

VOCUS



Vocus Group New Zealand

and

Vodafone New Zealand

Joint submission on expert report from Dr
Ingo Vogelsang on equivalence and
non-discrimination

18 November 2019

Contents

About the Vocus / Vodafone joint venture	3
Overseeing the obligations on the LFCs.....	3
The Vogelsang report.....	4
Discriminatory two-part tariffs must be removed.....	4
Issues that need to be reconsidered	5
Penetration Pricing	6
Clarity on the requirements.....	8
Resource based	8
Clean margin	10
Cost of expansion.....	10
Efficient entrant	12
Irrelevant considerations	13
The Commission must consider key price inputs	13
The Commission must also consider non-price terms.....	14
Access to both distribution fibres	14
Access to cabinets.....	15
Access to the existing ONTs	15
Un-equal installation timing	16

Thank you for the opportunity to provide a submission on the expert economic advice provided by Dr Ingo Vogelsang on the interpretation of the equivalence of inputs (EOI) and non-discrimination obligations imposed on the Local Fibre Companies (LFCs). This is a joint submission between Vocus Group New Zealand and Vodafone New Zealand.

About the Vocus / Vodafone joint venture

Vocus and Vodafone have established a joint venture to unbundle the fibre network from 1 January 2020. Our intention is to unlock the potential of New Zealand's fibre network by bringing a deeper level of innovation and competition than Kiwis experience today.

From the outset of our joint venture arrangement, our key concern was that there would not be a compliant layer 1 service available in the market from 1 January 2020. That is why we commenced engagement with the LFCs, early, in June 2018. Since then we have been frustrated by the LFCs lack of commitment to meeting their obligations. Every proposal we have seen from the LFCs has given little or no regard to their obligations in the Telecommunications Act 2001 (the Act) and the Deeds of Open Access Undertakings for Fibre Services (the Deeds). This is despite our efforts to highlight their non-compliance throughout their consultation processes.

We have also taken a number of steps to ensure we are ready to use an unbundled service from 1 January 2020. We have unbundled the first residential premise in New Zealand. We have demonstrated that we can provide 10Gbps speeds that have still not been replicated by any LFC. We also commissioned an independent economic study from Network Strategies to identify what a compliant layer 1 price is likely to be. This has helped us develop internal business cases and plans so could be ready to go as soon as the service was available.

We were then disappointed with the prices proposed by the LFCs. They were all well above double the price we expected based on Network Strategies work, effectively stopping unbundling in its tracks. These prices ignored the legal requirements on the LFCs, so in April 2019 we were forced to ask the Commerce Commission to intervene.¹ The Vogelsang report helpfully confirms our concerns were correct.

Overseeing the obligations on the LFCs

When we initially asked the Commission to intervene we had hoped guidance would be provided in a timely manner to help steer the LFCs towards a compliant layer 1 service from

¹ https://comcom.govt.nz/data/assets/pdf_file/0027/151578/Letter-received-from-Vodafone-New-Zealand-and-Vocus-Group-New-Zealand-Layer-1-unbundling-price-11-April-2019.pdf

January 2020. No guidance has been issued and this opportunity has been missed. This will be to the significant detriment of end-users and competition.

Our expectation is that none of the LFCs will meet their obligations to have in place a layer 1 service from 1 January 2020 which satisfies the s156AC purpose that it:

- promotes competition;
- is non-discriminatory;
- is compliant with equivalence of inputs; and
- facilitates efficient investment.

As we show below, Vogelsang's report confirms our long-standing position that the service offered by the LFCs breaches these obligations. This means, unless the LFCs quickly update their proposed terms, they will not be compliant with the Act in 6 weeks from the date of this submission.

It is not appropriate for the Commission to accept ongoing non-compliance from 1 January. This would not be consistent with the intent of the Act, or the Commission's responsibilities. Therefore, on 1 January 2020 the Commission will need to start an investigation under s156AQ and s156AR to enforce the undertakings under Part 4AA of the Telecommunications Act. This investigation must cover both price and non-price terms. We provide comments on the key issues for this investigation in the following sections. As part of this ruling the Commission may wish to provide guidance on how the LFCs can move from a non-compliant to a compliant position.

