



Proposed clarification of LFC Fibre Deals

Submission | Commerce Commission

17 August 2018

Left blank

The Proposal

1. Thank you for the opportunity to comment on the Commission's draft clarification of the Deeds of Open Access Undertakings for fibre services for the LFCs (**the draft**).
2. The applicants - Enable, Ultrafast, Northpower Fibre and Northpower UFB2 – have submitted a request for clarification of the definition of “Network” in their respective Deeds. The proposed clarification would amend the definition of “Network” in the Deeds so that, rather than referring to the fibre optic communications network operated by the LFC, it adopts a narrower definition of a fibre to the premises access network.
3. The Commission provisionally considers that the proposed clarification addresses an ambiguity within the text of the Deeds, and that the clarification is not material. Accordingly, the Commission's preliminary view is that the clarification request should be approved and that the Deeds be amended accordingly.
4. We provide more detailed comments on the draft below, but observe here that, in the absence of any analysis by the applicants or the Commission on the intended and potential **effects** of the clarification it is very difficult for retail service providers to provide sensible commentary on the draft. It's not clear to us, for example, what outcomes the Applicants are seeking to achieve from amending the Deed, nor is it clear that the proposed amendment is possible under the Act. The proposal would have the effect of narrowing the obligations in the Deed so that these potentially only applied to a subset of LFC services, whereas the Act requires a wider set of commitments relating to an LFC's overall business.

Comment

It remains unclear what the proposal is all about

5. The Applicants propose that the undertakings be narrowed so that they only apply to services provided over that part of the applicants' fibre network which connects an end user premises or building to the LFCs exchange or central office [2.7]. The Applicants propose to do this by restricting the definition of “Network” to the fibre to the LFCs home access network (“**FTTH network**”) and “Relevant Services” to those on the FTTH network. Unfortunately, on our reading it is not that straight forward.
6. We don't want to hold up sensible and pragmatic changes to the Deed that ensure they remain fit for purpose. However, the proposed amendment is potentially significant, and at this stage, it remains unclear what practical concern the proposal is seeking to address.
7. There are several possible intentions or implications for the proposed amendment that we can identify:
 - a. The proposal is intended to preclude wavelength unbundling by making it uneconomic through forcing deployment to the first exchange. Wavelength unbundling – which could conceivably extend a layer 1 unbundled service beyond the first central office - is now feasible and one of the options we support in industry consideration of unbundling obligations; or
 - b. The proposal is intended to exclude inter-exchange fibre from undertaking obligations. This seems to be the outcome the applicants most heavily hint at (although we note that a fibre to the premises access network is not defined by

reference to the *first* exchange and so it is not clear to us that the proposed change would achieve this outcome anyway); or

- c. The applicants desire to expand into retail markets and provide telecommunications services directly to end users where those services use network elements that are outside of a “fibre to the premises access network”. This would be a significant change to the current framework based on LFCs providing wholesale services on an open access basis.

We cannot tell whether the proposal is intended to, for example, provide relief in respect of the line of business restrictions (not to provide services at retail) for parts of their fibre network beyond that defined as the FTTP network or provide broader relief from non-discrimination on services provided partly across the FTTH Network and partly across other parts of the LFCs fibre network.

8. Each of these outcomes would be of significant concern to us, but it may be that LFCs have a different concern that has not been articulated to date and which we may be able to support if it was framed as a more targeted clarification directed at those concerns.
9. Accordingly, the Commission should ask the LFCs to set out what, in practice, they would like to do that is not permitted by the undertakings today. This is a necessary precursor to considering any amendments to the Deeds.

The regulatory framework

10. In any case, we do not agree that the proposed amendment is required to ensure that the Undertakings are valid and binding. Nor are we certain that the proposed amendments can or should be implemented through a clarification.
11. The LFCs argument appears to be that the number of related definitions in 156AB, together with the wording of key concepts such as unbundling, non-discrimination and equivalence, suggest that Part 4AA regulatory framework 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. Therefore, the Deeds must include a definitional error by referring to the potentially wider fibre optic communications network operated by the LFC.
12. This view does not align with our view of the scope of the Undertakings required. In our view the Act expressly anticipates undertakings that relate to an LFC’s wider fibre optic communications network, even though some elements of the Undertakings only relate to Relevant Services. In other words, the current Deed is consistent with Part 4AA and s156AD:
 - a. The Part 4AA overview notes that the part requires providers of wholesale telecommunications services that are provided using a fibre optic communications network or unbundled elements of such a network to give enforceable undertakings relating to several matters [156AA]; and
 - b. Section 156AD sets out that LFCs must enter into undertakings in accordance with the subpart, and then lists elements that must be included in the undertakings.

