisfying equivalence indicates that non-discrimination should also be satisfied.*	No change	The equivalence and non-discrimination obligations under the

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	equivalence and ND			*[…]* *The Commission's statements on the interrelationship between non-discrimination and equivalence reflect that it has taken an incorrect, overly expansive approach to interpretation of the "difference in treatment" limb of the non-discrimination test."*		Act and the deeds are distinct and complementary requirements and may both apply to the same conduct from a network operator. As set out in paragraph 5.5 of the guidance, a network operator may supply or price services on an equivalent basis, but the nature of the terms of supply may have a discriminatory effect on access seekers.
19.	Interaction between equivalence and ND	Chorus	sub, paras 80-84	*"[T]here are two distinct non-discrimination obligations in the Act (and reflected in the Deeds):* *1. No self-supply - the service provider must not treat access seekers differently. This is concerned with potential harm to competition between RSPs in markets where an LFC is not in direct competition with RSPs.* *2. Self-supply - where the service provider supplies itself with a relevant service, the service provider must not treat itself differently from other access seekers. This is concerned with potential harm to competition between LFCs and RSPs in the Layer 2 market where an LFC operates as a vertically integrated provider of Layer 1 and Layer 2 services.*	No change	As set out in paragraph 5.5 of the guidance, a network operator may supply or price services on an equivalent basis, but the nature of the terms of supply may have a discriminatory effect on access seekers. The non-discrimination obligation is a broader obligation applying to all services specified in the deeds. The equivalence obligation applies to a smaller set of services: only the L1 services described in the deeds. See also chapter 5 of the guidance.

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				This distinction was explained in the Amended Invitation to Participate for the UFB initiative (ITP) […] *It is clear from the ITP that the Government envisaged two separate scenarios where non-discrimination applies, and that the test for non-discrimination in the self-supply scenario is in effect identical to the equivalence obligation. Where an LFC provides Layer 1 services to itself and to RSPs on identical terms in accordance with its equivalence obligation, it will have also satisfied its non-discrimination obligation for self-supply. Given that equivalence is a more stringent test, it logically follows that offers which satisfy equivalence will not breach non-discrimination."*		
20.	Interaction between equivalence and ND	Enable / UFF	sub, paras 2.38-2.39	*"The Commission has previously warned against applying precedents from overseas jurisdictions to interpret New Zealand legislation or regulatory instruments.* *In this case a similar message is warranted – an economic principle applied in an overseas jurisdiction as an alternative to regulating the price of downstream services is unlikely to be a sound source of guidance for assessing whether an upstream price meets the equivalence*	No change	As set out in the response at row #6 above international case law can have relevance, if shown to be applicable. This is consistent with the position taken in the *Loyalty Offers* case.

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				obligations in the Act. However, to the extent that any guidance can be taken from the EU, it is that the ERT is not a component of equivalence but an additional obligation; one that is not an element of the Part 4AA regulatory regime."		
21.	Interaction between equivalence and ND	Enable / UFF	sub, paras 1.14 - 1.15. See also 1.16-1.17 and 3.1-3.12	"*We have previously submitted that the word "or" in the definition of non-discrimination means that the non-discrimination obligation is different where the service provider supplies itself with a relevant service compared with where it does not self-supply. The Commission incorrectly characterises our submission as being that the non-discrimination obligation is subsumed into the equivalence obligation. […]* *What we said in our submission was that the service provider's non-discrimination obligation for self-supply (not to treat itself differently from other access seekers) and its equivalence obligation (to treat access seekers the same as its own business units) are identical in effect, so that if the Commission concludes that equivalence is satisfied, it must also conclude that the non-discrimination obligation is satisfied."*	No change	As set out at paragraphs 5.3-5.6 of the guidance, the equivalence and non-discrimination obligations under the Act and the deeds are distinct and complementary requirements and may both apply to the same conduct from a network operator. A network operator may supply or price services on an equivalent basis, but the nature of the terms of supply may have a discriminatory effect on access seekers. See also chapter 5 of the guidance.

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22.	Interaction between equivalence and ND	Enable / UFF	sub, paras 1.18 - 1.19, 3.18 - 3.19	In support of the argument that if equivalence is satisfied, the Commission must also conclude that non-discrimination is satisfied, Enable and UFF argued that the Loyalty Offer case and the UBA-SLES case were not situations where equivalence had been met and breach of non-discrimination had nevertheless occurred, and that both cases would have been a breach of equivalence if the obligation had been in place at the time.	No change	We accurately describe and reference relevant cases relating to the concepts of non-discrimination and equivalence in the guidance.
23.	Interaction between equivalence and ND	Enable / UFF	sub, para 3.13 – 3.14	*"The Commission's interpretation that "there may be circumstances where the equivalence obligation is satisfied but the network operator has nevertheless breached the non-discrimination obligation" would have the perverse result that compliance with s156AD(2)(c)(iii) would result in a breach of s156AD(2)(c)(i), but if we were to change our behaviour to comply with the Commission's view of the s156AD(2)(c)(i) obligation, we would then be in breach of s156AD(2)(c)(iii), as we would no longer be treating access seekers in the same way as our own business operations - a truly perverse result.* *The guiding principle of statutory interpretation is the requirement to focus on the text and purpose of the statutory*	No change	The position taken in the guidance does not require LFCs to change their behaviour in a way that would put them in breach of the obligations of equivalence or non-discrimination or in a way that would create perverse outcomes. We are unaware of a situation (and Enable/UFF do not offer an example) in which this would be the case.

Row #	Overall theme	Submitter	Reference	Main submission arguments	Changes from draft guidance	Response
				provision. Legislation must be interpreted in such a way as to make the legislation work in a realistic and practical manner;"		
24.	Interaction between equivalence and ND	WIK (Enable / UFF)	sub, paras 2, 25,27	WIK argued that the Commission's position on equivalence and non-discrimination means the LFCs have to meet the equivalence and non-discrimination requirements under different tests which might generate different results. WIK further argued that, *"The equivalence of input (EOI) requirement is the only requirement LFCs have to meet when providing the unbundled services.* *[…]* *Non-discrimination obligation for self-supply is identical in effect to the service provider's equivalence obligation. […]* *When the equivalence test is satisfied, the non-discrimination test for self-supply is automatically satisfied."*	No change	Our position in the guidance (see paragraphs 5.3-5.6) is that the two obligations are distinct and complementary requirements. This position means that the criteria applied to determine whether a breach has occurred are distinct and that the conclusions from applying these criteria may be different for the two obligations. See also responses to rows #18, #21 and #23 above.
25.	Interaction between equivalence and ND	Chorus	cross-sub, paras 39-40	*"We agree with Enable/UFF and WIK that, "the non-discrimination obligation for self-supply is identical in effect to the service provider's equivalence obligation", and as a consequence, "when the equivalence test is satisfied, the non-discrimination test for self-supply is automatically satisfied. Vodafone/Vocus claim Enable/UFF don't*	No change	The equivalence and non-discrimination obligations under the Act and the deeds are distinct and complementary requirements and may both apply to the same conduct from a network operator. A network operator might supply or price services on an equivalent basis,

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				understand the relationship between equivalence and non-discrimination. However, Enable/UFF's submission was mischaracterised as arguing that the non-discrimination obligation is subsumed into the equivalence obligation. In fact, their position (acknowledging there are two distinct obligations) is the equivalence obligation (to treat access seekers the same as its own business units) is in effect identical to the non-discrimination obligation for self-supply (not to treat itself differently from other access seekers), and it follows that if equivalence is satisfied, non-discrimination is automatically satisfied."		however the nature of the terms of supply may still have a discriminatory effect on access seekers. See also chapter 5 of the guidance as well as the responses to rows #18, #21, and #24 above.
26.	Interaction between equivalence and ND	Trustpower	sub, paras 4.1.1 - 4.1.2	*"We agree with the Commission that: A network operator may supply or price services on an equivalent basis, but the nature or effect of the terms of supply may have a different effect on access seekers, which may be discriminatory. Yet the Commission's discussion of this point in the draft guidance paper focusses primarily on the situation where preferring the network operator could be discriminatory. We believe it may also be the case that treatment is discriminatory between access seekers."*	No change	As set out in chapter 4 of the guidance, non-discrimination prohibits a network operator from treating access seekers differently, or if the network operator supplies itself with a relevant service, from treating itself differently from other access seekers. The non-discrimination obligation applies to treating certain access seekers differently to other access seekers.