The Vogelsang report

The report from Dr Ingo Vogelsang provides a broad overview of the key economic issues at play. On many of these issues we agree with the position he has reached. In particular, we support:

- 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
- that a two-part tariff is inconsistent with the non-discrimination requirements.

Discriminatory two-part tariffs must be removed

As outlined in our letter to the Commission on 11 April 2019 the two part tariff proposed by the LFCs would result in discrimination on geographic grounds, and between firms of different market share.

The LFCs propose one fee for a feeder fibre between the exchange and the cabinet or fibre flexibility point (FFP), and then a separate fee for the distribution fibre connecting to the customer’s premise. The cost of the feeder fibre is shared by each customer connected to a particular splitter. The splitters Chorus use can service up to 16 connections. However, utilisation varies across geographic locations, and across different access seekers.

Figure 1 below demonstrates the resulting discrimination of the two part tariff set by the LFCs. It uses the prices proposed by Chorus and shows that a large number of layer 1 prices are possible depending on how many customers there are at a particular FFP. This means there will be discrimination in different geographic locations for a given access seeker, as well as discrimination between different access seekers at a given FFP.

Figure 1: Example of discrimination from the pricing structure proposed by the LFCs

	Access seeker 1		Access seeker 2		Access seeker 3		Access seeker 4		Access seeker 5		Access seeker 6	
	Cust	\$	Cust	\$	Cust	\$	Cust	\$	Cust	\$	Cust	\$
FFP1	10	\$48.70	12	\$45.37	5	\$68.70	7	\$57.27	3	\$95.37	11	\$46.88
FFP2	22	\$46.88										
FFP3	1	\$228.70										
FFP4	30	\$42.03										
FFP5	8	\$53.70										

Geographic discrimination

Discrimination across different access seekers

As noted by Vogelsang

[p]ricing by element simply is a misinterpretation of equivalence and is discriminatory. In contrast, a blended price per connection is compatible with retail minus and does not discriminate against smaller unbundlers.²

We are pleased with this finding, and hope this provides a clear signal for the LFCs to at a minimum move to a single layer 1 price before their obligations come into force on 1 January 2020.

Issues that need to be reconsidered

There are four critical issues from Vogelsang’s paper that warrant further consideration.

1. No economic or legal basis is provided to support the assertion that a different approach can be taken in a theoretical ‘penetration pricing’ period.
2. The Commission must draw stronger conclusions on what pricing approaches are non-compliant with the Act.

² P26

3. The Commission must consider the compliance of key price inputs.
4. The Commission must also consider the number of non-equivalent and discriminatory non-price terms proposed by the LFCs.

Penetration Pricing

We do not consider that Vogelsang's advice to treat the equivalence thresholds differently during periods of 'penetration pricing' has any factual basis, nor any economic or legal merit. The Commission should reject this part of the advice.

No evidence has ever been provided to substantiate claims from the LFCs that the current UFB pricing is below cost. In the first instance, the Commission must put the onus on the LFCs to prove penetration pricing is actually a reality in 2020.

To meet this threshold, the LFCs would need to demonstrate that the revenue from the average connection in 2020 is insufficient to cover the costs of servicing that customer. Economists would usually only consider the marginal or incremental costs, however to uphold financial capital maintenance on the fibre networks it may be appropriate to also include certain sunk costs. This must not include any investments that were built regardless of the UFB network, such as those built prior to December 2011. It must also exclude any 'losses' asset constructed as part of the Part 6 regime. This is simply a regulatory artefact and not a reflection of any true underlying economic cost.

Even if an LFC is able to substantiate the claim of below cost 'penetration' pricing, there are serious flaws in the logic leading to a different interpretation of their pricing obligations. Vogelsang's report provides little justification for his assertion, so we can only guess that the rationale arises from three flaws:

1. a misunderstanding of the impact on uptake;
2. a misunderstanding of the impact on investment incentives; and
3. a misunderstanding of the legal requirement to provide a price that allows for sufficient economic space from 1 January 2020 onwards.

Uptake of fibre in New Zealand has exceeded all expectations. Currently, more than 52% of Kiwis who are able to connect have taken up fibre.³ This is well above the initial target of 20% uptake. If penetration pricing was intended to drive uptake it has already well and truly fulfilled its policy intent. In turn, the high uptake makes it extremely unlikely that penetration pricing would still be in effect in 2020, as much more of the sunk assets are being utilised than ever forecast or anticipated.

