



**ENABLE NETWORKS LIMITED AND ULTRAFAST FIBRE LIMITED**

**CROSS SUBMISSIONS ON NZCC EQUIVALENCE AND NON-DISCRIMINATION DRAFT GUIDANCE DATED 4 MARCH 2020 AND THE NZCC'S 2 APRIL 2020 RESPONSE TO SUBMISSIONS ON THE INGO VOGELSANG REPORT**

**23 JUNE 2020**

## 1. Introduction

- 1.1 This cross-submission is made by Enable Networks Limited (**Enable**) and Ultrafast Fibre Limited (**UFF**) in response to submissions on the NZCC's draft guidance on equivalence and non-discrimination dated 4 March 2020 (**Draft Guidance**) and the NZCC's 2 April 2020 response to submissions on the Ingo Vogelsang Report.
- 1.2 We have focussed our attention on key issues raised in submissions. On issues we have not commented on in this cross submission we affirm the position set out in our submission dated 2 June 2020.

## 2. Chorus

- 2.1 We agree with Chorus that equivalence and non-discrimination are compliance obligations, not principles that empower the Commission to make determinations of regulatory policy<sup>1</sup>. Every part of the Draft Guidance must have a clear basis in the words of the Deeds of Open Access Undertakings for Fibre Services (**Deeds**)<sup>2</sup>, which are bilateral instruments between LFCs and the Crown<sup>3</sup>. Regulatory policy in other jurisdictions cannot override the words chosen by the parties in the Deeds<sup>4</sup>.
- 2.2 We also agree that 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, and that these factors would only be relevant if the Commission were making a regulatory decision.<sup>5</sup> This is consistent with our submission that the approach adopted by the Commission in the Draft Guidelines would amount to it taking the role of a de facto pricing regulator.<sup>6</sup>
- 2.3 We agree that the Telecommunications Act 2001 (**Act**) and Deeds set out different tests of non-discrimination: one in the case of self-supply and another where there is no self-supply. The non-discrimination test for self-supply is in effect identical to the equivalence obligation; when equivalence is satisfied, the non-discrimination obligation for self-supply is also satisfied.<sup>7</sup>
- 2.4 We submitted that it was clear from the plain meaning of the words that the definition of non-discrimination in the Act set out two mutually exclusive alternative tests;<sup>8</sup> Chorus demonstrates that this reflects the UFB policy intent in 2010 as set out in the amended Invitation to Participate in the UFB partner selection process.<sup>9</sup>
- 2.5 We agree with Chorus that the Commission's formulation of non-discrimination where there is no self-supply (offering the same terms if the offer has a different effect depending on the position of the access seeker purchasing the service) is "*so broad that it results in the difference in treatment limb having little meaningful effect*".<sup>10</sup> As Chorus notes, the position of every access seeker is

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<sup>1</sup> Chorus submission 2 June 2020 [10] (**Chorus**)

<sup>2</sup> Chorus [11]

<sup>3</sup> Chorus [14]

<sup>4</sup> Chorus [17]

<sup>5</sup> Chorus [22]

<sup>6</sup> Enable/UFF Submission 2 June 2020 [1.4] (**Enable/UFF**)

<sup>7</sup> Chorus [77] – [84]

<sup>8</sup> Enable/UFF [3.7] – [3.14]

<sup>9</sup> Chorus [81]

<sup>10</sup> Chorus [60]

different, so if the Commission's interpretation prevailed, "every offer will constitute a difference in treatment".<sup>11</sup>

- 2.6 We also agree with Chorus that the Commission is wrong to state that a difference in treatment can arise from the effect of an offer on the activity of access seekers in their capacity as participants in other telecommunications markets.<sup>12</sup> 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.

### 3. Vector

- 3.1 Vector submits, without any supporting evidence, that the requirement that access seekers must acquire both the feeder service and distribution service components of PONFAS is "contrary to the network design specification of the UFB project and agreements".<sup>13</sup> It says that "there does not appear to be a justifiable technical reason,"<sup>14</sup> for requiring feeder service elements to be ordered and provisioned before a distribution service order can be lodged, and these conditions "appear to be contrary to Part 4AA of the Act".<sup>15</sup>

- 3.2 To the contrary, the requirement that a feeder fibre (including splitter) be ordered before a distribution service order can be processed reflects the UFB network design specified by the Crown and is technically necessary for PONFAS to be provided. PONFAS is described in the Deeds as a "point-to-multipoint layer 1 service".<sup>16</sup> The technical reason for requiring a feeder fibre to be ordered and provisioned before the first order for a distribution fibre can be actioned is self-evident – the multipoint part (distribution) of the service must connect to the single point part (feeder) of the service to provide a point-to-multipoint service. For PONFAS, the distribution fibres must be connected to ports on a splitter in the Fibre Flexibility Point (FFP), and the splitter must be connected to a feeder fibre between the FFP and the Central Office (CO), for the end-to-end service to be provided.

