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Mr Simon Thomson
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Regulation Branch
Commerce Commission
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Dear Simon,

Vector Fibre Cross-Submission on Draft Guidelines on Equivalence and Non-Discrimination provisions

1. In this Cross-Submission Vector Fibre addresses only those issues in submissions to the Draft Guidance on Equivalence and Non-Discrimination which require further discussion. Our comments are intended to give the Commission a fair assessment of the issue for its Draft Guidelines.
2. The complacent attitude that Chorus and Local fibre Companies (LFCs) are showing to their Part 4AA obligations and behavioural Deed highlights the urgency for the final Guidance. The initial unbundled layer 1 PONFAS product from Chorus and LFCs which was required to be offered to the market from 1 January 2020 has several features which appear to fall foul of the Part 4AA framework.
3. Accordingly, the Commission's compliance assessment of the PONFAS offer non-price terms highlights the importance of the Part 4AA framework to swiftly address conduct which is intended to obstruct the development of the competitive investment infrastructure market.

Equivalence and non-discrimination are still important for wholesale-only telecommunications networks

4. Vector Fibre disagrees with Chorus' trivialisation of the obligation to non-discrimination and equivalence given the absence of a large retail arm to its business. Rather, the Crown's decision from the outset of the UFB programme was to prescribe a network architecture to enable unbundling from 1 January 2020. Accordingly, the Crown had always envisaged competitive network access investment as an important feature of New Zealand's future telecommunications competitive landscape. Indeed, unbundling of the fixed-line copper network had successfully fostered innovation. This was most evident with competitive

investment in digital subscriber line access multiplexer technology which vastly enhanced fixed line broadband and was a catalyst for Telecom New Zealand's Fibre-to-the-Node programme.

5. The foresight of the Crown to insert Part 4AA into the Telecommunications Act and require UFB operators to submit Deeds shows recognition of the risk that vertically integrated UFB providers would behave in a way to frustrate the development of their layer 1 business. This has in fact been borne out with the proposed terms for the PONFAS product from Chorus and LFCs.

The Deeds must be interpreted under the Part 4AA framework

6. 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 for network providers not to engage in conduct of a kind which would frustrate the development of the layer 1 unbundled fibre business. Accordingly, any interpretation of the text of the Deeds which permits conduct frustrating layer 1 business would undermine the Part 4AA framework.
7. We are concerned that Chorus and LFCs may have unwittingly developed a false sense of comfort that they should only be concerned with the text of their Deed for their conduct. However, they should be concerned with the behavioural prohibitions set out in Part 4AA, which combined with the Deeds are designed to safeguard the market from conduct that is intended to obstruct competitive investment relying on Chorus and LFCs developing a genuine layer 1 business. 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.

Non-discrimination and equivalence are behavioural obligations and not compliance requirements

8. Vector disagrees with the Chorus characterisation of the Part 4AA obligation. The conceptual framework of the Act and Deed are intended for Chorus and LFCs to constrain their own conduct to discriminate against their layer 1 business. We agree with Chorus that enforcement of Part 4AA can only occur once Chorus or LFCs are found to have breached this framework. However, the characterisation of this process as compliance as opposed

to enforcement is in fact trivialising the conduct and intent to damage the development of their layer 1 business and competitive infrastructure product market.

Non-discrimination is not automatically satisfied if the product is found to be equivalent

9. Enable and Ultra-Fast Fibre (UFF) commissioned an independent expert report by WIK Consult. WIK Consult asserts that Chorus and LFCs can be satisfied they have not breached the non-discrimination obligation if they can satisfy equivalence.
10. Vector Fibre disagrees with this proposition. Rather, the behavioural obligation for non-discrimination is intended to discern whether the Chorus LFC layer 2 bitstream business has an unfair advantage compared to a layer 1 access seeker. This assessment is broad, and in the context of UFB, given layer 1 access to the network is being provided at a mature time in the network life-cycle must be considered at the time of offering the layer 1 product. Therefore, the relevant assessment should consider all aspects of the layer 1 product experience relative to ordering a layer 2 bitstream circuit. This includes terms for the product, timelines for consumption, network information and access to relevant facilities. Each of these elements can result in discrimination against the layer 1 access seeker relative to the Chorus or LFC business. Accordingly, the test for non-discrimination is inherently broader than whether the layer 1 product is equivalent for access seekers and the Chorus or LFC layer 2 business.