³ Crown Infrastructure Partners, "Quarterly Connectivity Update, Q2: to 20 June 2019".

We also agree with Vogelsang's insight that product differentiation which will occur as a result of true layer 1 unbundling would further increase uptake as there would be a wider range of layer 2 services to meet different needs.⁴ It therefore follows that if the key policy intent of penetration pricing is to drive uptake, then the best way to fulfil this policy is by maintaining a sufficient margin for layer 1 unbundling to occur. In this respect, it can be said that any penetration pricing occurs on the layer 1 service, rather than at the layer 2 level.

Requiring a proper application of the equivalence and non-discrimination obligations from 2020 will also not have any undue impact on the LFCs incentives to invest. As explained by Vogelsang, the incentives to invest are complex and must be considered separately for layer 1 and layer 2 assets.

We agree with Vogelsang that unbundling will undoubtedly have a positive effect on the incentives to invest at layer 1.⁵ Unbundling will use the assets in new and exciting ways, and continue to drive uptake. This will make building layer 1 assets into other parts of the country more attractive for the LFCs, or any potential new entrant. This effect is the same both before and after 2022.

The LFCs will face increased competition in relation to Layer 2 assets with unbundling. However, there is no reason to protect the LFCs from this competition. Layer 2 assets do not have the same natural monopoly characteristics as the layer 1 fibre. The equipment has a short life, and it can be transferred and upgraded. The LFCs must be exposed to competitive pressure, and the Commission should not be persuaded by arguments to protect them if they are not able to effectively compete. Put another way, any impact on LFCs does not justify departure from the clear requirement in the Act to ensure an unbundled layer 1 service that enables competition is available to access seekers.

Arguments against this outcome are particularly weak prior to 2022. This is because the legislation allows the LFCs to capitalise any losses, and charge future customers to re-coup this asset. This will entirely compensate the LFCs for the cost of any assets that become stranded as a result of competition. They must not be double compensated by also limiting unbundling.

Finally, it is unclear what legal basis there is to ignore s156AC(a) and (b) under penetration pricing. Section 156AC(a) requires the promotion of competition, while s156AC(b) requires the application of non-discrimination and EOI. These requirements are in force from the date unbundling is required on 1 January 2020, they cannot be ignored, and they cannot be traded off against each other, they must all be equally met. The requirement for investment efficiency is not at odds with the promotion of competition or EOI. These are

⁴ Ingo Vogelsang, 2019, 'Equivalence and non-discrimination in New Zealand telecommunications markets: The case of Layer 1 unbundled access to fibre networks', p23.

⁵ Ingo Vogelsang, 2019, 'Equivalence and non-discrimination in New Zealand telecommunications markets: The case of Layer 1 unbundled access to fibre networks', p22.

complementary objectives that are best met by applying a consistent application from the start of next year.

Clarity on the requirements

Vogelsang's paper provides a broad overview of the relevant economic concepts. However, the Commission must synthesise the concepts to identify the legitimate ways the layer 1 price can be constructed. It is not enough to simply identify a 'safe-harbour' where the LFCs are safe from penalties. The Commission must also identify which pricing approaches are inconsistent with the LFCs obligations.

Figure 2 overleaf summarises Vogelsang's report against the obligations on the LFCs. It clearly shows the only approaches which are acceptable is an ECPR based on an efficient entrant, or in certain circumstances a resource based BBM or LRIC model. We provide comments on the key models below.

Resource based

A resource based approach to pricing access products typically leads to a lower price in other jurisdictions. We expect the same result in New Zealand. Up to now we have focussed on an efficient entrant model because as a potential entrant we understood the costs involved better, and it was the bare minimum requirement the LFCs must meet.

However, we agree with Vogelsang that if bitstream prices are high enough, then a resource based approach would be more appropriate. If the Part 6 regime currently being developed by the Commission provides too many generousities for the LFCs then we would favour a resource based approach. This may happen if the losses asset is set at too high a level, too many copper costs are allocated to fibre, or if any uplifts are given to the WACC.

