

**ENABLE NETWORKS LIMITED
ULTRAFIBRE LIMITED
NORTHPOWER FIBRE LIMITED
NORTHPOWER LFC2 LIMITED**

**REQUEST FOR CLARIFICATION OF UNDERTAKING PURSUANT TO SECTION 156AN OF THE
TELECOMMUNICATIONS ACT 2001**

1. The Applicants

- 1.1 Enable Networks Limited (**Enable**), Ultrafast Fibre Limited (**Ultrafast Fibre**) Northpower Fibre Limited and Northpower LFC Limited (**Northpower**) (collectively referred to as **Applicants**) are local fibre companies that have each invested in building the Ultrafast Broadband (**UFB**) network, in the greater Christchurch, central North Island and Northland areas respectively.
- 1.2 The Applicants are accordingly subject to Part 4AA of the Telecommunications Act 2001 (**Act**), have each entered into an undertaking in accordance with subpart 2 of Part 4AA, and are each entitled to make this request pursuant to section 156AN of the Act for clarification of their respective undertaking.

2. Telecommunications Act obligations

- 2.1 Subpart 2 of Part 4AA of the Act establishes a regime for “*Undertakings relating to networks developed with Crown funding as part of UFB initiative*”.
- 2.2 The regime applies to every local fibre company (**LFC**), which is defined in the Act as “*a company through which the investment of the Crown and a UFB partner in relation to a fibre optic communications network is effected*”.¹
- 2.3 LFCs were required to enter into an undertaking in accordance with subpart 2 of Part 4AA of the Act.² That undertaking was required to provide for LFCs to:
- (a) supply unbundled layer 1 services on all parts of its fibre-to-the-premises access network on and after 1 January 2020³ (**Unbundling Obligation**);
 - (b) achieve non-discrimination in relation to the supply of relevant services⁴ (**Non-discrimination Obligation**);
 - (c) design and build the LFC fibre network in a way that enables equivalence in relation to the supply of unbundled layer 1 services to be achieved on and after 1 January 2020⁵ (**EOI-ready Obligation**); and
 - (d) achieve equivalence in relation to the supply of unbundled layer 1 services on and after 1 January 2020⁶ (**Equivalence Obligation**).
- 2.4 **LFC fibre network** is defined in section 156AB of the Act as “*a fibre-to-the-premises access network that is owned or operated by an LFC*”.

¹ Telecommunications Act 2001, section 156AB.

² Section 156AD(1).

³ Section 156AD(2)(b).

⁴ Section 156AD(2)(c)(i).

⁵ Section 156AD(2)(c)(ii).

⁶ Section 156AD(2)(c)(iii).

- 2.5 **Fibre-to-the-premises access network** is in turn defined (relevantly) as “a network structure used to deliver telecommunications services over fibre media that connects a powered node in a central office location (an exchange or equivalent powered facility) to an end-user’s premises or building, or the optical distribution facility of an end-user’s premises or building”.
- 2.6 **Relevant service** is defined as “a wholesale telecommunications service that is provided using, or that provides access to unbundled elements of, an LFC fibre network”.
- 2.7 As is clear from these definitions in section 156AB, and the wording of the Unbundling, Non-discrimination, EOI-ready, and Equivalence Obligations, the regulatory framework set out in subpart 2 of Part 4AA applies only to services provided over that part of the fibre network which connects an end-user’s premises or building to the LFC’s exchange or central office.

3. Deed of Open Access Undertaking

- 3.1 On 6 October 2011 each of Enable, Ultrafast Fibre and Northpower executed a Deed of Open Access Undertakings for Fibre Services (**Applicant’s Undertaking**) to comply with its obligations under Part 4AA of the Act.
- 3.2 Each Applicant’s Undertaking was prepared by the Crown, and recorded, by way of background, that “these Undertakings are given by the LFC in accordance with, and are Undertakings for the purposes of, Part 4AA of the Telecommunications Act 2001.”⁷
- 3.3 The Unbundling, Non-discrimination, EOI-ready and Equivalence Obligations are described in each Applicant’s Undertaking as:
- (a) **Unbundling Obligation:**⁸ from 1 January 2020, the LFC must (i) make available the Input Services;
 - (b) **Non-discrimination Obligation:**⁹ When doing or omitting to do anything in respect of a Service the LFC will not discriminate:
 - (i) between Access Seekers;
 - (ii) in favour of any LFC Related Party; or
 - (iii) where the LFC supplies a Service to itself, in favour of the LFC itself.
 - (c) **EOI-ready Obligation:**¹⁰ 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; and
 - (d) **Equivalence Obligation:**¹¹ from 1 January 2020, the LFC must (ii) provide all Input Services to an Equivalence standard.
- 3.4 **Input Services** are defined in each Applicant’s Undertaking as:¹²
- a) the Direct Fibre Access Service;
 - b) the PON Fibre Access Service;

⁷ Enable Networks Limited, Deed of Open Access Undertakings for Fibre Services (6 October 2011) (**Undertaking**) at page 3. The Undertakings of the other Applicants follow the same format.

