

Enable Networks Limited

Deed of Open Access

Undertakings for Fibre Services

As amended under section 156AN of the Telecommunications Act 2001
by the New Zealand Commerce Commission in Decision 2018 NZCC 15

Table of Contents

Background..... 3

1. Definitions..... 3

2. Interpretation 6

3. Scope and Application 7

4. Commencement, Term and Variation 8

5. Obligation not to Discriminate 8

6. Equivalence of Inputs..... 9

7. Supply of service 11

8. Disclosure of service terms..... 11

9. Self-reporting, complaints and investigation..... 12

10. Certification 13

11. Arms-length dealings 13

12. Commercial Information..... 13

13. Confidentiality..... 13

14. Breach of these Undertakings 15

15. Force Majeure..... 15

16. Miscellaneous 16

SCHEDULE 1 18

Background

These Undertakings are given by the LFC in accordance with, and are Undertakings for the purposes of Part 4AA of the Telecommunications Act 2001.

1. Definitions

1.1. In these Undertakings, unless the context requires otherwise:

Access Seeker means a person who is obtaining, or has indicated to the LFC a desire to contract for, Services from the LFC.

Access Seeker Confidential Information has the meaning in clause 13.2.

Act means the Telecommunications Act 2001.

Arms-Length Terms has the meaning in clause 11.4.

CFH means Crown Fibre Holdings Limited or any entity that inherits its legal rights and obligations.

Commencement Date means the date on which the Minister's approval is notified in accordance with section 156AI (5) of the Act.

Commercial Information means information that is:

- (a) confidential; and
- (b) that is in respect of a Service, and is information regarding:
 - (i) service development;
 - (ii) pricing;
 - (iii) service launch dates;
 - (iv) network coverage and capabilities;

and from 1 January 2020 will include information regarding:

- (v) marketing strategy and intelligence;
- (vi) costs; and
- (vii) projected sales volumes

but does not include:

- (c) any information that is not current and which has been superseded by identifiable new information or is more than 18 months old; or
- (d) any information, or types of information, that the LFC and the Commission agree in writing is not Commercial Information.

Commission has the meaning given to that term in the Act.

Direct Fibre Access Service means a point-to-point layer 1 fibre access service the specifications and terms of which are contained in a Reference Offer.

Discriminate has the meaning in clause 5.2 and *discrimination* and *non-discrimination* have corresponding meanings.

End – User has the meaning given to that term in the Act.

Equivalence has the meaning in clause 6.3.

Government Initiative Agreement means the UFB Contract.

Government Initiative Service means the UFB School Access Products that the LFC is required to make available under the Government Initiative Agreement.

Input Services means the following Services:

- (a) the Direct Fibre Access Service;
- (b) the PON Fibre Access Service;
- (c) the Central Office and POI Co-location Service; and
- (d) any other unbundled layer 1 service on any part of the Network that the LFC is required to provide:
 - (i) as at 31 December 2019 under the UFB Contract or
 - (ii) under a Standard Terms Determination.

Internal Ordering means order capture, order validation, order feasibility and order detailing.

LFC means Enable Networks Limited.

LFC Related Party means any entity that is a Related Party of the LFC, and is deemed to include the Partner and any Related Party of the Partner.

Minister has the meaning given to that term in the Act.

Network means the Fibre-to-the-Premises Access Network which is, or will be, owned or operated by the LFC. (Amended by Decision 2018 NZCC 15)

Partner means Christchurch City Networks Limited.

PON Fibre Access Service means the point-to-multipoint layer 1 fibre access service the specifications and terms of which will be contained in a Reference Offer that will be produced by the LFC prior to the date on which the LFC is required to provide the service.

Reference Offer means the LFC's standard offer in respect of the Service(s) (*the template offer*) that contains sufficient terms to allow, without the need for an Access Seeker to enter another agreement with the LFC, the provision of that Service(s) and must include the Wholesale Services Agreement.

Related Party means in relation to another person:

- (a) Any company that is related within the meaning of section 4A(2)(a) of the Financial Reporting Act 1993;
- (b) Any partner or joint venturer of that person.