Figure 2: Summary of Vogelsang’s findings of the compliance of various pricing approaches

	Equivalence	Promotion of competition	Facilitating efficient investment
Resource based BBM or LRIC	If the l2 prices are well above cost it may be “preferable to switch to the average resource cost of L1 as a new upper bound.” p19	“price squeezes can occur under resource cost based pricing if the L2 price is sufficiently low ...” and therefore competition is only promoted under “a resource cost based L1 price if the L2 price is sufficiently high.” p21	“LRIC pricing generally will not [lead to efficient investment] It will only do so if the L2 price is sufficiently high.” p22
Constrained market pricing	“constrained market pricing may in practice not be very constraining on the regulated firm and could lead to a price that does not satisfy equivalence”. p14		
ECPR	Clean margin	“An interpretation of EoP based on the clean margin rule might be appropriate if there are no sunk costs and if there are no economies of scale and scope downstream” p18	“This will prevent most potential unbundlers from buying the service” p18
	Cost of expansion	“the avoidable costs should rather be measured in relation to the incumbent giving up the downstream service quantity altogether and should therefore be measured against the incumbent’s downstream average cost of reducing the downstream service to zero.” p18	Price squeezes can occur “under ECPR-type pricing if the avoidable costs are too low for efficient L1 unbundlers”p21
	Efficient entrant	“This provides for “economic space” between the incumbent’s downstream price and the upstream price” p16	The objective of promoting competition limits the extent to which discrimination can be justified and it favours an ECPR approach that is based on the downstream cost of a reasonably efficient entrant.” p21

Clean margin

Vogelsang notes that:

The requirement that Chorus and the other LFCs have to offer full L2 coverage throughout their coverage areas and therefore incur all the sunk costs of the value added between L1 and L2 speaks in favour of an upper bound for the L1 price consistent with the concept of EoP based on the clean margin rule.⁶

This misrepresents the nature of the LFCs obligations. There is no obligation for the LFCs to have standing capacity at layer 2. This equipment can be installed on an as-needed basis. If a customer chooses an unbundled layer 2 service, the LFC does not need to replicate this capacity.

We also do not agree that layer 2 equipment is necessarily sunk. It is simple to re-deploy or re-sell this equipment. The risk of stranding these investments has been overplayed, and has never been substantiated.

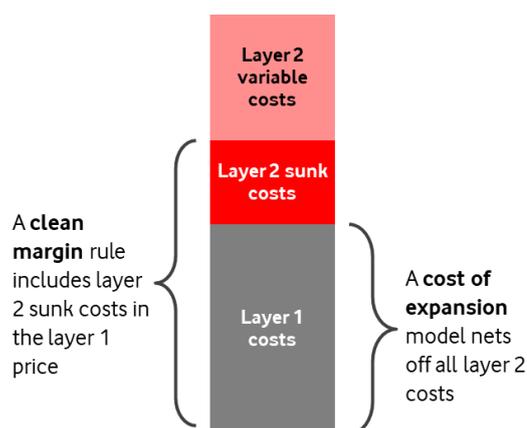
However, regardless of whether a clean margin rule can satisfy a theoretical application of the equivalence obligation, it clearly fails the requirement to promote competition. As shown in figure 3 the clean margin rule would allow the LFC to charge for its sunk layer 2 investments in the layer 1 price. This would squeeze the margin between layer 1 and layer 2 and shut out competition.

Cost of expansion

The key difference between the clean margin approach and the cost of expansion model is to disregard all layer 2 sunk investments in the layer 1 price. This is shown in figure 3. It asks the question, what costs would be saved if the LFC had made no investment at layer 2 at all, which means all costs are treated as variable.

As noted in the section on penetration pricing above, the size of sunk costs that may become stranded has been overplayed by the LFCs. In reality many of these costs can be redeployed or on-sold.

Figure 3: Comparison of a clean margin and cost of expansion model



⁶ Ingo Vogelsang, 2019, 'Equivalence and non-discrimination in New Zealand telecommunications markets: The case of Layer 1 unbundled access to fibre networks', p18.