- 3.3 The design and specifications of the layer 1 UFB network were set by the Crown. As Crown Fibre Holdings Limited (CFH) (now Crown Infrastructure Partners Limited (CIP)) explained to the Finance and Expenditure Committee in 2011:

*"CFH developed the product specifications for the UFB network (Layer 2 specifications were developed by the Telecommunications Carrier Forum and adopted by CFH), service level agreements and service level guarantees. Respondents' proposals had to comply with the product specifications as set out in the ITP and its subsequent amendments. CFH established the technical requirements that the network must be built to and all respondent bids must comply with these requirements."*<sup>17</sup>

- 3.4 These requirements were set out in two agreements between CFH and LFCs: a deed relating to certain undertakings (CFH Deed), and a Network Infrastructure Project Agreement (NIPA). For instance, requirement 8 of Schedule 6 of the UFF CIP Deed specified that "the provisioning of fibre in the Network allows for sufficient fibre to permit future Layer 1 unbundling post 31 December 2019, with sufficient feeder and distribution fibres, where a point to multipoint architecture is chosen,

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<sup>11</sup> Chorus [60]

<sup>12</sup> Chorus [64] - [67]

<sup>13</sup> Vector Submission 2 June 2020 [21] (Vector)

<sup>14</sup> Vector [17]

<sup>15</sup> Vector [17]

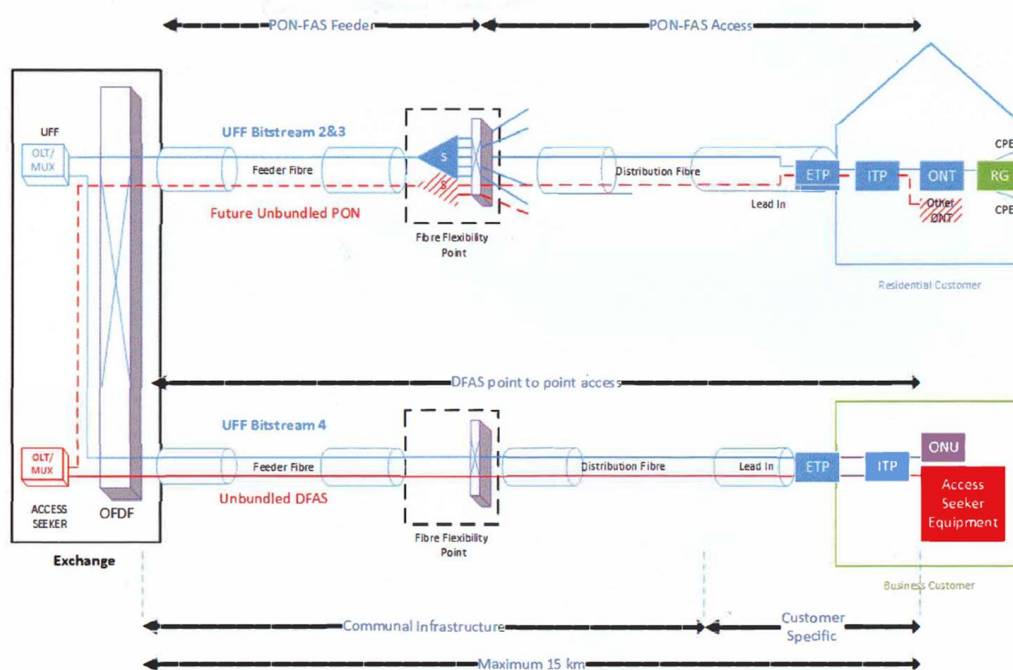
<sup>16</sup> Deed of Open Access Undertakings for Fibre Services, clause 1

<sup>17</sup> CFH Response to Select Committee questions, 23 March 2011

such that each Premises may be served by two distribution fibres fed from separate splitters ...” A similar provision is to be found in requirement 7 of Annexure 2 to Schedule 2 of the Enable NIPA.