Service means a wholesale Telecommunications Service that is provided using, or that provides access to unbundled elements of, a Network.

Standard Terms Determination means a standard terms determination made by the Commission under section 30M of the Act.

Telecommunications Service has the meaning given to that term in the Act.

UFB Contract means the Shareholders Agreement between CFH, Partner and the LFC dated 31 May 2011, as replaced, novated or amended from time to time.

Undertakings means this deed.

Wholesale Services Agreement means an agreement between the LFC and an Access Seeker which sets out the general terms for the supply of Services by the LFC to that Access Seeker.

Working Day has the meaning given to that term in the Act.

Fibre-to-the-Premises Access Network has the meaning given in Part 4AA of the Act (Inserted by Decision 2018 NZCC 15)

2. Interpretation

2.1. Examples used in these Undertakings are only illustrative of the clauses to which they relate. They do not limit those clauses. If an example and a clause are inconsistent, the clause prevails.

2.2. In these Undertakings, unless the context requires otherwise:

- (a) Clause headings are for convenience only, and are not part of these Undertakings;
- (b) References to clauses are references to clauses in these Undertakings;
- (c) The singular includes the plural and vice versa;
- (d) Words denoting natural persons include any legal entity or association of entities and vice versa;
- (e) Reference to a statute means that statute as amended and includes subordinate legislation;
- (f) Except where these Undertakings expressly provide otherwise, reference to a document means that document as amended;
- (g) Reference to the agreement of a party means written agreement;
- (h) Reference to approval, authorisation or consent means prior written approval authorisation or consent;
- (i) The words "including", "for example" or "such as" when introducing an example, do not limit the meaning of the Clause of the Undertakings to which that example relates.

2.3. Communications to and from a party may, if that party so agrees, be provided in electronic form.

2.4. References in clauses 6.7 and 8.1 of these Undertakings to the LFC being *required to provide* a Service means a requirement to provide a Service under clause 6.2, a determination made under Part 2 of the Act, a registered undertaking given by the LFC under the Act or the UFB Contract. For the avoidance of doubt this clause 2.4 does not require the LFC to provide Access Seekers with a Service or in any way limit clause 7.1.

3. Scope and Application

3.1. These Undertakings are binding on the LFC, are given by the LFC in favour of the Crown and are enforceable by the Crown and the Commission.

3.2. If anything in these Undertakings and anything in any agreement or arrangement in respect of the LFC or between:

- (a) the LFC and CFH;
- (b) the LFC and any Access Seeker;
- (c) the LFC and any LFC Related Party;

are inconsistent, these Undertakings prevail in relation to the obligations of the LFC.

3.3. These Undertakings only apply to the LFC in New Zealand. For the avoidance of doubt, the LFC will not use this limitation to circumvent the intent of these Undertakings.

3.4. Nothing in these Undertakings requires the LFC to maintain separate business units. Accordingly (without limitation):

- (a) because the LFC will have no separate entities to place or receive internal orders or to issue or receive internal bills, the LFC is not required to put in place written arrangements or implement any Internal Ordering, charging or billing (creation of the billing record, sending a bill and making payment) related to the internal supply of any service. For the avoidance of doubt, as more particularly provided in clauses 6.2(b), 6.3 and 6.4, the LFC will use the same procedures as Access Seekers for provisioning, support and all other procedures not otherwise identified in this clause 3.4(a) (including inventory maintenance, scheduling and managing workforce, workforce orchestration, physical path allocation, logical resource allocation and network provisioning); and
- (b) because the LFC is a single integrated business, the LFC is not required to implement separate management and reporting lines; and
- (c) the LFC is not required to implement a material upgrade or redesign of the LFC's systems for the purposes of restricting access to any information by certain Employees. This clause 3.4(c) does not limit the LFC's obligation to comply with the information use and disclosure requirements set out in clauses 5.5, 6.3(d), 12 and 13.

4. Commencement, Term and Variation

- 4.1. These Undertakings commence on the Commencement Date.
- 4.2. These Undertakings may be only varied in accordance with the process set out in sections 156AN of the Act.