However, to the extent there are any Layer 2 sunk costs that are displaced by unbundling, they must be disregarded from the layer 1 price. The LFCs lobbied hard during the development of the UFB initiative to delay unbundling so that they could gain a layer 2 foothold. It would be perverse to now argue this foothold has resulted in sunk investments that must be protected by making unbundling unviable. These are very ordinary pressures on a competitive business, and should not be protected by regulation.

Example: ONT installation costs

One of the critical costs for unbundling is the cost of installing the end-user layer 2 equipment known as an ONT.

When the LFCs installed this equipment they did so at the same time as they installed layer 1 equipment. This meant they could share call-out costs and some labour time with layer 1 costs, providing them with significant economies of scope.

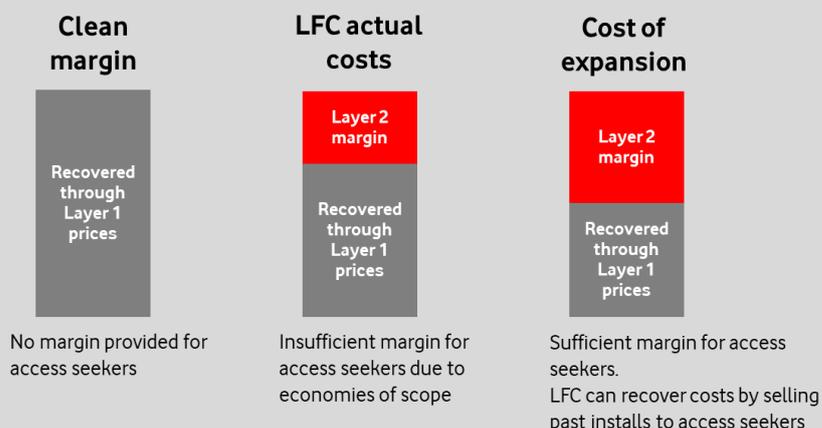
In a clean margin model the costs of installing an ONT may be considered sunk, and therefore recovered through the layer 1 price. However, any competitor would have to incur the full cost of a call out to install this equipment, giving them no basis to compete.

In a cost of expansion model, the LFC would need to subtract the stand-alone cost of a separate truck roll, as this would be the cost of expanding from layer 1 service to also have a layer 2 service at a particular premise. This is larger than the cost the LFC incurred themselves because of the economics of scope they benefitted from.

Under a cost of expansion model the LFC is then forced to reconsider whether this cost is truly sunk or not. For example if they chose to sell or rent the ONT to an access seeker, then they could also bundle in the depreciated cost of install. The access seeker is likely to take this deal because the depreciated cost of install is less than a fresh install. This results in the most efficient use of resources.

Another way of looking at this is to say that access seekers must be given equal access to the installation cost asset (these costs have typically been capitalised), or it must be excluded altogether.

Figure 4: Comparison of a clean margin, LFC actual costs and the costs of expansion for installing an ONT



A cost of expansion model can also be considered as a special type of efficient entrant test, where the entrant has 100% market share. Therefore, this approach is only consistent with the requirements to promote competition and efficient investment, if the downstream service has no, or very limited efficiencies of scale.

In the case of unbundling there are clear efficiencies of scale. An entity with larger scale can more efficiently utilise certain equipment, most notably the OLT ports on the layer 2 electronics at the exchange. A cost of expansion model would only be appropriate if an efficient competitor could gain sufficient scale to reach an inflection point where further scale offered no further advantage. Unfortunately, the non-price terms offered by the LFCs have made this impossible for the layer 1 services offered by the LFCs. These terms are discussed further in the following section.

Efficient entrant

As shown in figure 3 above, an efficient entrant model is the only approach to layer 1 pricing identified by Vogelsang that is always consistent with the obligations on the LFCs. Although as rightly identified by Vogelsang, if layer 2 prices are sufficiently high then a resource based approach will be a better implementation.

As noted by Vogelsang the key requirement of EOI is that the LFC must demonstrate the layer 1 price is equal to what “the incumbent internally charges itself for the service”.⁷ Since in the event of unbundling the LFC will no longer have 100% market share, it is critical that any model considers the appropriate scale to use.

It is nonsensical to use any firm’s actual market share as these are subject to change. For example, if an LFC tried to justify a price based on their own market share, then it would provide an incentive for access seekers to create larger and larger joint ventures until they had a larger market share than the LFC. It is unlikely this is the intended incentive.