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27.	Interaction between equivalence and ND	Trustpower	sub, paras 4.1.4 - 4.1.5	*"In the current context, while price or non-price terms may satisfy the equivalence requirements (if the Commission adopts an alternative cost standard), it may still be discriminatory if those terms result in a different treatment of smaller RSPs as compared to larger RSPs.* *While the no harm to competition limb is about the competitive process and not about individual market participants, the reality is that a substantial number of smaller RSPs will be treated differently to the larger RSPs and this will affect the competitive process."*	No change	As set out above, eg in the response to row #24, our position in the guidance (see paragraphs 5.3-5.6) is that the equivalence and non-discrimination obligations under the Act and the deeds are distinct and complementary requirements and may both apply to the same conduct from a network operator. A network operator might supply or price services on an equivalent basis; however, the nature of the terms of supply may still have a discriminatory effect on access seekers. See also chapter 5 of the guidance. With respect to the point raised by Trustpower on terms that result in different treatment of smaller RSPs compared to larger RSPs, we note that as explained at paragraph 4.33 of the guidance, the competition limb of the exclusion to the non-discrimination obligation requires a wider consideration of the market context. While not every disadvantage to an access seeker is harmful to competition, a difference in treatment that is likely to affect the competitive

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						position of a number of market participants (irrespective of their size) is unlikely to satisfy this limb of the exclusion. See also response to row #79 below.
28.	Interaction between equivalence and ND	Vodafone / Vocus	cross-sub, p2, 3	*"Chorus appears to be trying to establish an artificial separation of its undertakings (the Deeds) from the legislative provisions they were established under.* *[…]* *The requirements of the Act would not be meet [sic] if the Deeds are specified or interpreted in a way that narrows the extent to which non-discrimination and equivalence is achieved. Further, if there is any lack of clarity in the Deeds then it is available for them to be interpreted in light of the requirements and purposes of the Telecommunications Act under which they were established.* *[...]* *any Court would look to the standard interpretation of technical phrases within the industry it is used. In this case, equivalence of inputs and non-discrimination are specific technical terms used in telecommunications regulation around the world. Both the Crown and the LFCs would (should) have had mind to their*	No change	We agree there should not be an artificial separation of the purposes in the Act and the deeds, or that the purposes are to be read down in any way when exercising our monitoring and enforcement powers. We discuss the purpose statements and our interpretation of them in paragraphs 2.32- 2.35 of the guidance. In particular we state that we will take the purposes into consideration when exercising our monitoring and enforcement powers in relation to the undertakings regimes.

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				meaning when entering into the Deeds. This makes the wide international body of literature on these topics of paramount importance, not to be dismissed as suggested by Chorus."		
29.	Interaction between equivalence and ND	Spark	cross-sub, para 6(b)	[the LFCs proposed approach] *"could potentially lead to perverse outcomes whereby provided the service were supplied to access seekers using, say, the same price and the provisioning system as its own business unit, the access provider could be considered equivalence and non-discrimination compliant. With this approach, LFCs could implement pricing structures or design services with limited functionality (i.e. by business rules that require feeder and splitters to be taken together or complex and long provisioning requirements) that advantage themselves or distort competition in downstream markets."*	Revised	We have expanded further on non-price terms in our guidance. We have provided further guidance on non-price terms for equivalence (see paragraphs 3.14, 3.15, and 3.19 to 3.21) and non-discrimination (see paragraphs 4.52 to 4.55).
30.	Level of prescription	Vodafone / Vocus	sub, p 3-4	*"The draft Guidelines should provide substantively more certainty and direction about what is and is not acceptable behaviour.* *[…]* *There would be substantial public benefits to doing this, as well as greater regulatory certainty for both Access Providers and*	Revised	The guidance is intended to be enduring, and the concepts of equivalence and non-discrimination need to apply consistently across the different service offerings under the deeds. We consider that the guidance strikes

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				Access Seekers […] Consistent with this, Chorus has commented "Certainty about our compliance obligations … will help us continue to deliver products and services to meet our customers' needs" *[…]* *A mix of clearer and more certain guidance, coupled with Information Disclosure Requirements which make transparent pricing methodologies, and the rationale for the selected methodologies, along with price squeeze testing requirements, is needed to provide reasonable surety that the equivalence and non-discrimination requirements are being met."*		the right balance in providing certainty and direction about what is and is not acceptable behaviour. We have expanded the guidance to provide more detail on several concepts where submitters asked for more certainty (eg, on non-price terms). From 1 January 2022, information disclosure regulations will apply to providers of fibre fixed line access services that are regulated under Part 6 of the Telecommunications Act. We intend to consult on our draft decisions for PQ and ID regulation under Part 6 during 2021. We encourage Vodafone and Vocus to engage in that process.
31.	Level of prescription	Vodafone / Vocus	sub, p 4	Vodafone and Vocus say that there is too much latitude in interpreting the draft guidance regarding the margin between downstream and upstream prices [when the margin is only equal to, but not greater than, the long-run average avoidable costs of the downstream product]. Vodafone and Vocus say the Commission should specify the circumstances where such pricing would be sufficient to allow entry of Access Seekers on the market.	No change	We consider that the guidance strikes the right balance in providing certainty and direction on the concepts of equivalence and non-discrimination. The guidance is intended to be enduring, and the concepts of equivalence and non-discrimination need to apply consistently across the different service offerings under the deeds.

Row #	Overall theme	Submitter	Reference	Main submission arguments	Changes from draft guidance	Response
				Vodafone and Vocus say there is also too much latitude in interpreting whether applying an alternative downstream cost standard would promote competition.		We note that promoting competition is a consideration required by the purpose statements and would appropriately be considered as part of an enforcement investigation. The downstream cost standard that may be appropriate to promote competition will depend on the specific markets considered (see paragraph 3.58 of the guidance).
32.	Level of prescription	Vodafone / Vocus	sub, p 5	Vodafone and Vocus say the draft guidance takes a backward step compared to the advice in the Vogelsang report. E.g. the draft doesn't specify a safe harbour and makes tentative statements re. two-part tariffs. *"We reiterate, that we support Dr Vogelsang position that:* *"a safe harbour of layer 1 price that is the lower of the resource based cost and the ECPR cost (based on an efficient entrant)"; and* *"a two-part tariff is inconsistent with the non-discrimination requirements"."* *The Guidelines should specify these requirements without qualification. Discriminatory two-part tariffs must be removed. "*	No change	With respect to equivalence, the guidance provides practical guidance on the upstream prices that are likely to satisfy EOP in a way consistent with the advice received in the Expert Economist Report. It is important to remember that the test for non-discrimination has two parts: first, there must be a difference of treatment; second, we must assess whether that difference of treatment is objectively justifiable, and whether it harms or is likely to harm, competition (see paragraph 4.24 of the guidance). As outlined in the guidance at paragraph 4.49, multi-part tariffs are

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						likely to constitute a difference of treatment. Whether they meet the two limbs of the exclusion (of being objectively justifiable and not likely to harm competition) can only be assessed on a case-by-case basis.
33.	Level of prescription	Vodafone / Vocus	sub, p 6	*"An example where the Commission is simply silent, or the Commission's views are at best implicit, is in relation to 'penetration pricing'. We consider the Commission's Response to Submissions provides additional and greater clarity in relation to penetration than the draft Guidelines and material from the Response to Submissions should be uplifted into the Guidelines e.g.: "In the event that penetration pricing was occurring, the consistent use of ECPR throughout the period of penetration pricing and in subsequent periods (as discussed in the draft Guidelines at paragraph 3.60) will ensure that there is sufficient economic space for competition at the layer 2 level.""*	Revised	Paragraphs 3.59 and 3.62 of the guidance explain that a cost-based upstream price will meet equivalence only if ERT is satisfied, using at a minimum, the ECPR rule based on an EEO cost-based standard. In other words, a cost-based price will meet equivalence only if it is equal to or lower than the ECPR-based price. This concept is also illustrated at Figure 3.2 of the guidance. We have further explained at paragraph 3.63 of the guidance that the interpretation of equivalence does not alter with the level of downstream price and ERT will apply equally during periods of penetration pricing as well as periods when the downstream price is above costs.
34.	Level of prescription	Chorus	cross-sub, paras 7, 9	*"…some RSPs are asking for the draft guidance to go further and to do more, for example requiring LFCs to proactively demonstrate compliance with our*	No change	Our guidance provides our view of what the equivalence and non-discrimination obligations require. Our guidance does not consider specific

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				obligations or codifying the rules about when there will be a breach. *[...]* *The Deeds don't set our price and non-price terms of supply and can't be interpreted in a way that amounts to a de facto specification of terms. We have not breached our obligations simply because our customers don't like the terms we have set."*		services or the characteristics of services or specific conduct. As stated in our guidance at paragraph 1.9, only the courts can decide whether obligations in the deeds have been breached. Whether there has been a breach of equivalence or non-discrimination obligations will always turn on the facts of a case. Our guidance is intended to assist interested parties to understand our approach to equivalence and non-discrimination obligations and explains how we will exercise our monitoring and enforcement powers.
35.	Level of prescription	Spark	sub, table p 3, paras 14-15	*"The guidelines could consider potential exclusionary conduct by access providers. Access providers have incentives to design products, offer non-price terms and create information asymmetries to increase the costs of access seekers looking to create innovative products that ultimately compete with those of the access provider (including the Layer 2 products provided by LFCs).* *The guidelines could outline, in a similar way to price terms, that access seeker non-price conduct that weakens access seekers*	Revised	We agree with Spark's submission that non-price terms can be equally important to the competitive process as prices. The equivalence obligation requires network operators to offer the exact same non-price terms to access seekers as those it relies on internally for its downstream operations. Non-price terms can have many aspects (including product design and access to information) and while it may not be possible to list all of them in any guidance, we cover the

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				ability to compete would not be consistent with equivalence and non-discrimination required under the Act. *[...]* *Exclusionary conduct of this nature is commonly seen as harming the competitive process by weakening the ability of rival firms to compete and such conduct does not constitute competing on the merits. Under a raising-rivals' costs strategy, a seller takes actions to make it more costly for rival sellers to serve buyers, thus weakening the rivals' abilities to compete.* *[...]* *For example, to satisfy equivalence of inputs and non-discrimination, a network operator must treat access seekers and its own business equally, but also ensure non-price aspects of services are not exclusionary:* *a. Where the conduct raises rivals' costs so that it undermines competition on the merits;* *b. Where access seekers do not have access to the same inputs and opportunities to exploit efficiencies and innovation."*		more common ones in paragraph 3.20 of the guidance. In an investigation into a potential breach of the non-discrimination obligation, we expect the same non-price terms to be relevant (see paragraph 4.53 of the guidance). For the avoidance of doubt, we have added paragraphs 4.54-4.55 of the guidance, which clarify that any non-price terms offered to access seekers that may have an exclusionary effect or have a non-trivial effect of raising an access seeker's costs relative to the costs faced by the network operator's own downstream costs, are not likely to meet the dual limb of the non-discrimination exclusion and are thus, likely to fail the non-discrimination obligation.
36.	Level of prescription	Spark	sub, table on p 7	*"We support the Commission's proposed broad approach to non-discrimination and consideration of practices that distort*	Revised	See response in row #35 above.