5. Non-discrimination

5.1. When doing or omitting to do anything in respect of a Service the LFC will not Discriminate:

- (a) between Access Seekers;
- (b) in favour of any LFC Related Party; or
- (c) where the LFC supplies a Service to itself, in favour of the LFC itself.

5.2. In these Undertakings, "to Discriminate" means to treat differently, except to the extent a particular difference in treatment is objectively justifiable and does not harm, and is unlikely to harm, competition in any telecommunications market.

5.3. Compliance with the requirement in clause 5.1(c) not to Discriminate in relation to the Direct Fibre Access Service may be evidenced by the standards set out in Schedule 1.

5.4. For the avoidance of doubt the following differences in treatment are objectively justifiable and do not harm, and are unlikely to harm, competition in any telecommunications market consistent with clause 5.2 in relation to any Government Initiative Service:

- (i) the LFC not making Government Initiative Services available (for whatever reason) more widely than is required by the terms of the Government Initiative Agreement; or
- (ii) the LFC providing any Government Initiative Service on the terms of the Government Initiative Agreement (or terms that are more favourable, including price).

5.5 For the avoidance of doubt, the requirement in clause 5.1 includes a requirement to provide Commercial Information to Access Seekers on a non-discriminatory basis.

6. Equivalence

6.1. The LFC will ensure that the design and build of the Network enables Access Seekers to purchase the Input Services on an Equivalence basis on and after 1 January 2020. In doing so;

- (a) It is acknowledged that the LFC and CFH have agreed to design and build a Network in a way that achieves the outcome described in clause 6.1; and
- (b) The LFC will consult with the Commission in July 2015 on the design and build of the Network for the purpose of informing the Commission as to how the LFC and CFH have agreed to meet the obligation in clause 6.1. The LFC will take due notice of any feedback received from the Commission.

6.2. Subject to clause 6.7, from 1 January 2020, the LFC must:

- (a) make available the Input Services; and
- (b) provide all Input Services to an Equivalence standard.

6.3. In this Undertaking "*Equivalence*" means that if the LFC is required to provide Access Seekers with an Input Service under clause 6.2, it must do so on an equivalence of inputs basis, meaning:

- (a) The LFC must provide itself and the Access Seekers with the same Input Service;
- (b) The LFC must deliver that Input Service to itself and the Access Seekers on the same timescales and on the same terms and conditions (including price and service levels);
- (c) The LFC must deliver the Input Service to itself and the Access Seekers by means of the same systems and processes (including operational support processes);
- (d) When providing that Input Service to its own business operations, the LFC must provide its own business operations and the Access Seekers with the same Commercial Information about that Input Service, and those same systems and processes; and
- (e) When providing that Input Service to itself, the LFC must use systems and process that Access Seekers are able to use in the same way, and with the same degree of reliability and performance.

6.4. In clause 6.3, the same means exactly the same, subject to:

- (a) Trivial differences;
- (b) Differences that reflect the fact the LFC is a single business and is not required to maintain separate business units as more particularly set out in clause 3.4, including relating to:

- (i) Credit requirements and vetting;
 - (ii) Payment;
 - (iii) Provisions relating to the termination of supply;
 - (iv) Provisions relating to dispute resolution (to the extent necessary because the LFC is one company); and
- (c) Differences relating to:
- i. requirements for a safe working environment; and
 - ii. matters of national and crime related security, physical security, security required to protect the operational integrity of the network, or any other security requirements agreed by the LFC and the Commission;
- (d) Differences that are identified after the Commencement Date and that are agreed by the LFC and the Commission in writing where those differences are not inconsistent with "equivalence" (as that term is defined in Part 4AA of the Act) having regard to the purpose statement in section 156AC of the Act; and
- (e) Differences relating to terms required by a residual terms determination under subpart 2A of Part 2 of the Act.

6.5. In this clause 6, "the LFC itself" includes any LFC Related Parties which acquire an Input Service from the LFC.

6.6. For the avoidance of doubt, clause 6.1 does not limit clause 6.2.

6.7. Where the LFC is required to provide a new Input Service to the Equivalence standard, to recognise the practical implementation issues associated with development of a new service the LFC and the Commission may agree a reasonable time period during which, and reasonable conditions on which, any failure by the LFC to deliver that new Input Service to the Equivalence standard will be treated as trivial or de minimis for the purposes of clause 16.1 in the context of the launch and ongoing provision of the new Input Service.