- 3.5 The network design was also subject to review by the Commission. Clause 6.1(b) of the Deeds required LFCs to consult with the Commission in July 2015 on the design and build of the network for the purpose of informing the Commission how each LFC and CIP had agreed to meet the obligation in clause 6.1 of the Deeds to design and build the network to enable access seekers to purchase input services on an equivalence basis. LFCs were required to take notice of any feedback received from the Commission.
- 3.6 Enable and UFF engaged in this process with the Commission. The Commission reported in July 2017 that it had found that physical access to UFF’s layer 1 network was compliant with the definition of Equivalence as set out in the Deed, and in the case of Enable, that the design and build of the network met the “same input service” requirement of the Equivalence obligation and was likely to do so on and after 2020<sup>18</sup>.
- 3.7 As part of the consultation process UFF provided the Commission with diagrams of the fibre network architecture:

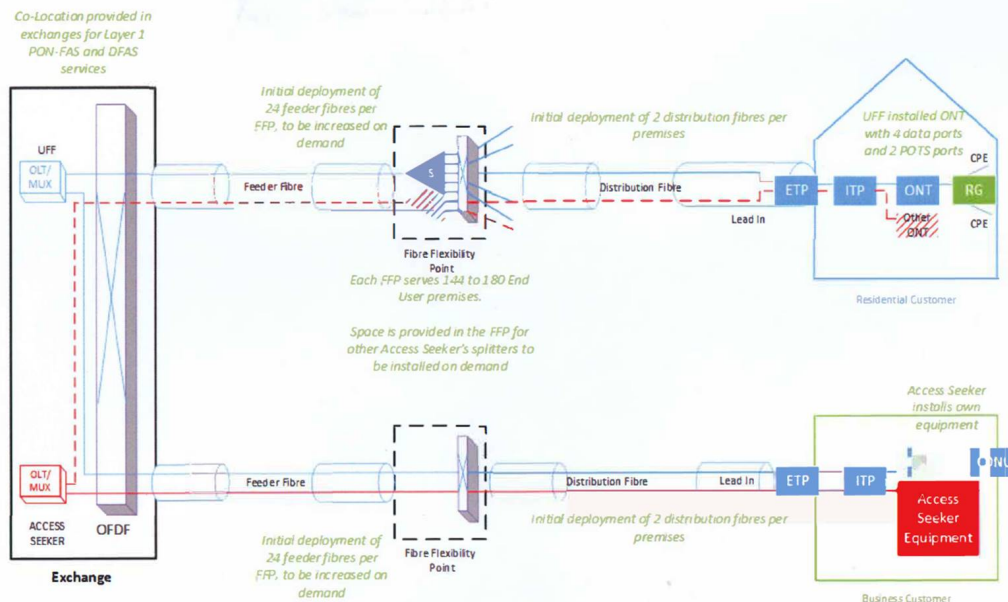
**ULTRAFAS FIBRE LIMITED’S FIBRE NETWORK ARCHITECTURE – DFAS AND PON-FAS**



and how EOI would be implemented:

<sup>18</sup> NZCC, *Report on consultation with Chorus and LFCs relating to clause 6.1(b) of their fibre open access undertakings*, p3 (NZCC Consultation Report)

**ULTRAFAS FIBRE LIMITED'S FIBRE NETWORK ARCHITECTURE TO IMPLEMENT EOI**



3.8 The procedures, operational support, supply of information and other matters relevant to the supply of PONFAS are the same for access seekers as apply to our own business operations:

(a) **Enable's PONFAS and Bitstream Processes**

- The ordering and provisioning processes are identical for an Access Seeker ordering **PONFAS** and Enable ordering a GPON based **Bitstream** service. Both orders are processed over Enable's Business Support System (BSS).
- When an Access Seeker places an order for PONFAS it passes through the same set of validation rules that apply to Enable when it places a Bitstream order. These rules determine if the order meets Enable's connection criteria that a splitter/port is available. Successful orders (PONFAS or Bitstream) are immediately classified, passed through the 'Assign and Design' process and forwarded to the field force for connection.
- When no splitter/port is available the PONFAS/Bitstream order is put on hold. The Access Seeker/Enable is given access to a Capacity Report which provides visibility of PONFAS/Bitstream feeder fibre availability. The onus is on the Access Seeker/Enable to manage splitter capacity to ensure availability of a splitter port to meet the PONFAS/Bitstream order. When a feeder fibre is not available, the Access Seeker/Enable must order the installation of a PONFAS/Bitstream feeder fibre and associated splitter.
- Once the feeder fibre/splitter is in place, the PONFAS/Bitstream order is taken off hold and follows the normal day-to-day provisioning process referred to above.