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				competition. *The Commission may wish to provide examples of non-price discrimination that would cause concerns such as an access provider failing to use the same processes for developing new service variants."*		
37.	Level of prescription	Spark	sub, paras 40 - 41	*"The guidelines set out key non-price and transparency obligations, which we support. As noted in our submission on the expert's report, we believe that non-price barriers to competition are as important for promoting competition and end-user benefits.* *To further promote certainty relating to these obligations, the Commission could provide clarifying examples in the guidance that Part 4AA obligations require:* *a. Access providers to use the same processes for developing new layer 1 or 2 variants for their own downstream services.* *b. The disclosure of reference offers irrespective of whether the service is provided to the access providers own business unit. The framework requires the same treatment, transparency and the maximum use of reference offers, and this should extend to access seeker and access provider use of the network."*	Revised	We have provided further guidance on non-price terms for equivalence (see paragraphs 3.14, 3.15, and 3.19 to 3.21) and non-discrimination (see paragraphs 4.52 to 4.55).

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38.	Level of prescription	Vodafone / Vocus	cross-sub, p1	*"We support and agree with Spark's recommendation that the Commission:* *[…]* *c. Provide greater clarity on the type of conduct that would likely breach the non-discrimination obligation, including an analytical method for doing so. Given the purpose of the legislation it is important that non-discrimination guidelines recognise the potential distortions in downstream and adjacent markets, not just on downstream fibre markets."*	Revised	We have expanded further on non-price terms in our guidance. We have provided further guidance on non-price terms for equivalence (see paragraphs 3.14, 3.15, and 3.19 to 3.21) and non-discrimination (see paragraphs 4.52 to 4.55). We have also provided further guidance on difference in treatment with regards to price (paragraphs 4.44 to 4.46) and non-price (paragraphs 4.54 and 4.55) terms. However, we have decided not to provide an analytical model on the type of conduct that would likely breach the non-discrimination obligation at this time.
39.	Level of prescription	Spark	cross-sub, p2, paras 30 to 31	"*The guidelines can usefully provide guidance on costing parameters or principles as suggested in Vector's submission that support the Part 4AA purpose.* *[…]* *In terms of the proposed EEO standard, ease of implementation in itself shouldn't be a reason to apply an approach that is unlikely to produce outcomes consistent with the requirements of the Act.*	No change	We have addressed this issue in response to Chorus' submission above. We agree with Spark that the guidance cannot provide Chorus the certainty it requests because the appropriate test and compliance will depend on the factual situation. Also, as Spark notes, there is a balance to be struck between providing practical guidance while ensuring there is flexibility to consider concerning

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				[...] *The draft guidelines cannot provide Chorus the certainty it requests because, as the Commission notes, the appropriate test and compliance will depend on the factual situation."*		behaviour that fails to comply with the Act. The concepts of equivalence and non-discrimination are broad in a sense they are applied to a suite of different types of services in the Act, from copper to fibre, and fixed wireless access services. The guidance discusses equivalence and non-discrimination as concepts applicable to each of the services they are applied to but not at a level of detail for individual services or specific deeds. In our view we have struck the right balance in providing guidance as to what these concepts mean as they apply in the Act and to all of the deeds.
40.	Level of prescription	Spark	cross-sub, p2, paras 32 to 35	*"The guidelines could also strengthen the self-supporting and compliance promoting aspects of the obligations. For example, the Commission noted in its advice to the Finance and Expenditure Select Committee that equivalence, standard term offers and transparency work together to allow the Commission to identify discriminatory behaviour.* *[...]* *The Commission advised the Committee*	No change	There are reporting and information disclosure obligations in the deeds as well as in the Act. From 1 January 2022, information disclosure regulations will apply to providers of fibre fixed line access services that are regulated under Part 6 of the Telecommunications Act. We intend to consult on our draft decisions for PQ and ID regulation under Part 6

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				that […] "[the] difference [between equivalence and non-discrimination] is not just technical. It is important because where different systems are used for internal and external supply it becomes very difficult to monitor and enforce discrimination on non-price terms. These non-price terms can be critical for competition; end-users can place a high value on quality of service and will differentiate between service offerings on this basis. Even if such discrimination can be eventually identified and stopped, the harm to competition is not so easily rectified." [...] "In the absence of these arms-length rules, and the requirement for internal trades to be documented, it can be extremely difficult, if not impossible, to determine whether two services are the same, and therefore whether discriminatory conduct is taking place." The Select Committee accepted the Commission's advice and recommendation to amend s156AD and this was reported back accordingly."		during 2021. We encourage Spark to engage in that process.
41.	Level of prescription	Vector	cross-sub, para 16	*"The Equivalence and Non-Discrimination Guidelines should provide more certainty to*	Revised	We have expanded further on non-price terms in our guidance. We have

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				the market about the behavioural expectations of Chorus and LFCs to their layer 1 businesses."		provided further guidance on non-price terms for equivalence (see paragraphs 3.14, 3.15, and 3.19 to 3.21) and non-discrimination (see paragraphs 4.52 to 4.55).
42.	Level of prescription	Vodafone / Vocus	cross-sub, p2	*"Despite Chorus' purported view that "Equivalence and non-discrimination are compliance obligations, not principles", Chorus also argues the Commission should develop "guidance for compliance obligations … based on high-level principles" […].* *Chorus also contradicted itself with the stance that "Guidance [should be] based on high-level principles, rather than detail", but "Chorus and other LFCs must be able to assess in advance of any enforcement action whether their conduct complies with the requirements of equivalence and non-discrimination".* *The extent to which Chorus will be able to rely on the Guidance to assess in advance whether their conduct is compliant is directly related to how detailed and prescriptive the Commission's Guidance is. […]compliance is not simply a binary pass/fail construct, and can depend on the particular circumstances. This is evident from Commission's paper and the expert*	No change	We have expanded some parts of our guidance where submitters asked for more clarity on how we would interpret certain concepts. For instance, we have given examples of non-price terms relevant to the equivalence obligation in chapter 3 of the guidance. However, as mentioned at paragraph 1.9, our guidance is not a substitute for a compliance assessment, and any decision by the Commission to take enforcement action will be made on a case-by-case basis in accordance with the Act, the Commission's enforcement criteria and any enforcement response guidelines. As stated in our response to Spark at row #39 above, we agree with Spark that the guidance cannot provide Chorus the certainty it requests because the application of the obligations will depend on the factual situation.

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				advice it has received. *[…]* *Compliance with legislative requirements is rarely (if ever) contingent on the existence of a set of ex-ante binary pass/fail guidance, and will inevitably involve ex post evaluation of whether a regulated firm's behaviour is consistent with its obligations. Nothing in the Telecommunications Act requires a mechanistic set of rules (which would have to be highly prescriptive) for determining compliance.* *However, we do agree with the overall sentiment of Chorus' argument that for the guidance to have any practical value it needs to be less tentative, and more precise in the standards that would be applied. This would be better achieved by immediately starting an investigation into the price terms of the PONFAS service."*		
43.	EOI	Vodafone / Vocus	sub, p 6	*"…the content in relation to non-price terms is very vague. We reiterate our submission that this is something that the Commission should develop its thinking on in the final Guidelines."*	Revised	We have expanded further on non-price terms in our guidance. We have provided further guidance on non-price terms for equivalence (see paragraphs 3.14, 3.15, and 3.19 to 3.21) and non-discrimination (see paragraphs 4.52 to 4.55).