7. Supply of service

7.1. Subject to clause 6.2, nothing in these Undertakings requires the LFC to provide Access Seekers with a Service.

- 7.2. On and from the Commencement Date, where the LFC offers and provides Services to Access Seekers, it must do so in accordance with these Undertakings.
- 7.3. For the avoidance of doubt, further terms and conditions of supply, including any eligibility requirements or other obligations of the Access Seeker, may be provided for in agreements between the LFC and CFH, and the LFC and each Access Seeker.
- 7.4. The LFC will not supply Services to End-Users.
- 7.5. For the avoidance of doubt, nothing in this clause 7 prevents the LFC from:
- (a) providing SCADA to a third party, including any Related Party, for the purposes of that party providing SCADA to itself or Transpower New Zealand Limited; or
 - (b) providing Services to a Related Party for the purpose of the Related Party providing services relating to remote monitoring, metering or control of electricity distribution or electricity transmission networks.

8. Disclosure of service terms

- 8.1. Where the LFC is required to provide a Service it will produce a Reference Offer for that Service unless the terms on which the LFC must provide the service are set out in a Standard Terms Determination.
- 8.2. The LFC must publicly disclose (including on a website owned or controlled by the LFC) all Reference Offers not later than 10 Working Days after the Service to which the Reference Offer relates is available on those terms and conditions.
- 8.3. Any variations or additions to a Reference Offer, or terms on which the LFC has agreed to supply a Service subject to a Standard Terms Determination that differ from those set out in the Standard Terms Determination, will likewise be publicly disclosed within 10 Working Days.
- 8.4. Any Wholesale Services Agreement entered into by the LFC with an Access Seeker on terms that are different from the terms of the standard Wholesale Services Agreement contained in a Reference Offer, and any variation or addition to such a Wholesale Services Agreement, is a variation to a Reference Offer for the purposes of clause 8.3.
- 8.5. The LFC may with the consent of the Commission withhold public disclosure of terms and conditions under clause 8.2 or clause 8.3:
- (a) At the request of an Access Seeker which is not an LFC Related Party; or

- (b) Which the LFC considers on reasonable grounds to be commercially sensitive or confidential.

8.6. Where the LFC or an Access Seeker makes a request to the Commission for consent to withhold any information from public disclosure under clause 8.5, if the Commission has not given notice to the LFC granting or declining consent before the relevant deadline for disclosure then the LFC's obligation to disclose does not operate until it has received notice from the Commission.

9. Self-reporting, complaints and investigation

9.1. The LFC will disclose any material breach of these Undertakings to the Commission as soon as is reasonably practicable (but in any event not later than 20 Working Days) after the LFC becomes aware of that breach. Within 10 Working Days of the end of the first quarter following the Commencement Date the LFC will disclose to the Commission any non-material breach of these Undertakings that occurred in that quarter and that the LFC is aware of, and thereafter within 10 Working Days of the end of each quarter any non-material breach of these Undertakings that the LFC has become aware of since the last report. All disclosures under this clause will be in sufficient detail to reasonably inform the Commission of the nature, cause and extent of the breach.

9.2. Where the Commission has reasonable grounds to believe that there has been a breach of these Undertakings, or where the Commission has received a complaint from any Access Seeker concerning the LFC's non-compliance with these Undertakings, the Commission may on request in writing (which will include details of the potential breach), and the LFC will supply to the Commission within a reasonable period of time, such information as is relevant to support its assessment of the LFC's compliance with this Undertaking. The Commission may request information under this clause without revealing the identity of any complainant.

9.3. Where the Commission requests information under clause 9.2, the Commission may require any information or report required pursuant to these Undertakings to be provided by the LFC by a time, in a form and manner as reasonably required by the Commission.

10. Certification

10.1. No later than 20 Working Days following the end of each LFC financial year the Board of the LFC must certify to the Commission annually on behalf of the LFC that, to the best of the directors' knowledge after making reasonable inquiry, the LFC has complied with these

Undertakings (except for any breaches that have been reported to the Commission or are reported with the certificate).