(b) **UFF's PONFAS and Bitstream Processes**

- A PONFAS order from an access seeker is processed using the same TelFlow system as a Bitstream order from UFF.
- Where a splitter/port is available the order is passed through to field contractors for connection.
- If no splitter/port is available, the order is put on hold awaiting an order for a feeder fibre and splitter.
- To avoid installation delay, the UFF layer 2 business unit advises the layer 1 business unit of its maximum splitter utilisation, and the layer 1 provisioning team provide regular reports on splitter utilisation. This enables an additional feeder fibre/splitter to be ordered and installed in an FFP before the splitter capacity is exhausted, to avoid subsequent orders to be put on hold. Reports on splitter utilisation will be provided to access seekers in the same way.
- Once the feeder fibre/splitter is installed, the PONFAS/Bitstream order is passed through to the field contractor for connection.

3.9 Vector submits that to provide PONFAS an access seeker must be willing to first acquire in excess of 20,000 feeder services at a cost of millions before being able to onboard a single customer.<sup>19</sup> This is an absurd proposition. The access seeker must order one feeder fibre for each splitter it installs in an FFP, in the same way, using the same process, as the LFC. It would therefore only need to acquire a single feeder service before it onboards its first customer.

3.10 Vector further submits that *"the tying of the two service components together is at odds with how regulation was implemented for Telecom New Zealand's copper access network and fibre-to-the-node network"*.<sup>20</sup> This is also incorrect. As explained in our submission,<sup>21</sup> and in the WIK Report,<sup>22</sup> the copper and fibre-to-the-node equivalent of PONFAS is subloop unbundling, and PONFAS adopts the same technical and pricing structure.

#### 4. **Vodafone/Vocus**

4.1 Vodafone/Vocus submit that *"Access Providers do not fully understand what the equivalence and non-discrimination obligations mean and require in practice"*.<sup>23</sup>

4.2 To the contrary, we understand our obligations well. After the Commission advised us in October 2018 that it was *"not yet in a position to meaningfully discuss our expectations of the unbundled layer 1 services post 2020"*<sup>24</sup> we commissioned expert economic, legal and accounting advice to advise us on our obligations, and how they should be implemented.

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<sup>19</sup> Vector [20]

<sup>20</sup> Vector [22]

<sup>21</sup> Enable/UFF [4.6]

<sup>22</sup> WIK-Consult GmbH, *Equivalence and non-discrimination – A review and critique of the Commission's intended approach for fibre regulation*, 26 May 2020 [91]

<sup>23</sup> Vodafone/Vocus Submission 2 June 2020 p3(**Vodafone/Vocus**)

