



# **Vector Fibre: submission to the Commerce Commission on the draft guidance for non- discrimination and equivalence**

Due 2 June 2020



## Introduction

1. The Commerce Commission's (the Commission) Draft Guidance for Non-Discrimination and Equivalence is a key milestone for the enlivening of the Part 4AA framework in the *Telecommunications Act 2001* (hereinafter referred to as the Act).
2. As the Commission has documented, Part 4AA was inserted into the Act as part of the *Telecommunications (TSO, Broadband and Other Matters) Amendment Act 2011*. These amendments significantly altered the Act to give effect to the successful tendering of the government's Ultra-Fast Broadband (UFB) project. The key terms for the UFB tender required the network to be wholesale-only and a clear specification the networks must be capable of being unbundled from the 2020 calendar year.
3. To date, the emphasis of the UFB programme has been to improve the capability of New Zealand's fixed line telecommunications infrastructure. In particular, the UFB project has focused on upgrading "last mile" copper telecommunications circuits which are less efficient with digital signal attenuation than optical fibre technology. This was the focus of the government investment and, in this respect, the project has been highly successful. New Zealand's broadband performance which used to rank poorly within the OECD now ranks much more favourably.
4. The current COVID 19 public health pandemic significantly magnifies the need for high performing affordable communications infrastructure for New Zealand businesses to continue to trade and operate effectively. COVID 19 has significantly hastened the change for businesses to leverage digital communications for commercial and operational requirements.
5. With no end in sight to the COVID 19 challenge, it is more important than ever for connectivity to be appropriate for business needs. Indeed, as commercial providers progressively move back into commercial districts the need for tailored digital communications will create much greater demand for bespoke services and solutions. Where the market fails to deliver these services at

appropriate service levels and commercial terms, New Zealand's economy will fail to regain the output lost from the COVID 19 restrictions.

6. The requirement for UFB network operators to supply unbundled access services (if provided on reasonable terms) will enable the market to provide the right connectivity solutions for New Zealand businesses whether it be throughput speed, contention, service support or price.
7. The unbundling challenge is the most significant issue facing the telecommunications sector and warrants as much attention by the Commission as the Input Methodologies project under Part 6 of the Act.
8. The Commission has announced a compliance assessment of the Chorus and Local Fibre Company (LFC) Reference Offers for the Unbundled Layer 1 Offer to determine their consistency with Part 4AA and Open Access Deeds. Vector Fibre can share our experiences to date with seeking to acquire this service.

## Is the Chorus Reference Offer consistent with equivalence and non-discrimination?

9. Vector Fibre does not believe the current Reference Offer for the unbundled point-to-multi-point service (hereinafter referred to as PONFAS) from Chorus and LFCs is consistent with Part 4AA of the Act and the Deeds submitted by parties to participate in the UFB tender. In this submission we discuss the Chorus PONFAS Reference Offer. However, where the terms are mirrored in other LFC offers, the concern applies to all.
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.
11. Given the opportunity for Chorus and LFCs to discourage layer 1 unbundled access take-up is broad, similarly is the coverage of Part 4AA and the Deeds to address such conduct. Accordingly, the powers of Part 4AA are equally

applicable to both obstructions resulting from commercial terms for service and non-commercial technical requirements.

12. Vector Fibre considers the current Chorus Reference Offer for PONFAS which has been in market for almost six months has in fact inhibited unbundled take-up to the detriment of telecommunications end-users. Vector Fibre had planned – and would still like – to develop a service suite using the PONFAS service.
13. However, to date we have not even been able to consume the product for testing purposes due to delays in Chorus finalising processes and equipment. Moreover, it is quickly becoming apparent that the terms of the service, if left unchanged, make the product commercially unviable.

#### *Ordering timeframes and business rules*

14. The Chorus PONFAS Reference Offer bundles two service elements, the Feeder Service and Distribution Service elements. The Feeder Service refers to the portion of the link from the network aggregation “node” back to the local exchange while the Distribution Service refers to the final leg from the customer to the network aggregation “node”.
15. The Chorus business rules for PONFAS create significant up-front cost and a provisioning experience which is inferior to an equivalent layer 2 bitstream service.
16. We do not believe there are valid technical reasons for the service to be prescribed in a way that makes a PONFAS Service up to three times longer than an equivalent layer 2 bitstream service.
17. Further, the Reference Offer imposes conditions such as requiring Feeder Service elements to be ordered and provisioned before a Distribution Service order can be lodged. There does not appear to be a justifiable technical reason for these types of conditions. Rather, the terms are designed to take advantage of the component structured pricing of the service and create significant up-front costs for access seekers to dissuade them from taking up the PONFAS service. Accordingly, such conditions appear to be contrary to Part 4AA of the Act.