11. Arms-length dealings

11.1. All dealings between the LFC and LFC Related Parties relating to the supply of Services to LFC Related Parties must be on Arms-Length Terms.

11.2. All dealings between the LFC and LFC Related Parties relating to the supply of Services to LFC Related Parties must be recorded in writing, including any terms of supply and price or other transfers, and those records must be retained by the LFC in a form that can be audited and/or disclosed to the Commission under clause 8.

11.3. The LFC will disclose to the Commission within 30 working days of the end of each LFC financial year all transactions in that year with LFC Related Parties involving the supply of Services with a value above 1% of the LFC's net assets or annual revenue, whichever is less.

11.4. In these Undertakings, Arms-Length Terms means having relationships, dealings and transactions that do not include elements that parties in their respective positions would usually omit, and do not omit elements that parties in their respective positions would usually include, if:

- (a) The parties were independent and acting independently;
- (b) The parties were unrelated and acting at arms-length.

12. Commercial Information

12.1. The LFC will:

- (a) prior to 1 January 2020, disclose Commercial Information relating to the Direct Fibre Access Service to Access Seekers on a non-discriminatory basis; and
- (b) from 1 January 2020, disclose Commercial Information relating to Input Services to Access Seekers in accordance with Equivalence.

13. Confidentiality

13.1. Where the Commission has accepted an application from an Access Seeker in accordance with clause 13.3, at any time when Services are supplied to an Access Seeker the following provisions shall apply to the supply of those Services:

- (a) The LFC will keep all Access Seeker Confidential Information in confidence and will not disclose Access Seeker Confidential Information to any third party other than as necessary for the provision of the Services to that Access Seeker.
- (b) The LFC will not use the Access Seeker Confidential Information for sales or marketing purposes.
- (c) The LFC will make and enforce internal rules and policies to ensure compliance with the obligation in this clause 13.1.
- (d) A disclosure of Access Seeker Confidential Information will not constitute a breach of these Undertakings where it is:
 - (i) In confidence, to an emergency organisation that reasonably needs that information;
 - (ii) Properly made pursuant to a relevant legal or regulatory obligation;
 - (iii) To the Commission;
 - (iv) In confidence to CFH as required by a written agreement between the LFC and CFH that has been disclosed to the Commission;
 - (v) Properly and reasonably made to a court.
- (e) A disclosure or use of Access Seeker Confidential Information will not constitute a breach of these Undertakings where and to the extent that such disclosure or use is authorised by the Access Seeker.

13.2. In these Undertakings *Access Seeker Confidential Information* means any information that:

- (a) An Access Seeker provides to the LFC in relation to the provision of a Service; or
- (b) The LFC otherwise holds or obtains in relation to the provision of a Service to an Access Seeker,

that is by its nature confidential or proprietary, is disclosed in confidence or which the LFC knows or ought reasonably to know is confidential to that Access Seeker, or that concerns a person that is, or intends to become, a customer or End User of that Access Seeker; but does not include:

- (c) Information that was publicly available or known to the LFC at the time of receipt, or that becomes publicly available other than as a result of a breach of confidentiality;

- (d) Information that was obtained by the LFC from sources that are independent of the Access Seeker;
- (e) Information that is required to be disclosed by the LFC by law;
- (f) Information, or types of information, that the LFC and the Commission agree is not Access Seeker Confidential Information; and
- (g) Information, or types of information, that an Access Seeker agrees is not Access Seeker Confidential Information.

13.3. Clause 13.1 does not apply to the supply of Services:

- (a) Pursuant to a Standard Terms Determination;
- (b) Under a commercial arrangement with an Access Seeker for the supply of Services that contains appropriate protections for confidential information belonging to Access Seekers which are consistent with standard industry practice, unless:
 - (i) the Access Seeker applies to the Commission in writing for the application of clause 13.1 and
 - (ii) the Commission agrees that it is appropriate that clause 13.1 apply instead of the commercial arrangement

in which case the provisions of clause 13.1 will apply in substitution for the confidential information protections in the commercial agreement and those terms are of no effect.