The undertakings anticipate commitments relating to the fibre to the premises network structure, wholesale telecommunications services that are provided using elements of that structure, and LFC commercial and operational matters such as

arms-length arrangements, use of standard terms, access to information and the treatment of confidential information (i.e. 156AD(2)(d-i)).

13. While some elements of the legislative framework for undertakings make specific reference to a fibre to the premises access network or relevant services, a number of the requirements relate to the LFC. Therefore, we do not believe it is possible to narrow the scope of the Deed as requested by the applicants and remain consistent with the Act. The proposed amendment would imply that key obligations such as the prohibition on an LFC retailing telecommunications services, would not apply to the LFC but rather a narrower subset of access services.
14. Given that the Deed is structured so the definition of Network captures all the requirements of s156AD and sets the scope of the Deed, it is unsurprising that the definition refers to a fibre optic communications network. In doing this, the Deed has been structured to pick up the language of the underlying LFC definition to which the s156AD undertakings apply, the Part 4AA overview and the UFB original invitation to participate. There is nothing to suggest that the drafting of the current drafting was a mistake.
15. The Application also contrasts the phrasing with used in the Chorus Deed. In our view the LFC Deeds will necessarily different from the Chorus Deed to reflect each circumstance. The line of business restrictions, for example, are contained in the LFC Deeds but the Chorus Deed references line of business restrictions of the Act. We would be concerned if the LFCs sought to use this example to also restrict the application of the line of business restriction which were always intended to apply to the LFC's entire fibre business pursuant to the ITP for UFB.
16. Further, the draft notes that – at the time the bill was being considered - a number of terms relating to LFC activities were being used inter-changeably. We agree, the Commission should be cautious making inferences from a specific section of a report. For example, the draft refers to the explanatory note to the bill introduced in late 2010 relating to the then proposed 156AY power to specify a network [subsequently deleted] as an indication that the undertakings were intended to apply only to fibre to the premises access networks, and not have a wider scope. However, the subsequent May 2011 Select Committee Report which recommended the expanded s156AD requirements we have today, noted that the expanded approach would enhance the value of undertakings by confirming obligations that apply in their fibre undertakings.¹ We believe that the Select Committee report better reflected the general policy intent at the time that LFCs should be open access wholesale only service providers as anticipated by the invitation to participate.
17. Accordingly, it is unlikely that the undertakings provisions were intended to be as tightly bound to the defined fibre to the premises access network as proposed. We don't know why the LFCs have sought the clarification, but it seems to us that any such request warrants deeper analysis and more robust debate before such a change can be made. And we disagree with the suggestion that the deeds could be void under the Act.

The next steps

18. As noted above, our intention is not to hold up sensible and pragmatic changes to the Deed ensuring they remain fit for purpose. However, LFCs have proposed to amend the Deed in a

¹ Bill as Reported from the Finance and Expenditure Committee on 16 May 2011, page 8
https://www.parliament.nz/en/pb/sc/reports/document/49DBSCH_SCR5144_1/telecommunications-tso-broadband-and-other-matters

way that has potentially significant implications for the regulatory framework with no information relating to the practical concern the LFCs are looking to address. With that information we would likely be able to consider their concerns, potentially suggesting clarification targeted at those needs.

19. As it stands, the proposed Deed amendment would be a material change to the regulatory framework as, for example, LFCs could then be permitted to provide services directly to end users and confidentiality obligations narrowed. Even if the Commission wished to consider the proposal further, these are material changes and we doubt that the clarification route is open to it. At a minimum, assessment of the proposal would need to consider the proposal in light of the s156AC purposes and potential implications for other elements of the regulatory framework such as the wholesale service agreements and UFB agreements, and anticipated Part 6 information disclosure requirements. We have not considered these aspects of the proposal.

END