

28 August 2020

Hiramai Rogers
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New Zealand

By email only: Hiramai.rogers@ultrafast.co.nz

Dear Hiramai,

UFF Limited – Compliance advice

1. The purpose of this letter is to inform you that the Commerce Commission (**Commission**) has completed its investigation into Ultrafast Fibre Limited's (**UFF**) potential breaches of UFF's Deed of Open Access Undertakings for Fibre Services and UFF's Deed of Open Access Undertakings for Fibre Services for UFB2 (together, the **Deeds**).
2. In summary, the Commission considers that UFF is likely to have breached clauses 10.1 and 11.3 of the Deeds by not providing the documents outlined in these clauses to the Commission within the timeframes specified in the Deeds.
3. After weighing up the factors set out in our Enforcement Criteria¹, we have decided to conclude this investigation by providing compliance advice regarding UFF's reporting obligations under the Deeds.

UFF's obligations under the Deeds

4. Clause 10.1 of the Deeds requires the Board of UFF to certify to the Commission annually on behalf of UFF that, to the best of the directors' knowledge after making reasonable inquiry, UFF has complied with the Deeds (except for any breaches that have been reported to the Commission or are reported with the annual certificate)(**annual certification**).

¹ The Commission's Enforcement Criteria is available at <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>.

5. Under clause 10.1, the annual certification is due no later than 20 working days following the end of each UFF financial year.
6. Clause 11.3 of the Deeds requires UFF to disclose to the Commission within 30 working days of the end of each UFF financial year all transactions in that year with UFF related parties involving the supply of certain services with a value above 1% of UFF's net assets or annual revenue, whichever is less (**disclosure of arm-length dealings**).

Our investigation

7. UFF's financial year ends on 31 March.
8. For the 2019/20 financial year, the due date for the provision of UFF's annual certification was therefore 30 April 2020, and the due date for UFF's disclosure of arm-length dealings was 14 May 2020.
9. UFF did not provide the annual certification by 30 April 2020 and did not provide the disclosure of arm-length dealings by 14 May 2020. Instead it provided both documents on 3 June 2020. The Commission opened an investigation following these failures to comply.
10. We sent a notice of investigation to UFF on 25 June 2020.² In this letter, we:
 - 10.1 noted that UFF's failure to comply with its reporting obligations by the due date constituted potential breaches of the Deeds;
 - 10.2 sought UFF's views on the circumstances that led to UFF's potential breaches; and
 - 10.3 requested UFF provide any information or evidence that supports UFF's view (such as email correspondence or internal documents) by Thursday 9 July 2020.
11. We received UFF's response on Wednesday 8 July 2020.³ In its letter, UFF acknowledged it had an obligation to provide the Commission with the annual certification by 30 April 2020 and the disclosure of arms-length dealing by 14 May 2020, that it did not provide those documents to the Commission until 3 June 2020, and that it should have notified the Commission as soon as it became aware of the likelihood of the delay.
12. In summary, UFF considers the main reasons for not meeting its reporting obligations were:

² Commission letter to UFF, *Notice of investigation – UFF compliance with the Fibre Deeds*, 25 June 2020.

³ UFF email to the Commission, 8 July 2020.

- 12.1 the impact of COVID-19 Alert level 4;
- 12.2 a heavy regulatory workload from the Commission; and
- 12.3 the UFF Board not meeting in due time to go through the internal approval process ahead of the due dates for both the annual certification and the disclosure of arm-length dealings.

The Commission's view

Failure to provide annual certification and disclosure of arm-length dealings in due time

- 13. We are of the view that UFF's failure to provide its annual certification and disclosure of arm-length dealings to the Commission in the timeframes specified under the Deeds gives rise to a likely breach of clauses 10.1 and 11.3 of the Deeds.
- 14. While we recognise UFF faced challenges during the COVID-19 lockdown, we are not satisfied that UFF's failures to comply are attributable to this.
- 15. UFF indicated in its response letter of 8 July that its Board did not meet in April 2020 and was therefore unable to sign the compliance certificates ahead of the due dates.⁴ UFF did not argue or demonstrate in its response letter that its Board's failure to meet at a time that would have enabled compliance with the relevant obligations in the Deeds was attributable to the COVID-19 situation, or outside its control.
- 16. We also note that UFF failed to submit its annual certification and disclosure of arm-length dealings on time in each of the two preceding years.

Mitigating factors

- 17. UFF submitted the compliance documents.
- 18. UFF informed us that it is evaluating whether the reporting timeframes under the Deeds are sufficient to allow for internal financial reporting, management sign-off and Board approval processes.

Compliance advice

Reporting obligations under the Deeds

- 19. Compliance with clauses 10.1 and 11.3 of the Deeds is important because timely disclosure of relevant information to the Commission by UFF under these clauses supports the Commission's assessment of UFF's compliance with the Deeds.
- 20. We expect UFF to ensure its internal approval processes will enable it to comply with the reporting timeframes specified under the Deeds in the future.

⁴ UFF Letter to the Commission, *Letter to NZCC – Response to Deed of Open Access notice*, 8 July 2020.

Escalation path

21. We will take this compliance advice into account if UFF were to engage in similar conduct in the future. In this regard, we note that past conduct is a relevant consideration under our Enforcement Criteria.
22. We may also draw this compliance advice to the attention of a court in any subsequent proceedings brought by the Commission against UFF.

Penalties for a breach of the Deeds

23. Only a court can decide if there has actually been a breach of the Deeds and a court can impose penalties where it finds the law has been broken.
24. UFF should be aware that our decision to issue this compliance advice letter does not prevent any other person or entity from taking private action through the court in respect of these potential breaches.

Conclusion

25. This letter is public information and will be published on our website.
26. Thank you for your assistance with this investigation. Please contact Juline Bunel on (04) 924 3849 or via email at juline.bunel@comcom.govt.nz if you have any questions on this matter.

Yours sincerely



Stephen Bass
Head of Compliance and Investigations
Regulation Branch, Commerce Commission