⁸ Undertaking, clause 6.2(a).

⁹ Above, clause 5.1.

¹⁰ Above, clause 6.1.

¹¹ Above, clause 6.2(b).

¹² Above, clause 1.1. As no unbundled layer 1 service is required to be provided under a Standard Terms Determination, that part of the definition is not relevant.

- 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 as at 31 December 2019 under the UFB Contract.*

3.5 **Network** is defined in each Applicant's Undertaking as "*the fibre-optic communications network which is, or will be, owned or operated by the LFC.*"¹³

3.6 **Service** is defined in each Applicant's Undertaking as "*a wholesale Telecommunications service that is provided using, or that provides access to unbundled elements of, a Network.*"¹⁴

4. Error in Definition of Network in each Applicant's Undertaking

4.1 While Part 4AA of the Act is clear (as we summarise at 2.7) that the Unbundling, Non-discrimination, EOI-ready, and Equivalence Obligations apply only to services provided over that part of the fibre network which connects an end-user's premises or building to the LFC's exchange or central office, Network is defined in each Applicant's Undertaking as "*the fibre-optic communications network which is, or will be, owned or operated by the LFC.*"

4.2 The consequence of this definitional error is to extend the scope of each Applicant's Undertaking to the entire fibre network, thereby imposing obligations on the Applicants in respect of services which are not delivered over the fibre-to-the-premises access network.

4.3 This was not the intention of the Applicant's Undertaking, which, as each states, was entered into in accordance with and for the purposes of Part 4AA of the Act.

4.4 Section 156L of the Act provides for a pecuniary penalty of up to \$10 million if a person has failed, without reasonable excuse, to comply with an undertaking under Part 4AA. The error in the definition of Network has the effect of creating a wider exposure to penalty than is provided for in the Act.

4.5 Section 156AD(5)(a) of the Act provides that "*an undertaking **must not** provide for rules or obligations in respect of services that are not relevant services (including layer 1 services).*" Relevant service is defined as "*a wholesale telecommunications service that is provided using, or that provides access to unbundled elements of, an LFC fibre network*", and LFC fibre network is defined as "*a fibre-to-the-premises access network that is owned or operated by an LFC*".

4.6 Each Applicant's Undertaking, by purporting to provide for rules or obligations in respect of services which are not relevant services, breaches section 156AD(5)(a) of the Act. As a consequence, those rules or obligations are *ultra vires* and of no effect.

5. Correct Definition of Network in the Chorus Undertaking

5.1 In contrast to the Applicant's Undertaking, Network is correctly defined in clause 1.1 of the undertaking given by Chorus Limited on 6 October 2011 under section 156AH of the Act (**Chorus Undertaking**):

(a) "*Network means the Fibre-to-the-Premises Access Network which is, or will be, owned or operated by Chorus*"; and

(b) "*Fibre-to-the-Premises Access Network has the meaning given in Part 4AA of the Act*".

5.2 These definitions reflect those contained in Part 4AA, as noted at 2.5 above.

¹³ Above, clause 1.1

¹⁴ Above, clause 1.1.

6. Request for clarification of Applicant's Undertaking under section 156AN of the Act

6.1 The Applicants request that the Commission amend each Applicant's Undertaking to clarify it by adopting the relevant definitions from the Chorus Undertaking, namely:

- (a) replacing the definition of Network currently in each Applicant's Undertaking with the following definition which is consistent with the definition of Network in the Chorus Undertaking:

"Network means the Fibre-to-the-Premises Access Network which is, or will be, owned or operated by the LFC"; and

- (b) adding to each Applicant's Undertaking the definition of Fibre-to-the-Premises Access Network set out in the Chorus Undertaking:

"Fibre-to-the-Premises Access Network has the meaning given in Part 4AA of the Act."

6.2 This change would:

- (a) give effect to the true intent of each Applicant's Undertaking (as evidenced by the first sentence in each of them);
- (b) bring each Applicant's Undertaking within the scope of its primary enabling legislation and create enforceable obligations; and
- (c) make the Applicants' obligations consistent with Chorus' obligations.

6.3 For these reasons, the requested change is not a material change, and the Commission is not precluded by section 156AN(b) of the Act from amending each undertaking to clarify it in the manner requested.

6.4 All correspondence and notices in respect of this request should be directed in the first instance to:

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