Component pricing for PONFAS needs to be accompanied by choice for components

11. WIK Consult has also highlighted the component pricing style adopted for the PONFAS product is an efficient pricing construct and reflects the components used to deliver the PONFAS product. Vector Fibre does not disagree with this proposition. WIK Consult highlight the PONFAS service includes a fixed charge for the feeder fibre, splitter and co-location service elements and a per customer charge (which it describes as a variable charge) for the distribution fibre. Vector Fibre considers this service model is appropriate only if access seekers can acquire the elements severable or in a bundle to complete their product offering. Indeed, the option to acquire the elements separately provides the appropriate signal for whether it is efficient to invest in infrastructure to avoid the fixed charge elements or to acquire all the elements together. Enabling access at the network element level is consistent with the Open Access principle the Part 4AA regime was intended to achieve.

12. WIK Consult provide detailed analysis to show that alternative investment in the fixed elements is very difficult to achieve economically given the small addressable market at fibre-flexibility points (FFPs). However, this does not mean that access seekers should be denied to the opportunity to invest in assets where they are able to make a commercial case for investment. Accordingly, Vector Fibre considers component pricing is efficient but cannot be exclusionary. Indeed, this was the model the Commission adopted for the Telecom New Zealand Fibre-to-the-Node (FTTN) network. As with FFP unbundling, access to components at roadside cabinets in the FTTN was a more challenging business case for access seekers. This limited the extent to which access competition could occur at the roadside cabinet “node”. However, reasonable access was provided under the Part 2 framework to ensure if an access seeker could make a commercial case for roadside cabinet unbundling, then they were not be frustrated from doing so.
13. Indeed, the business rules Chorus has applied for Feeder Service provisioning – namely that an access seeker must exhaust the capacity of its existing splitter at the Fibre Flexibility Point before a new Feeder Service is limiting layer 2 product innovation. This business rule significantly limits any innovation access seekers may offer with respect to their own bit-stream service dimensioning for customers. Instead, they are restricted to service ratios like the Chorus and LFCs. These strict conditions of the PONFAS offer mean access seekers not only have to endure the lengthy ordering timeframes for the components of the PONFAS service but are also restricted with the innovation they are able to offer.

Unbundling will deliver innovation for long-run benefit of end-users

14. Vector Fibre considers unbundling or even the threat of unbundling will deliver greater innovation from competitive investment by access seekers and more engagement by Chorus and LFCs to customer needs. For example, the 2019 introduction by Chorus of the Hyperfibre product range based on XGS-PON technology enables the delivery of new products with a potential 10Gbit per second speed per customer over the PON network. The Hyperfibre range improves the capability of the fibre-to-the premises network beyond the specification of the UFB GPON service specification which have a 1Gbit per second limit. It is apparent this was indeed timed to coincide with the obligation for unbundled access to the UFB network.
15. The Chorus Hyperfibre product range shows how even the option for unbundling has resulted in a pre-emptive investment in capability to undermine access seeker innovation with service design. Technology will continue to evolve with vendors continuing to demonstrate new opportunities for service innovation on fibre networks. However, if Chorus

and LFCs can successfully obstruct unbundled access, and determine the timeline for the introduction of new technologies, the benefits of investment in service innovation will not reach New Zealand end-users or reach them in a timely manner.

Conclusion

16. Vector Fibre considers the Part 4AA framework and the Commission's enforcement of it as a crucial part of New Zealand's overall telecommunications framework. The Equivalence and Non-Discrimination Guidelines should provide more certainty to the market about the behavioural expectations of Chorus and LFCs to their layer 1 businesses. The Commission's Compliance assessment of the PONFAS product offer is a significant piece of work to complement this workstream. This should ensure any complacency about the framework are dispelled and for Chorus and LFCs to provide appropriate layer 1 products for the market.

Yours sincerely



Michael Shirley
GM Vector Fibre