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44.	EOP	Chorus	sub, table p6 and paras 27-29	*"Equivalence is always satisfied by an ECPR-based rule relying on an EEO cost standard. Once ECPR is satisfied, no further inquiry is necessary.* *[…]* *The ECPR upstream price represents the (imputed) internal price that a vertically integrated supplier charges itself.* *The use of ECPR upstream price as a compliance reference point is also consistent with the line of cases developed under section 36 of the Commerce Act - most recently in Telecom Corporation of New Zealand Ltd v Commerce Commission (Data) in relation to price squeeze, which is conceptually related to equivalence.* *As mentioned above, the Commission should primarily have regard to New Zealand case law that has developed under section 36 of the Commerce Act, where that is relevant to the economic concepts in the Deeds, rather than the development of competition law in the EU."*	No change	We disagree with Chorus' argument that equivalence is always satisfied by an ECPR-based rule relying on an EEO cost standard. As explained at paragraphs 3.31 to 3.36 of the guidance, for equivalence to be meaningful the margin between the network operator's upstream and downstream prices has to cover the costs of providing the downstream service including a normal return on capital, i.e., the available margin has to satisfy an economic replicability test (ERT). While in some circumstances an upstream price calculated using an ECPR-based rule relying on an EEO cost standard may satisfy ERT, this would not necessarily be the case in all cases. Whether ERT is met (and thus, equivalence is satisfied) has to be evaluated in the context of the specific markets and services subject to an equivalence obligation. At paragraph 3.58 of the guidance we provide examples of situations where, in order to meet ERT, the margin between the upstream and downstream prices has to be larger than the one that would

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						be provided using an ECPR-based rule relying on an EEO standard.
45.	EOP	Chorus	sub, paras 30-35	Chorus submitted that in the draft guidance *"the Commission proposes to use a two-step assessment".* *They also noted that, "It is not clear to us, but the Commission appears to be trying to address two separate objectives – dealing with 'exclusionary prices' (or margin squeezes) and dealing with prices that may result in 'excessive returns' (or profit above normal return on capital).* *Figure 3.2 in the Draft Guidance shows that in Scenario 2 (where downstream prices are below the combined downstream and upstream costs), the objective is to ensure there is sufficient economic space for competition at Layer 2. However, in Scenario 1 (where downstream prices are above the combined downstream and upstream costs), the objective isn't clear. In Scenario 1, if the ECPR upstream price is used, the economic space for competition at Layer 2 is the same as it is in Scenario 2, but there appears to be an assumption the upstream provider will earn profits above the normal return on capital.* *If we have understood Figure 3.2 correctly,*	Revised	We agree with Chorus that ERT only needs to solve for 'exclusionary prices'. However, Chorus misinterpreted paragraphs 3.61-3.66 of the draft guidance. It was not the intent of the draft guidance to introduce a "two-step assessment". At paragraph 3.39 of the guidance, we have clarified that the discussion at paragraphs 3.64-3.72 only offers practical guidance on upstream price levels that are likely to satisfy ERT in different market circumstances for network operators who seek to undertake internal assurance processes. We also explain at paragraphs 2.33-2.35 of the guidance that the Commission's monitoring and enforcement powers are provided for in the Act which requires us to give consideration to the purposes of Part 4AA when exercising our powers.

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				then we note that the economic replicability test (ERT) only needs to solve for 'exclusionary prices'. Potential 'excessive returns', as portrayed in Scenario 1 in Figure 3.2 of the draft guidance, is not something the ERT test is concerned with. Other regulatory tools are available to deal with potential excessive returns - as explained below, the Part 6 regulatory framework, specifically the revenue cap, prevents Chorus from earning profits above the normal return on capital."		
46.	EOP	Chorus	sub, paras 36-38	*"In any event under Part 6, Chorus is limited in its ability to extract excessive profits: we cannot set downstream prices that are, in aggregate, above the combined downstream and upstream costs. From 1 January 2022, Chorus' FFLAS will be subject to a revenue cap under PQ regulation, derived using BBM cost methodology. So, our combined Layer 1 and Layer 2 prices in aggregate, cannot exceed cost-based prices, and we cannot earn profits above the normal return on capital.* *This means, under Part 6, Scenario 1 of Figure 3.2 of the draft guidance does not apply. Instead, only the following two*	No change	We have explained the interaction of the regulation introduced by Part 6 of the Act with the equivalence and non-discrimination obligations in chapter 2 of the guidance.[7] We acknowledge that when Part 6 regulation comes into effect, the regulation will limit Chorus' ability to extract excessive profits in relation to certain fibre fixed line access services (FFLAS). This is, however, not necessarily the case for all network providers that are now, or may be in future, subject to an equivalence

[7] See also Commerce Commission "Fixed line telecommunications regulation overview" (2 April 2020).

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				scenarios are relevant: *Market conditions in which downstream prices (in aggregate) are set below combined downstream and upstream costs (so-called 'penetration pricing'); and* *Market conditions in which downstream prices (in aggregate) are set equal to combined downstream and upstream costs. Under both scenarios, equivalence is satisfied using the ECPR upstream price."*		obligation. Further, Part 6 regulation is also subject to change (for example deregulation may remove certain Chorus FFLAS from Part 6 regulation). We note that the (aggregate) downstream price level is not determinative of the assessment of whether equivalence is met - it is only the margin between the downstream and upstream prices that determines whether ERT is satisfied (and hence, equivalence is met).
47.	EOP	Chorus	sub, paras 41-42	*"It is also unclear how the Commission derives its two-step approach from the words of the Deeds. As we have discussed above, the ECPR upstream price reflects the (imputed) price that an LFC charges itself. It therefore directly addresses the factual inquiry required by the equivalence obligation. In contrast, the Commission has not provided any reasoning in support of the proposition that, under certain conditions, an upstream cost standard is instead required.* *Related to that point, it is also unclear what additional inquiry would be required in circumstances where prices were set above the lower of the ECPR upstream*	Revised	The guidance clearly indicates at paragraphs 3.31-3.34 that for equivalence to be satisfied, ERT has to be met. The relevant test is ERT, not ECPR. There is no 'additional inquiry' or 'additional test' beyond establishing whether ERT is met (see also paragraph 3.39 of the guidance). While the guidance sets out ECPR methodology based on an EEO cost standard as the minimum downstream cost standard that could satisfy ERT and thus equivalence, as discussed at paragraphs 3.54 and 3.57-3.58 of the guidance, this

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				price or cost-based upstream price. The Commission has not explained what additional test might apply under these circumstances, or what factors would be relevant to the Court's assessment. In our view, the underlying error here is in focusing on what pricing methodology would best achieve the Act's purpose statement, rather than asking what factual inquiry is required to apply the equivalence obligation as set out in the Deeds."		minimum standard may not provide sufficient margin between the upstream and downstream prices for ERT to be met. Cost-based upstream prices can also meet ERT in some circumstances and so can prices below the upstream costs - see the discussion at paragraphs 3.59-3.72 of the guidance.
48.	EOP	Chorus	sub, paras 44-47, 50	*"The question the equivalence obligation asks is whether the LFC is charging others the same price it is charging itself. That question is about the LFC's conduct; it does not depend on the circumstances of the RSPs, nor their relative efficiencies of scale and scope compared to the LFC.* *The question the Commission appears to be asking is whether there is sufficient economic space for an efficient RSP to enter and compete at the downstream level, using the upstream service supplied by the network operator. That's a different question, and not relevant to the equivalence obligation.* *[…]* *The Commission effectively elevates the purpose statement to the status of a rule,*	No change	Whether there is sufficient economic space for an efficient RSP to enter and compete at the downstream level, using the upstream service supplied by the network operator, is relevant to the equivalence obligation. The equivalence obligation would be meaningless unless the upstream prices were at a level that allowed for some reasonable probability of competitive entry. If there is no feasibility of entry, the legislative intent of introducing the equivalence obligation would not be met. We acknowledge the practical difficulties pointed by out Chorus for network operators to make assessments of market conditions to

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				saying "alternative downstream cost standards will be appropriate if applying an alternative standard would promote competition and investment for the long-term benefit of telecommunication end-users." *[…]* *It appears inconsistent with the Commission's own view that the purpose statements do not create a separate or independent test for compliance with the Deeds and the Act and its statement in its Fixed line telecommunications regulation overview that the Deeds don't set price or non-price terms.* *[…]* *Even assuming it was reasonable to expect LFCs to make these assessments of market conditions in advance of setting prices, LFCs would then have to determine what adjustments should be made to the EEO cost standard in order to meet the Commission's requirements. It is unclear how an LFC could determine – at the point of setting prices – what adjustments to its own downstream costs are required to meet these standards. The exercise is necessarily a discretionary one with no*		evaluate whether ERT, and thus equivalence is met, in advance of setting prices. It is for this reason that we included in the Guidance (at paragraphs 3.64-3.72) a practical approach for internal assurance processes by network operators that could assist network operators in setting upstream prices that are likely to meet EOP. As explained above and in our guidance at paragraphs 2.32-2.35, the s 156AC purposes are relevant to the provisions of Part 4AA, including our monitoring and enforcement powers.