<sup>24</sup> NZCC email to MinterEllisonRuddWatts, 4 October 2018



- 4.3 Vodafone/Vocus also claim that our statement that we were confident that our respective pricing methodologies for the PONFAS products met the equivalence standard *“to be nothing more than an unsubstantiated assertion”*.<sup>25</sup> One can only assume they have not read our submission of 31 October 2019 as it explains in detail the reasons for stating that *“we have both satisfied our pricing equivalence obligations”*:<sup>26</sup>
- (a) we commissioned an expert report from WIK-Consult on EOI pricing for unbundled services of LFCs;
  - (b) on WIK’s advice we adopted a top-down pricing methodology to determine price equivalence for PONFAS;
  - (c) we noted in our submission that the Commission’s expert Dr Vogelsang had identified this pricing methodology as one that would *“yield equivalence”*;<sup>27</sup>
  - (d) we commissioned PWC to review our work on building our respective pricing models to determine the PONFAS price;
  - (e) we each prepared a description of our Pricing Methodology which was reviewed by WIK who reported in each case the modelling approach used was suitable to determine L 1 unbundled prices which meet the equivalence standard; and
  - (f) we briefed the Commission throughout this process and in advance of releasing our L1 prices to the market provided the Commission with a copy of the WIK report, our respective model documentation, and WIK’s assessment of the modelling approach adopted.
- 4.4 In a situation where the Commission for more than a year while this process took place remained unable to meaningfully discuss with us its expectations on the unbundled layer 1 services post 2020, there is nothing more we could have done. Far from being an unsubstantiated assertion, our confidence that our PONFAS pricing satisfies equivalence is abundantly supported by the evidence we have provided to the Commission.
- 4.5 Vodafone/Vocus’ claim that our view about the s156AC purpose statement *“is clearly incorrect”*<sup>28</sup> is also wrong. We said that *“the s156AC purpose statements do not place any additional constraint upon LFCs”*.<sup>29</sup> The Commission agreed: *“the s156AC purposes do not create a separate or independent test for compliance with the deeds or the Act.”*<sup>30</sup>
- 4.6 Vodafone/Vocus further claim that *“Enable/UFF misunderstand the meaning of, and interrelationship between, equivalence and non-discrimination”*.<sup>31</sup> As we explained in detail in our submission<sup>32</sup> the misunderstanding is not ours, but the Commission’s. The plain meaning of the

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<sup>25</sup> Vodafone/Vocus p3

<sup>26</sup> Enable/UFF [2.8]

<sup>27</sup> Enable/UFF [2.6]

<sup>28</sup> Vodafone/Vocus p3

<sup>29</sup> Enable and Ultrafast, *Submission on application of equivalence and non-discrimination obligations under Part 4AA of the Telecommunications Act 2001*, 31 October 2019, [4.5]

<sup>30</sup> NZCC *Equivalence and non-discrimination in New Zealand telecommunications – Ingo Vogelsang report, Response to submissions*, 2 April 2020 [43]

<sup>31</sup> Vodafone/Vocus p4.

<sup>32</sup> Enable/UFF [3.1] – [3.21]

words in the Act, consistent with the policy intent as set out in the ITP, is that the test of non-discrimination in the case of self-supply is identical to the equivalence test.<sup>33</sup>

## 5. Spark

- 5.1 Spark submits, without any supporting evidence, that “*Chorus and LFCs’ approach to the PONFAS results in a complex and high cost to support service which, together with an expected inferior customer experience relative to that available from Chorus and LFCs, is unworkable for access seekers and their customers*”.<sup>34</sup>
- 5.2 As we have previously explained, the design and business rules relating to PONFAS are determined by the network architecture that was specified by the Crown under the UFB Initiative. We do not, from our own experience, regard the PONFAS design and business rules as “*complex and high cost to support*”; but the extent to which they are is a direct consequence of the network design mandated in the CFH Deed and NIPA.
- 5.3 Moreover, as explained above, not only was the network architecture mandated by the Crown, but the Commission reviewed our design and build of the network for the purpose of ensuring access seekers would be able to purchase input services on an equivalence basis, and found it was compliant with the definition of Equivalence as set out in the Deed.<sup>35</sup>
- 5.4 However, even if the claim made by Spark were correct, complexity and cost is not relevant in considering whether equivalence is satisfied. The only relevant issue is whether the design of, and business rules for, PONFAS mirror the way in which we deliver layer 1 services to our layer 2 business operations. Equivalence requires that the procedures for third-party access seekers such as Spark are the same as we use internally. If the network architecture imposed on us were complex and high cost to support, equivalence requires that the same complexity and cost be borne by access seekers.
- 5.5 Spark asserts that PONFAS will deliver “*an expected inferior customer experience relative to that available from Chorus and LFCs*”. As the service in question is access to the same dark fibre infrastructure used by us to deliver the layer 2 bitstream service, using the same procedures that we use, there is no reason why access seekers would expect to have an inferior customer experience relative to our own layer 2 business operations. Spark provides no explanation why this would be the case.
- 5.6 Spark claims that PONFAS “*is unworkable for access seekers and their customers*”. Again, no explanation is provided for how a PONFAS service delivered to access seekers in the same way as it is delivered to own business operations could be unworkable for access seekers and their customers. To the contrary, the success of the UFB initiative is testament to a very successful and workable fibre deployment.

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<sup>33</sup> See also Chorus [77] – [84]

<sup>34</sup> Spark submission 2 June 2020 [13] (**Spark**)

<sup>35</sup> NZCC Consultation Report p3