As noted by James Every-Palmer QC, another key EOI requirement is to provide sufficient economic space to allow for an efficient competitor.⁸ It follows that the scale assumed in any model must be consistent with the size of a typical efficient competitor in similar markets.

We agree with Vogelsang that a nominal market share of between 15-20% is appropriate. The expert report we commissioned from Network Strategies conservatively assumes a 20% market share, so should be considered the upper end of the acceptable price range.

⁷ Ingo Vogelsang, 2019, ‘Equivalence and non-discrimination in New Zealand telecommunications markets: The case of Layer 1 unbundled access to fibre networks’, p20.

⁸ James Every-Palmer, “Equivalence of inputs obligation: Implications for pricing of layer 1 services” advice prepared for Vodafone New Zealand, 2 September 2016.

Irrelevant considerations

Vogelsang's report considers two issues that are irrelevant to the Commission's role in the legislation. These factors must be disregarded in the Commission's considerations.

The unbundling price must not be dependent on the nature of the downstream service as suggested by Vogelsang at page 16. Doing so would breach the promotion of competition and efficient investment obligations. More importantly, it would provide the LFCs a means to continue to dictate the layer 2 market, which would undermine the entire purpose of unbundling in the first place.

Vogelsang also provides some advice on how to ensure the LFCs can continue to offer layer 2 services at page 19. The Commission's legislative role does not allow them to consider this issue. We also consider it to be extremely unlikely to ever occur. The LFCs will have strong incentives to continue to operate at layer 2. We expect them to be robust competitors, helping to drive great outcomes for New Zealanders. It is also our intention to offer wholesale layer 2 services ourselves, enriching competition in that market for the benefit of end-users.

The Commission must consider key price inputs

We provided the Commission with a detailed independent economic report from Network Strategies that demonstrates an approach to layer 1 pricing that is consistent with the LFCs obligations.⁹ Vogelsang's analysis confirms this analysis would meet the requirements of the LFCs.

We are disappointed Vogelsang's analysis doesn't engage with Network Strategies' report. Doing so would have allowed a more thorough discussion of how key inputs are determined. It is critical that future work from the Commission takes this extra step. Without it there is simply too much room for LFCs to manipulate the results and continue to shut out unbundling.

The following key inputs need to be considered by the Commission.

- The WACC rate applied. It is reasonable to assume that the riskier layer 2 component of the business will have a higher cost of capital than the more stable layer 1 infrastructure. This can be achieved by using an asset beta at the higher end of the comparator set for layer 2 assets, and at the lower end for layer 1 assets.
- The churn rate of layer 2 customers. Because of the cost of retrieving and refurbishing ONTs, the churn rate determines the functional life of these assets.

⁹ Non-confidential version available at https://comcom.govt.nz/_data/assets/pdf_file/0026/151577/Vocus-Group-New-Zealand-and-Vodafone-New-Zealand-Network-strategies-fibre-unbundling-summary-report-11-April-2019.pdf

Network Strategies proposed a life of between 3 years (consistent with the OECD) and 4 years (consistent with the New Zealand naked broadband churn rate).

- The market share of the efficient competitor at layer 2. Vogelsang states this should be between 15-20%.
- How common costs are allocated between layer 1 and layer 2. Network Strategies used a common cost mark-up for the efficient competitor of 19.6% based on precedents from similar models in other jurisdictions. Without some clear guidance on this allocation, and price from an LFC will be open to continuous challenge.

The Commission must also consider non-price terms

The LFCs have set a number of stifling non-price terms that would make unbundling unviable no matter the price. The Commission must consider the following matters when assessing compliance with the Act.

- The LFCs are not allowing equal access to the distribution fibres.
- The LFCs are not allowing equal access to the roadside cabinets and fibre flexibility points (FFPs).
- The LFCs are not allowing access to the existing ONTs.
- The LFCs have timing requirements on an unbundled connection far in excess of what they provide to themselves.

This is indicative of an approach to quality of service by LFCs that has broader implications.

Access to both distribution fibres

As part of the UFB contracts, the LFCs are required to install two distribution fibres to each premise. This allows for leap-frogging of services to maintain continuity (for example, during an upgrade to newer generation equipment, or switching between layer 2 providers), or to offer two connections to the same premise in some circumstances.