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				single right answer. This is not appropriate as a compliance measure."		
49.	EOP	Enable / UFF	sub, para 1.3, 1.5	*"The economic replicability test (ERT) is not an appropriate measure of layer 1 price equivalence when the price of the bundled layer 2 price is below cost* *While a network operator may choose to use the ERT methodology neither the Act nor the Deed required its use. ERT does not have universal application. It is inappropriate for determining equivalence as to price for an upstream service where the price of the downstream service is below cost, as its application would result in a below-cost layer 1 price. Our layer 2 prices are currently below cost because uptake has not yet reached the point where the prices set by the Crown cover the costs incurred by either Enable or UFF in providing the service, including a normal rate of return."*	No change	See the response at row #54 below.
50.	EOP	Enable / UFF	sub, paras 1.10(a)-(b), 1.11, 2.12	"(*a) the UK experience gives no guidance on price equivalence as in the UK the layer 1 price is set by the regulator using the forward-looking cost-based Total Service Long Run Incremental Cost (TSLRIC) methodology; and* *(b) the EU experience shows that ERT is not a requirement of price equivalence, but is*	No change	The guidance makes useful and accurate reference to European policy, regulation and case law. See also response at row #57 below.

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				an additional requirement to be applied where *(i) upstream services are subject to cost-based regulation; and* *(ii) the network operator has downstream pricing flexibility* *[...]* *The BT undertakings regime, which was the model for the regime adopted in New Zealand in 2006 in relation to Telecom, did not extend to price."*		
51.	EOP	Enable / UFF	sub, para 2.5	*"WIK observed that "only a cost-based price is in line with efficiency and proper incentives for investment" and concluded that "the most relevant costing approach to determine the price of a service which is equivalent to actual costs is a top-down costing methodology". We have used this methodology to calculate our layer 1 prices in accordance with our equivalence obligations."*	No change	As explained in the guidance at paragraph 3.28, the concept of equivalence does not specify a pricing methodology. Rather, for equivalence to be met, the margin between the network operator's upstream and downstream prices has to cover the costs of providing the downstream service including a normal return on capital, ie, the available margin has to satisfy ERT (see paragraphs 3.31-3.34 of the guidance). We specifically noted that the concept of equivalence does not alter with the level of the downstream price and that cost-based prices that do not meet ERT will be presumed to fail equivalence (see paragraphs 3.61-3.63).

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						We acknowledge Enable / UFF's (and WIK's) submission that cost-based prices are efficient and provide appropriate incentives for investment (at layer 1). We explained in paragraphs 2.34-2.35 of the guidance that we will take the purposes at s 156AC into consideration when exercising our monitoring and enforcement powers. However, we note that when exercising our powers we may need to balance the incentives for efficient investment (s 156AC(c)) with the promotion of competition to the long-term benefit of end-users (s 156AC(a)).
52.	EOP	Enable / UFF	sub, para 2.25	*"Mandating below-cost access prices is unprecedented.* *This is an outcome clearly inconsistent with the key principle in the EC Recommendation that "operators can cover costs that are efficiently incurred and receive an appropriate return on invested capital"."*	No change	We do not mandate access prices in the guidance. As stated in the guidance (at paragraphs 2.55 and 3.28), s 156AD(5) provides the deeds are not to set price or non-price terms for services. Further, the Commission has no role under the deeds to set prices (or non-price terms) for services. With respect to the point raised by Enable / UFF on consistency with the

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						EC Recommendation, we note that the EC Recommendation also states that the ERT ensures that network operators do not abuse the pricing flexibility under penetration pricing to exclude competitors.[8] The EC Recommendation therefore contemplates the use of the ERT in circumstances where penetration pricing is used to stimulate demand for NGA-based services. See also response at row #54 below.
53.	EOP	Enable / UFF	sub, paras 2.26, 2.28	*"The Commission shows in scenario 2 of figure 3.2 of the draft guidance that the application of ERT in this situation results in a below cost layer 1 price. It does not express concern at this outcome. To the contrary, its response to our submission that ERT cannot be a measure of equivalence where layer 2 prices are below cost is that "neither the equivalence not the non-discrimination obligation require the L1 prices to be cost based."* *[…]* *Surprisingly, the only concern the*	Revised	We have amended paragraph 3.63 in the guidance to make our position on equivalence in circumstances of below-cost downstream prices clearer.

[8] See European Commission "Commission recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment - C(2013) 5761" (11 September 2013), recital 62.

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				Commission expresses about the consequences of below-cost layer 1 prices is the impact on investments made by unbundlers should downstream prices increase to cover costs: if "the ECPR minimum standard is applied during periods when downstream prices are below costs, it would not be appropriate to move to a cost-based standard for the upstream price in subsequent periods without considering the costs to end-users from the risk of asset stranding.""		
54.	EOP	Enable / UFF	sub, para 2.29	*"The Commission does not at any point consider the impact of below-cost layer 1 prices on the LFC. […]* *The Commission dismisses the claim that LFCs' incentives to invest in layer 1 services would be adversely impacted by a below-cost unbundled layer 1 price, on the basis that this outcome would not be due to the application of the ERT but "would be a result of the decision to engage in penetration pricing in the first place"."*	No change	As noted at paragraphs 3.28-3.29 of the guidance, the equivalence obligation does not determine prices for individual services. Subject to other legislative or contractual constraints (such as the CIP contracts or Part 6 regulation), network operators are free to set their own prices for both the downstream and upstream services, provided that the upstream prices are set in a way that meets the ERT (see paragraphs 3.31-3.34 of the guidance). If the network operator has set downstream prices at below-cost level (to stimulate demand for the services or due to prior contractual obligations), setting the

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						upstream price at a level where equivalence is satisfied through an ERT margin that covers the downstream costs, has the same impact on the network operator as the impact of below-cost downstream prices. The equivalence obligation is concerned with the available margin for the downstream service (ie, that a normal return on capital can be earned given the upstream price), not with the return available for the upstream service. However, as noted in paragraph 3.55 of the guidance, an investigation into whether ERT is met is likely to take a dynamic multi-period approach to evaluate the profitability of downstream products. See also paragraph 3.63 of the guidance**.**
55.	EOP	WIK (Enable / UFF)	sub, paras 3, 6-7, 30, 39-41, 48-49	WIK argued the Commission's position that to satisfy equivalence ERT has to hold "*regardless of the level (and structure) of the wholesale prices [...] violates efficiency requirements, discourages investment, distorts entry decisions and in the end harms the long-term interests of end-users."* WIK submitted that:	No change	We explained in paragraphs 2.34-2.35 of the guidance that we will take the purposes at s 156AC into consideration when exercising our monitoring and enforcement powers. However, we note that when exercising our powers we may need to balance the incentives for efficient investment (s 156AC(c)) with the promotion of competition to the long-

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				- applying ERT to determine upstream prices is only efficient as long as there is price flexibility for the network operator in determining its downstream price; - a cost-based upstream price (resulting from applying ERT to a cost-based downstream price) will enable efficient entry (and competition) in the downstream market; - if ERT results in an upstream price below cost, the outcome favours access seekers at the expense of network operators and results in inefficient entry.		term benefit of end-users (s 156AC(a)). We note also that as explained at paragraphs 3.61-3.63 of the guidance, the interpretation of the equivalence obligation does not alter with the level of the downstream price. Specifically, a cost-based upstream price that fails ERT implicitly favours the network operator's own downstream operations and thus, cannot be consistent with equivalence.
56.	EOP	WIK (Enable / UFF)	sub, paras 4, 31, 47	WIK argued that the the additional requirement formulated by the Commission in the draft guidance, for the upstream price to be the lower of the imputed upstream price calculated using the minimum of the ECPR-based rule and the upstream cost calculated using either the LRIC or BBM methodology, is not a rational and efficient dynamic pricing approach. WIK submitted that this approach *"does not allow LFCs to earn enough revenues over time to recover the UFB investment and to earn a risk-adjusted rate of return."*	Revised	We note that paragraphs 3.68-3.72 of the guidance do not impose an additional requirement on network operators to price at the lower of the imputed upstream price calculated using the minimum of the ECPR-based rule and the upstream costs. We have further clarified our position at paragraphs 3.64-3.67 of the guidance. Separately, we note that as explained in paragraphs 3.28 and 4.47 of the guidance, neither the equivalence nor the non-discrimination obligation

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				WIK further submitted (at para 47) that market participants did not get sufficient guidance from the Commission in the draft guidance, because the Commission did not consider the effect of the risk of asset stranding by requiring a below-cost upstream price.		require upstream prices to be cost-based, nor do they require that the upstream service earns "a risk-adjusted rate of return" (ie, financial capital maintenance (FCM) for the upstream service). Rather, equivalence is concerned with the available margin for the downstream service - one could interpret this requirement as a requirement for FCM to be met for the downstream service.
57.	EOP	WIK (Enable / UFF)	sub, paras 5, 33- 38	WIK argued that: - the dominant application of the ERT among European NRAs is used to test whether access seekers are able to replicate the end-user prices of the vertically integrated incumbent. - The ERT also provides pricing flexibility for wholesale inputs which are not subject to cost-based regulation, which was regarded as an important prerequisite for promoting efficient investment. - European NRAs do not use the ERT to derive the L1 unbundling price from a (regulated) L2 or wholesale access price. That would not make sense because the unbundling price is	No change	While we agree with WIK's description of the regulatory precedents from the EU, we note that the EC recommendation is in the context of regulating wholesale prices, and that EU providers face some pricing constraints at the retail level (eg from competition from cable or copper). We do not consider that the specific regulatory context in which ERT is applied in the EU means that the concept cannot be applied to a different regulatory context and specifically, to the interpretation of EOP as defined in the deeds and the Act.