14. Breach of these Undertakings

14.1. These Undertakings will be enforced in accordance with sections 156AQ to 156AS of the Act.

15. Force Majeure

15.1. A "force majeure event" is any:

- (a) act of God, fire, earthquake, storm, tornado or flood;
- (b) strike, lockout, work stoppage or other labour hindrance;
- (c) explosion, collision or nuclear accident;

- (d) sabotage, riot, civil disturbance, insurrection, epidemic, national emergency (whether in fact or law) or act of war (whether declared or not) or terrorism;
- (e) the failure of any equipment, materials, services or supplies provided to the LFC by any other person;
- (f) unavoidable accident; or
- (g) other event beyond the reasonable control of the LFC; but

does not include:

- (h) loss of supply of any essential services where such loss of supply is caused by the LFC's action or negligence;
- (i) any event which the LFC could have prevented or overcome by the exercise of reasonable diligence and at reasonable cost; or
- (j) any lack of funds for any reason.

15.2. If the LFC fails, or believes it might fail, to meet an obligation under these Undertakings because of a force majeure event, it will:

- (a) give notice to the Commission of the event and the likely effect of the event as soon as is reasonably practicable after it becomes aware of the event;
- (b) in the case of an anticipated failure, continue to meet the obligation for as long as reasonably possible; and
- (c) following the failure, do all it reasonably can to meet the obligation as soon as is practicable.

15.3. The LFC will not be in breach of these Undertakings if it fails to meet an obligation under these Undertakings to the extent that, and for as long as, such failure is the result of a force majeure event.

16. Miscellaneous

16.1. The LFC will not be in breach of these Undertakings if it fails to meet a requirement of these Undertakings and the failure to comply is trivial or de minimis.

16.2. Subject to clause 3.2, nothing in these Undertakings limits any obligation of the LFC, the Board, the CEO, an Employee, an LFC agent or an LFC contractor to comply with any law that is binding on, or applies to, that person or the LFC, or prevents such compliance.

Executed as a Deed on the 6th day of October 2011

SIGNED for and on behalf of
ENABLE NETWORKS LIMITED
by two directors

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SCHEDULE 1

APPLICATION OF NON-DISCRIMINATION TO THE DIRECT FIBRE ACCESS SERVICE

Clause 5.1(c) of these Undertakings requires, among other things, that the LFC not Discriminate in relation to the provision of the Direct Fibre Access Service to Access Seekers and the use by the LFC of the same service as an input to a point-to-point layer 2 fibre service. Clause 5.3 provides that compliance with the requirement in clause 5.1(c) may be evidenced by the matters set out in this Schedule.

Price

- 1.1 Where the LFC uses the Direct Fibre Access Service as an input to a point-to-point layer 2 fibre service, the LFC will satisfy its non-discrimination obligation in clause 5.1(c) in relation to price if the LFC provides the Direct Fibre Access Service and point-to-point layer 2 fibre service at prices equal to:
- (a) the price caps in the UFB Contract (including the agreed schedule of changes to those price caps); or
 - (b) the prices set out in a Standard Terms Determination in place for either the Direct Fibre Access Service or point-to-point layer 2 fibre service.
- 1.2 If the LFC does not price either the Direct Fibre Access Service or point-to-point layer 2 fibre service (or both) in accordance with clause 1.1 above, for the purposes of assessing whether the Direct Fibre Access Service pricing meets the non-discrimination requirement:
- (a) it will be assumed that the point-to-point layer 2 fibre service price is built up from the Direct Fibre Access price;
 - (b) the LFC will keep a record of the costs incurred over and above the price of the Direct Fibre Access Service when providing the point-to-point layer 2 fibre service, including the costs of individual components.
- 1.3 For the avoidance of doubt the records required to be kept by the LFC under clause 1.2(b) of this Schedule 1 do not constitute a “written arrangement” for the purposes of clause 3.4(a).

Non price

- 1.4 It will be assumed that the point-to-point layer 2 fibre service is built up from the network elements of the Direct Fibre Access Service provided to Access Seekers.