The LFCs are now claiming exclusive use of one of those fibres, and access seekers must share the other fibre between themselves. This is a clear breach of the equivalence obligations and would hurt the customer experience. For example, where there is an in-tact unbundler, there would be a significantly different experience for a customer churning back to the LFC, than churning to another layer 2 access seeker.

- If the customer churns back to the LFC then it would only require a back-office switch, and there will be no interruption of service.

- If the customer churns to another layer 2 access seeker then there would be significant downtime, as the one fibre is disconnected from the existing provider and then transferred to the gaining provider.

Access to cabinets

The LFCs have all chosen not to allow any unbundler access to the roadside cabinets or FFPs. This means the access seeker must send one truck roll to the premise to install the end-user ONT, and then the LFC must send a second truck roll to the cabinet to connect the fibre. This creates unnecessary delay complexity and cost for access seekers, whereas the LFC faces none of these impositions. It is therefore another clear breach of equivalence.

We also find the reasoning from the LFCs to be cynical. They claim only their technicians are qualified to operate the fibres at the cabinet.

- There have been numerous reports of poor workmanship, and exploitative practices from the technicians used by some of the LFCs. There is no justification for claiming that they hold any special position as the only qualified technicians.
- The technicians hired by any access seeker are likely to have also done work for the LFC themselves. There are only so many firms available to do this work.
- There has been no attempt made to create any certification or training to make sure technicians hired by access seekers are capable of doing the job.

Access to the existing ONTs

Many customers will already have an ONT installed in their home, which is the layer 2 equipment that decodes the signal and sends it through to an RSPs Wi-Fi gateway unit. To minimise the impact on customers we have requested that for any unbundled connection the LFC either sells or rents the ONT to the access seeker. The LFCs have refused.

The LFCs have given a number of reasons over the last 16 months for refusing access.

- In initial discussions they claimed it was not technically possible. We tested this with our own equipment and can confirm that it is technically feasible.
- Then in Chorus' first product construct document they claimed they had regulatory constraints requiring them to keep a functioning ONT in the home.¹⁰ No such obligation exists. In specified fibre areas the TSO obligation is removed, and there is nothing in the UFB agreements with the Crown that require this.

¹⁰ Chorus 'High level Unbundling Product Construct v1', October 2018, p23.

- The LFCs now simply claim it is a commercial decision, presumably to put them in a stronger position than any access seeker.

While the ONT is not a piece of layer 2 equipment, the LFCs are clearly limiting access to this equipment to stifle unbundling. While the Commission may have limited powers to require access to this equipment there are two actions within their power that would place a better incentive on the LFCs to enter into commercial arrangements.

- Do not allow the LFCs to recover the costs of the ONT through layer 1 prices. Even if the LFC can prove this asset is stranded it should be removed from the regulatory asset base in the event of unbundling.
- Require that the layer 1 price provides enough economic space for an access seeker to pay the full stand-alone installation cost of an ONT.

Un-equal installation timing

Chorus' proposed layer 1 service can take up to 95 days to provision a simple install. In comparison Chorus is able to provision a layer 2 bitstream service in 30 days. This is a clear breach of equivalence and non-discrimination and does not provide a level playing field for competition.

At clause 10.5 of the PONFAS operations manual, Chorus states:

A PONFAS Distribution Service Request will be deemed invalid and may be rejected by the LFC if ... the Service Provider does not have a PONFAS Feeder Service at the Fibre Flexibility Point associated with the End User Premises. The PONFAS Feeder Service is required for a Service Provider to access and interconnect with the applicable PONFAS Distribution Service.

That means the feeder service and the distribution service must be ordered sequentially at the timeframes below.

- Feeder fibre – 65 days to provision. An access seeker needs a feeder fibre for every 16 customers at each FFP. We are unsure why this is such a significant delay. In the vast majority of circumstances there are a number of spare feeder fibres already installed, they just need to be connected at the exchange and the FFP.
- Distribution fibre. Simple installs take 30 days, and complex installs take 65 days.

Based on Chorus bitstream install timeframes, it appears that they are allowing these services to happen in parallel for themselves, but denying this advantage to access seekers.