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				regulated and there is no flexibility for the incumbent to vary it. WIK refer to the EC Recommendation which supports cost-based wholesale pricing, as the appropriate signal for efficient investment, and noted that a 'retail-minus' approach is not used in the EU to set the L1 wholesale price (though acknowledge that ERT is sometimes used to test the sufficient economic space between L2 and L3 prices and between L2 prices and regulated LLU price).		
58.	EOP	WIK (Enable / UFF)	sub, para 29, footnote 3	WIK argued the correct cost standard should be 'incremental downstream long-run avoidable cost', not 'downstream long-run avoidable cost'. WIK acknowledged this would include downstream fixed costs that are avoidable in the long-run.	No change	We note that the equivalence obligation does not imply a specific cost standard or methodology (see paragraphs 3.28-3.30 in the guidance). The guidance interprets EOP to mean that the margin available between the upstream and downstream prices has to satisfy ERT (see paragraph 3.32 of the guidance). While the guidance (at paragraphs 3.45-3.48) outlines a 'minimum downstream cost standard' requirement in the application of ERT, it also notes that applying this standard does not guarantee that ERT would be met (see paragraph 3.39 of the guidance).

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59.	EOP	Spark	sub, para 20-22	*"A key issue in the ERT is determining the cost standard for the downstream costs. […]* *The* [Commission's cost standard as described in the draft guidance] *will result in the highest upstream price, and minimum margin for downstream access seekers to enter and compete. While the minimum standard could discourage productively inefficient access seeker investment, it will also prevent investments that would lead to gains in dynamic efficiency over time (investments both from access seekers and access providers facing competitive forces)."*	No change	We acknowledge the validity of Spark's argument and agree with it - the same point is made at paragraph 3.49 of the guidance. For the reasons explained at paragraph 3.50 of the guidance, we consider it appropriate to set the minimum downstream cost standard at the level we have, but we note again, that this is only a minimum standard and meeting this standard does not guarantee that ERT is met (see paragraph 3.39 of the guidance). In markets with significant fixed and/or common costs or markets where there may be potential net gains in dynamic efficiency, a different downstream cost standard might be required in order to meet ERT (and thus, satisfy equivalence). See the discussion at paragraph 3.54 of the guidance as well as the discussion of alternative cost standards at paragraphs 3.56-3.58 of the guidance.
60.	EOP	Spark	sub, paras 33-36	*"We also doubt that the proposed LRAAC approach is consistent with the access provider equivalence obligation to treat access seekers the same as their own downstream business.* *In terms of equal treatment, if the purpose*	Revised	We have considered Spark's arguments and the examples they provide of categories of costs that may be incurred by access seekers that would not be covered by the minimum downstream cost standard

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				is to promote competition, access seekers must be afforded the same opportunities to access efficiencies as the access providers own downstream business. For example, to access technical efficiencies, recover all costs within the competitive margin (including sunk); and exploit and set price within the downstream market. *However, our understanding of the default LRAAC approach is that it would see these opportunities reserved only for the access providers own downstream businesses*. *[…]* *These costs should be included in the margin cost standard. If an access seeker is not able to access these efficiencies, then they must be more (rather than equally) efficient than the access provider to enter the market and compete."*		we have set. We acknowledge that such costs, if they were incurred in the provision of the downstream service, might be relevant to an evaluation of whether ERT is met. The guidance already explicitly acknowledges that the minimum downstream cost standard may not be appropriate in the presence of large fixed and/or sunk costs (see paragraph 3.54 of the guidance and the follow-up discussion of alternative cost standards at paragraphs 3.56-3.58 of the guidance). Whether an alternative cost standard is required to meet ERT, and thus satisfy equivalence of price, would depend on the cost structure of the downstream product and is better addressed through an enforcement investigation. We explain our reasons for setting a minimum downstream cost standard based on long-run average avoidable costs in paragraphs 3.47 and 3.52-3.54 of the guidance.
61.	EOP	Chorus	cross-sub, para 23	*"We also note, and agree with, Vodafone's submission that draft guidance should reflect the Commission's statement from its Response to Vogelsang submissions "In the event that penetration pricing was*	Revised	Paragraphs 3.59 and 3.61 of the guidance explain that a cost-based upstream price will meet equivalence only if ERT is satisfied, using at a minimum, the ECPR rule based on an

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				occurring, the consistent use of ECPR throughout the period of penetration pricing and in subsequent periods (as discussed in the draft guidance at paragraph 3.60) will ensure that there is sufficient economic space for competition at the layer 2 level."		EEO cost-based standard. In other words, a cost-based price will meet equivalence only if it is equal to or lower than the ECPR-based price. This concept is also illustrated at Figure 3.2 of the guidance. We have further explained at paragraph 3.63 of the guidance that the interpretation of equivalence does not alter with the level of downstream price and ERT will apply equally during periods of penetration pricing as well as periods when the downstream price is above costs.
62.	EOP	Chorus	cross-sub, para 27	"*The Commission's Draft guidance recognises the importance of adopting a standard that can be applied in a compliance context. The Commission has acknowledged that setting a downstream cost standard by reference to the economic costs of a different operator is not appropriate in a setting where prices are set commercially and are subject to enforcement action under the equivalence requirement, because the LFC will not know the downstream costs of its competitors. The Commission has also noted that EEO is a practical approach that network operators can implement. We note that the*	No change	We have outlined a standard that we think is likely to satisfy EOP. It is up to the LFCs to determine price and non-price terms on an equivalent and non-discriminatory basis. Any investigation into a matter will be dependent on the relevant facts and context.

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				certainty of this guidance will be undermined if Chorus and LFCs are then held to a different standard in an investigation."		
63.	ND	Chorus	sub, para 57-61, 63	"*The Draft Guidance is unclear regarding the limits of the Commission's concept of indirect discrimination […]* *We reserve our position on whether indirect discrimination is a legitimate interpretation of the Deeds. However, if it is, we agree that it would be narrowly confined to offers that, as the Commission says, could "never be taken up" by a significant proportion of RSPs. That approach is consistent with the Loyalty case, in which the volume discounts adopted by Telecom were found to amount to a difference in treatment because smaller RSPs could never meet the criteria for the offer.* *However, the draft guidance [...] suggests that the same terms will amount to different treatment simply because the offer is more or less attractive to certain RSPs.* *This formulation is so broad that it results in the difference in treatment limb having little meaningful effect. If a difference in treatment arises simply because an offer*	Revised	In our view, the interpretation of the concept of 'difference in treatment' in the deeds needs to take account of the existence of the exclusion for conduct which is objectively justifiable and does not harm competition. Specifically in the context of indirect discrimination, we say at paragraph 4.18 of the guidance that a network operator cannot be expected to tailor its offer to each individual access seeker, but that an offer that is structured in such a way that it could never be taken up by certain categories of (or any) access seekers could still result in a difference in treatment. Where the same offer (including the same price per unit and other non-price terms) is made to all access seekers, we do not consider that differences in the attractiveness of the offer to individual access seekers will

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				has a "different effect" on certain RSPs, then every offer will constitute a difference in treatment. No offer is equally attractive to all RSPs, given their inherent differences in commercial strategy, product range, scale, operational capability, marketing spend and strategy. *A basic principle of interpretation [contractual and statutory] is that words cannot be interpreted in such a way that they are deprived of any effect. The parties to the Deeds cannot be taken to have intended an interpretation of "difference in treatment" that would mean all offers amount to a difference in treatment. Such an interpretation would reduce the non-discrimination obligation to an assessment of objective justification and competitive harm, making the first limb of the test redundant.* *[…]* *Indirect discrimination could arise only in circumstances where a significant cross-section of RSPs would not be eligible for an offer as a result of factors entirely outside of those RSPs' control. For example, volume discounts set at thresholds for which only the largest RSPs would be eligible plausibly constitute indirect discrimination. In*		necessarily connote discrimination, as in this situation, access seekers would not be treated differently. However, as explained at paragraph 4.49 of the guidance, the same price structure (eg, menu/schedule of prices) offered to all access seekers could still result in a difference in treatment. There are likely only to be a narrow set of circumstances where non-discrimination might be breached when equivalence has been met, and these would generally be pricing matters or similar matters such as service bundling. We explain the assessment of non-discrimination in further detail in chapter 4 of our guidance.

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				contrast, indirect discrimination would not arise simply because an offer is less attractive to one RSP or group of RSPs, including where that is due to their inherent characteristics (e.g. the geographic spread of an RSP's customer base).”		
64.	ND	Chorus	sub, paras 64-67	“*The Draft Guidance states that non-discrimination, “may also extend to differences in treatment affecting the activity of access seekers in their capacity as participants in any other telecommunications market.” We disagree. Non-discrimination only applies to RSPs when taking relevant services from us. […] While we accept that the Commission may look at competitive effects in any telecommunications market when assessing whether an objectively justifiable difference in treatment nonetheless harms competition, this analysis does not apply to the “difference in treatment” limb of the non-discrimination test. Other telecommunications markets are not relevant to the threshold question of whether an offer constitutes a difference in treatment; they only come into play when relying on the exception.*	No change	The consideration of other telecommunications markets can be relevant in establishing a difference in treatment. The reference to "effects on competition in any telecommunications market" in the definition of non-discrimination in the Act and the deeds reinforces this interpretation (as outlined in paragraph 4.19 of our guidance). Notwithstanding this, provided offers are made on a non-discriminatory basis, network operators are not precluded from competing with other technologies in other telecommunications markets (as outlined in paragraph 4.20 of our guidance). Offers can be discriminatory if structured in such a way that means they are not functionally available to all access seekers on the same basis.