## Are Chorus' PONFAS Reference Offer terms reasonable?

18. As discussed above, the key element of the Chorus PONFAS Reference Offer is the pre-condition for access seekers to acquire a Feeder Service before being able to complete their service with the “last leg” Distribution Service.
19. Any access seeker wishing to develop a business model leveraging the PONFAS service input must be willing to pre-order multiple Feeder Service elements to comply with Chorus' business rules/timeframes so as not to provide an inferior customer experience to a wholesale bitstream resale competitor. There are likely to be well in excess of 20,000 FFPs across the country on the Chorus network alone.
20. Therefore, to provide a market offer for a service based on the PONFAS input an access seeker must be willing to first acquire this many Feeder Services at a cost of millions before being able to onboard a single customer.

*Is the tying of the Feeder Service and Distribution Service consistent with open access regulation?*

21. We consider the inability to only acquire a Distribution Service from Chorus is a significant shortcoming of the PONFAS Reference Offer. The Reference Offer tying terms forces access seekers to acquire both the Feeder Service and Distribution Service components. We consider such terms are in fact contrary to the network design specification of the UFB project and agreements.
22. 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. Access regulation for unbundling for those networks was defined for each network element being capable of being severable and able to be acquired separately or together. Therefore, unbundling regulation has historically enabled access seekers to acquire only the network service elements necessary to complete their service offering.

23. The ability to only acquire the network elements as necessary contributed to the growth in New Zealand's inter-city backhaul markets and the growth in local exchange-based telecommunications competition.
24. This approach ensured network elements were replicated where necessary and limited the risk of stranded capacity in the market and unnecessary technical congestion of networks.
25. Indeed, the fact Chorus has chosen a component tariff pricing model for PONFAS demonstrates the Feeder Service and Distribution Service are severable components and should be able to be acquired separately. This serves the principles of open access where access seekers are only required to purchase the elements of the network needed to fulfill their service offering. However, Chorus has chosen to construct its component pricing model and non-price terms to discourage take-up of unbundled layer 1 services.
26. The benefit of open access has also recently been taken up in the Commission's joint project with the Electricity Authority to encourage Open Access for Electricity Distribution Networks. Therefore, we consider it highly unusual for Chorus to be entitled to limit the opportunity for open access from its prescriptive terms from where access seekers can take-up the bundled component PONFAS service. This is especially the case where the Commission is active in expanding the principles of open access to other sectors where access competition is not as mature as telecommunications infrastructure competition.

## Why is unbundling such a significant issue?

27. Telecommunications micro-economic reform has always been premised on the benefits of a competitive process assisting with removing legacy inefficiency with service delivery. Indeed, this was in fact the key reason for the original case for telecommunications micro-economic reform and should continue to be the primary focus for telecommunications regulation.
28. New Zealand's history of unbundling serves a useful lesson of how a restrained approach to access infrastructure layer 1 products has damaged markets to the detriment of consumers. The failure to provide a comprehensive suite of regulated access products allowed the incumbent – Telecom New Zealand – to

act in a way to limit access to necessary products and obstruct the growth and expansion of competitors in the market.

29. During the Professor Ingo Vogelsang expert report consultation Nova Energy and Trustpower expressed concern about the potential for unbundled PONFAS to disproportionately impact smaller retail service providers. This concern is short-sighted. Rather, both small and large RSPs have more opportunity and / or wholesalers for growth and innovation where they can control more elements of their service. Access to unbundled network elements and wholesale competition delivers more choice to service providers and better outcomes for end customers.

## Conclusion

30. The benefits that unbundled network access offers to competition was central to the government's decision to make unbundling a fundamental criterion for participating in the UFB tender.

31. Given there is much anticipation and uncertainty about the wholesale service terms Chorus and LFCs will offer under Part 6 of the Act, then a clear and strongly enforced regime under Part 4AA of the Act is even more important for unbundled access.

32. Ensuring unbundling of PONFAS occurs in a manner consistent with the original intention of the UFB project will deliver enduring long-term benefits to New Zealand's digital economy and COVID 19 recovery. However, the current terms for Chorus' PONFAS fall well short of the intention of the UFB project. Should the current PONFAS Reference Offers be allowed to continue without modification then the technological gains from the UFB project will slowly dissipate as economic gains for New Zealand.

33. Accordingly, we encourage the Commission to gather as much information from stakeholders as possible to ensure its compliance assessment of the non-price terms of PONFAS is thorough and considers where Reference Offer terms may in fact breach Part 4AA of the Act.