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				The only differences in treatment that are relevant are those that affect RSPs in their capacity as LFCs' customers. This is apparent from the words of the non-discrimination obligation in the Deeds, which provide that discrimination arises from a difference in treatment "in respect of a Service". "Service" is defined as a wholesale telecommunications service provided by the LFC via its fibre network. Similarly, the definition of non-discrimination in the Act provides that the service provider must not treat access seekers differently "in respect of a service". The non-discrimination obligation protects access seekers solely in their capacity as access seekers. *This interpretation is also supported by practical considerations. LFCs don't have knowledge of an RSP's activities other than in its capacity as an access seeker. It would be unreasonable to expect LFCs to consider differential effects on RSPs in relation to activities or services which LFCs may have limited or no information about. In addition, an interpretation that applied non-discrimination to RSPs' activities other than as LFCs' customers would risk proscribing competition between LFCs and*		Where non-discrimination obligations apply, if a provider wishes to offer promotions, discounts or more complex component based pricing, the provider may need to give greater consideration to its offer to ensure it meets its obligations under the deeds. See also chapter 5 of our guidance.

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				RSPs' competing network technologies. For example, LFCs' fibre services compete with fixed wireless and mobile services. It is normal competitive conduct for LFCs to offer fibre services on terms that compete effectively with fixed wireless and mobile."		
65.	ND	Chorus	sub, para 69	*"We agree that identifying the relevant unit of service is a key question. What constitutes the unit of service depends on the functional level of the market where the service is supplied (i.e., Layer 0, 1 or 2), and the characteristics of the service provided at that functional level. For example:* *(1) A unit of service supplied at downstream level (Layer 2 market) is generally expressed as a unit of specific bandwidth (and other service characteristics) supplied per access line;* *(2) A unit of service supplied at upstream level (Layer 0 or Layer 1 markets) may be expressed as a unit of footprint allocated in the colocation space, or a unit of distribution component supplied to connect an additional access line to an existing point-to-multipoint connectivity."*	No change	We outline further what may constitute a unit of service in paragraphs 4.45 and 4.46 of our guidance.
66.	ND	Chorus	sub, paras 70-72	*"[…] there is no difference in treatment with regards to price simply because a pricing structure is more or less attractive*	No change	Whether component pricing is efficient is not directly relevant to the assessment of a difference in

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				to some RSPs. Nor is there a difference in treatment where RSPs choose to consume different components of a service in different proportions. *Component pricing is an efficient and commonly used pricing structure at upstream level, including in pricing set by the Commission previously for copper services subject to non-discrimination under the Copper Deed and for fibre services subject to CIP agreements and the Fibre Deed.* *As we have stated previously, no offer is equally attractive to all RSPs, including a blended price."*		treatment in relation to the non-discrimination obligation. As outlined at paragraph 4.49 of the guidance, price structure can in itself result in a difference of treatment, eg, multi-part tariff structures. However, a difference in treatment can be both objectively justified and not harmful to competition (see paragraph 4.50 of the guidance). A network operator would need to provide sufficient evidence that the practice is compatible with the non-discrimination obligation by showing that there is both an objective justification for the difference in treatment, and the difference in treatment does not, and is unlikely to, harm competition.
67.	ND	Chorus	sub, paras 74-76	"*Economic regulation and competition law are concerned with harm to the competitive process, not the protection of individual competitors.* *The Draft Guidance notes that in markets with few actual (or potential) competitors, harm to an individual competitor can have a significant impact on the competitive process.*	No change	In our view the aim of Part 4AA and the requirement on LFCs to comply with the obligations of equivalence and non-discrimination are set out in the purposes in s 156AC, namely to: (a) promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New

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				This isn't a concern for retail fixed telecommunications markets, where there are many actual (or potential) competitors. If the Commission is concerned about the harm to competition in the Layer 2 market, where there are likely to be few actual (or potential) competitors, the equivalence obligation is specifically designed to prevent any harm to efficient competition. This means, if a service satisfies the equivalence obligation, it can be assumed there will be no harm to efficient competition."		Zealand; and (b) require transparency, non-discrimination, and equivalence of supply in relation to certain telecommunications services; and (c) facilitate efficient investment in telecommunications infrastructure and services. We interpret the requirements of the Act and the deeds in accordance with, and to give effect to these purposes.
68.	ND	Enable / UFF	sub, paras 1.29, 4.9	*"We agree with Chorus that the Commission's interpretation would mean that "all offers will by definition constitute a difference in treatment – as no offer is equally attractive to all customers given their differences in commercial strategy, product range, scale, operational capability, marketing spend and strategy"."*	No change	As indicated in our guidance (paragraph 4.18) a network operator cannot be expected to tailor its offer to each individual access seeker (eg, to accommodate the access seeker's commercial structure). Nonetheless, an offer that is structured in such a way that it could never be taken up by certain categories of (or any) access seekers could still result in a difference in treatment.
69.	ND	WIK (Enable / UFF)	sub, paras 8 and 62. See also Enable /	WIK argued that including in the definition of non-discrimination a behaviour which offers the same terms to different access seekers, but has different effect depending on the position of the access seeker means	Revised	We accept that network operators would not have full information on the position of each access seeker purchasing the service. We have clarified in paragraph 4.18 of the

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			UFF sub, para 4.8.	that (subjective) characteristics of the access seeker may determine whether they face discriminatory treatment. WIK considered this approach makes the concept of discrimination highly arbitrary and subject to adverse selection and moral hazard, and argued this is inefficient.		guidance that there is no obligation on network operators to tailor their offers to each individual access seeker, provided they make the same offer to all access seekers (and their own downstream operations) and provided the offer is not structured in ways that the network operator could have reasonably foreseen would make the offer inaccessible to some access seekers. See also paragraph 4.44.2 of the guidance and response in rows #71 and #72 below.
70.	ND	Enable / UFF	sub, paras 1.30, 4.10	*"The Commission adopted the EEO standard for equivalence in its draft guidance "because the network operator will not know the downstream costs of its downstream competitors." A test of discrimination based on the individual characteristics of each customer must be rejected for the same reason – the network operator will not know "the position of the access seeker purchasing the service"."*	Revised	See response in row #69 above.
71.	ND	WIK (Enable / UFF)	sub, paras 13 and 94	WIK submitted that component pricing: - is efficient, as it results in no *"inefficient duplication and underutilization of resources"*;	No change	WIK's arguments may be correct in some market contexts. However, we note that efficiency is not the relevant criteria for establishing whether price or non-price terms may constitute a difference of treatment in breach of

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				- means that relevant network elements are equally and efficiently used as the network operator uses them.		the non-discrimination obligation. A breach can occur even if the practice is efficient (see paragraphs 4.5 and 4.24 of the guidance). While efficiency could satisfy the first limb of the exclusion, covering 'objective justification' (see eg, paragraphs 4.28 and 4.48 of the guidance), nonetheless, the second limb, requiring 'no harm to competition' would still have to be satisfied for the exclusion to apply (see paragraph 4.24 of the guidance).
72.	ND	WIK (Enable / UFF)	sub, para 15. See also paras 98-103.	*"Component prices are not discriminatory with regard to individual customer characteristics. They do not vary according to willingness to pay. Component prices also do not involve large up-front payments to adversely select large unbundlers against small unbundlers. They are not volume discounts or a two-part tariff, and do not represent second or third degree price discrimination."*	No change	As explained in paragraph 4.43 of the guidance, a difference in treatment with regards to price will exist if there is any (non-trivial) difference in the unit price of a service. A difference in treatment may breach the non-discrimination obligation, irrespective of whether it arises from willingness to pay or individual customer characteristics (or other factors), unless it meets the two limbs of the exclusion that it is objectively justifiable and does not harm, and is not likely to harm, competition (see

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						also paragraphs 4.24 and 4.47-4.48 of the guidance).
73.	ND	Vodafone / Vocus	sub, p 6-7	*"[T]he European Commission allows for an objective justification defence in relation to the behaviour of dominant firms which are likely to have a foreclosure effect on the market. However, this is only accepted for cases where there are other external factors, such as health and safety considerations, or where it is a 'loss minimising' reaction to competition from others.* *Critically they conclude that "The burden of proof for such an objective justification or efficiency defence will be on the dominant company".* *This concept has also been adopted in New Zealand, for example in the Human Rights Act.* *[…]* *It therefore follows that the burden of proof of any objective justification must sit with Chorus and the other LFCs."*	No change	We state in the guidance (see paragraphs 4.40 to 4.41) that the network operator may be best placed to show that there is an objective justification for the difference in treatment in question. If we consider there is a *prima facie* case of discrimination, a network operator may need to demonstrate that there is an objective justification, and that the difference in treatment does not, and is unlikely to, harm competition. It is important to note that the question of whether or not there has been a breach of the non-discrimination obligation would ultimately be a matter for the High Court.
74.	ND	Chorus	cross-sub, paras 28-33	*"We disagree with RSP submissions that the Commission's broad approach to non-discrimination is correct."* Chorus supported Enable-UFF's point that indirect discrimination could only arise	Revised	The guidance acknowledges at paragraph 4.18 that a network operator cannot be expected to tailor its offer to each individual access seeker. Nonetheless, an offer that is structured in such a way that it could

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				where a significant cross-section of RSPs would not be eligible for an offer as a result of factors entirely outside of those RSPs' control; and WIK's point that the inherent characteristics of individual access seekers are subjective and cannot be the reference point for determining whether offer terms constitute a difference in treatment.		never be taken up by certain categories of (or any) access seekers could still result in a difference in treatment. The guidance also notes that a difference in treatment with regards to price can arise where a price is not functionally available to all access seekers, meaning that there must not be conditions attached to the offer that prevent an access seeker from taking the offer up (see paragraph 4.44.2 of the guidance).
75.	ND	Chorus	cross-sub, paras 34-35	*"In response to the suggestion that our offers "have different effects on access seekers or influence adjacent and downstream markets,"* [response to Spark sub para 38] *we ensure our offers are designed in a way that they can reasonably be taken up by all our customers. As we already noted, non-discrimination applies in respect of RSPs in their role as customers. It can't be used as a mechanism to shelter individual RSPs from network competition.* *We also reject any characterisation of our approach as "shaping" competition in downstream markets. We develop offers that respond to RSP needs in order to maximise utilisation of the fibre network.*	Revised	We have clarified in paragraph 4.18 of the guidance that there is no obligation on network providers to tailor their offers to each individual access seeker, provided they make the same offer to all access seekers (and their own downstream operations) and provided the offer is not structured in ways that the network operator could have reasonably foreseen would make the offer inaccessible to some access seekers.

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				How RSPs use our services to compete in retail markets is up to them."		
76.	ND	Chorus	cross-sub, para 38	**"***We agree with WIK that component pricing is non-discriminatory. We endorse the analysis in section 4.5 of the WIK report which concludes that:* *(1) Component pricing of the Layer 1 service does not necessarily favour larger access seekers – the rationale of using the Layer 1 service depends on its local concentration (or market share) of demand. This can but does not necessarily correlate to a buyer's size or national market share in the end-user market.* *(2) A single price for the Layer 1 service would not satisfy non-discrimination and would be highly inefficient.* *(3) Component pricing creates incentives to use Layer 1 PONFAS services only if the relevant network elements are equally or similarly efficiently used as the network operator is using them. Access seekers will use PONFAS if and when they can concentrate a relevant number of customers in an FFP area so there is no inefficient duplication and underutilization of resources.* *(4) Component pricing is calculated based on cost averaging between low cost and*	No change	We respond to each of the arguments raised by Chorus in this paragraph as follows: (1) This observation is not relevant to the guidance, but as a general observation we agree that for unbundling the national market share of the access seeker is irrelevant – it is the local market share that matters. Component pricing might not favour 'larger access seekers' at the national level, but it does favour them at the local level. The relevant 'market' for unbundling is local, not national. (2)-(4) As noted in the introduction to this document at paragraphs 6.3-6.5 above, the guidance is of general nature. The scope of the guidance does not extend to specific applications of the obligations (eg, the PONFAS price). As explained in paragraph 1.9 of the guidance, only the courts can decide whether the equivalence and non-discrimination obligations have been breached. See also response in row #71 above.

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				high cost areas and is therefore consistent with geographic uniform pricing. *(5) Component pricing is not customer-specific pricing. The price is neutral between RSPs and does not vary upon individual characteristics so component pricing is not discriminatory with regard to individual customer characteristics.* *(6) The key economic characteristic of price discrimination is that prices vary according to willingness to pay of the customer. This is not the case with component pricing – all RSPs pay the same. The intention of pricing components separately is not to differentiate according to willingness to pay, it has the rationale to incentivise an efficient purchase behaviour.* *(7) Component prices don't involve large up-front payments to adversely select large unbundlers against small unbundlers. They aren't volume discounts or a two-part tariff, and don't represent second or third degree price discrimination."*		(5)-(7) See response in row #72 above.
77.	ND	Enable / UFF	cross-sub, paras 2.1 to 2.6	Enable / UFF agreed with Chorus that: - the Commission's position on non-discrimination results in every offer constituting a difference in treatment; - the non-discrimination test for self-supply is in effect identical to the	No change	See our response to Chorus at row #63 above. In addition, the consideration of other telecommunications markets can be relevant in establishing a difference in

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				equivalence obligation; when equivalence is satisfied, the non-discrimination obligation for self-supply is also satisfied; - the UFB policy intent in 2010 as set out in the amended Invitation to Participate in the UFB partner selection process shows that the meaning was to have two mutually exclusive definitions of non-discrimination; - the non-discrimination obligation as defined in the Deed applies to the behaviour of the LFC in respect of a service provided using the fibre to the premises (FTTP) access network; the obligation can therefore only apply to a FTTP service, and protect access seekers solely in their capacity as recipients of that service.		treatment. The reference to "effects on competition in any telecommunications market" in the definition of non-discrimination in the Act and the deeds reinforces this interpretation (as outlined in paragraph 4.19 of our guidance). Notwithstanding this, provided offers are made on a non-discriminatory basis, network operators are not precluded from competing with other technologies in other telecommunications markets (as outlined in paragraph 4.20 of our guidance). Offers can be discriminatory if structured in such a way that means they are not functionally available to all access seekers on the same basis. Where non-discrimination obligations apply, if a provider wishes to offer promotions, discounts or more complex component based pricing, the provider may need to give greater consideration to its offer to ensure it meets its obligations under the deeds. See also chapter 5 of our guidance.

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78.	PONFAS	Enable / UFF	sub, para 1.27. See also para 4.6 and WIK (Enable / UFF), paras 16 and 106-111	*"PONFAS is the fibre equivalent of the copper sub-loop service, and PONFAS pricing follows the same structure as sub-loop pricing. Both services separately priced the feeder fibre (sub-loop backhaul) and distribution fibre (sub-loop UCLL) components of the service."*	No change	As explained in the introduction to this document at paragraphs 6.3-6.4 above, the guidance is intended to provide our views on the interpretation of the equivalence and non-discrimination obligations in principle. The scope of the guidance therefore does not extend to assessing individual offers. Nonetheless, we note that the regulation of SLU in New Zealand does not constitute a useful comparison to the pricing structure developed by the LFCs for the PONFAS unbundling service since the components of the SLU offer were defined as different services and available for purchase separately.[9]
79.	PONFAS	Trustpower	sub, paras 2.1.2, 2.1.6	*"PONFAS is likely to only be economically viable for the very largest of the RSPs. This poses risks with respect to the effectiveness of retail competition.* *[…]* *We believe that the answer to our concerns is not whether smaller RSPs can continue to*	No change	While it is not the role of the guidance to evaluate the specific market conditions of the fibre layer 1 and layer 2 markets, we note that the introduction of more competition at layer 2 (through some access seekers taking up the PONFAS offer) ought to

[9] See for example, Commerce Commission "Standard terms determination for Telecom's sub-loop unbundled copper local loop network services: Service Appendix 3, Schedule 4 sub-loop backhaul operations manual" (20 October 2010), Appendix D.

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				use layer 2 products, but whether the competitive playing field will become tilted so far in favour of larger unbundling RSPs that the ability of smaller RSPs to compete is meaningfully diminished."		benefit all RSPs, including smaller RSPs, and ultimately end-users, through providing greater competitive constraint on the LFCs' layer 2 offers.
80.	Process	Spark	sub, para 11. Similar points raised also at para 32.	*"We recommend that the Commission:* *a. Consider how network operators may use product design and non-price terms to undertake exclusionary conduct to raise rivals' costs.* *b. Be open to revisiting aspects of the guidelines (providing more guidance) when the investigation in to RSP layer 1 complaints has been completed. As noted in the draft, the appropriate cost standard for a margin squeeze test is context specific, and detailed investigation may enable the Commission to provide additional useful guidance.* *c. Provide greater clarity on the type of conduct that would likely breach the non-discrimination obligation, including an analytical method for doing so. Given the purpose of the legislation it is important that non-discrimination guidelines recognise the potential distortions in downstream and adjacent markets, not just on downstream fibre markets."*	Revised	We expanded the discussion on non-price terms in our guidance. We provided further guidance on non-price terms for equivalence (see paragraphs 3.14, 3.15, and 3.19 to 3.21) and non-discrimination (see paragraphs 4.52 to 4.55). We have also provided further guidance on difference in treatment with regards price terms (paragraphs 4.44 to 4.46). However, at this time we have decided not to include in the guidance a more prescriptive analytical method for identifying the type of conduct that would likely breach the non-discrimination obligation. Our guidance cannot be tailored to every potential situation in the market. We may review our guidance from time to time and will consider relevant learnings from any

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						compliance assessments and investigations when we conduct a review.
81.	Process	Vodafone / Vocus	cross-sub, p 1	Vodafone / Vocus supported the recommendations in para 11 of Spark's sub (see row #80 above).	Revised	See response in row #80 above.