

Clarification of the Deeds of Open Access Undertakings for Fibre Services for each of Enable Networks Limited, Ultrafast Fibre Limited, Northpower Fibre Limited and Northpower LFC2 Limited

Decision 2018 NZCC 15

Amendment made under section 156AN of the Telecommunications Act 2001

The Commission:

Dr Stephen Gale, Telecommunications Commissioner
Elisabeth Welton
Dr Jill Walker

Date of Decision: 26 September 2018

Introduction

1. The Commission **approves** the joint application for clarification of the Deeds of Open Access Undertakings for Fibre Services executed in favour of the Crown (together, ***the Deeds***)¹ by the following local fibre companies (***LFCs***)²:
 - 1.1 Enable Networks Limited;
 - 1.2 Ultrafast Fibre Limited³;
 - 1.3 Northpower Fibre Limited⁴; and
 - 1.4 Northpower LFC2 Ltd,
 (together, ***the Applicants***).
2. The Applicants have requested that the definition of “Network” in their respective Deeds be clarified.
3. A copy of the joint application for clarification is attached in **Appendix A**.⁵
4. This clarification decision (**Decision**) is made under section 156AN of the Telecommunications Act 2001 (**Act**)
5. This Decision sets out the nature of the clarification and the reasons for the Commission’s decision. Specifically, this Decision sets out:
 - 5.1 a summary of the relevant background;
 - 5.2 our analysis of why the clarification meets the criteria in section 156AN of the Act;
 - 5.3 our response to the submissions and cross-submissions received on our Draft Clarification published on 3 August 2018; and
 - 5.4 the amendments made to each of the Applicants’ Deeds as part of this clarification process.

¹ The Deeds include the Deeds of Open Access Undertakings for Fibre Services for each of Enable Networks Limited, Ultrafast Fibre Limited (previously known as Ultrafast Broadband Limited) and Northpower Fibre Limited (previously known as Whangarei Local Fibre Company Limited), dated on or about 6 October 2011 and effective on or about 10 November 2011, the Deed of Open Access Undertakings for Fibre Services for Ultrafast Fibre Limited dated 19 May 2017 and effective on 22 June 2017 and the Deed of Open Access Undertakings for Fibre Services for Northpower LFC2 Limited dated 24 May 2017 and effective on 22 June 2017

² Defined in section 156AB of the Act

³ Previously known as Ultrafast Broadband Limited

⁴ Previously known as Whangarei Local Fibre Company Limited

⁵ This includes an extension to the original joint application. A copy of the Applicants’ extension request is also set out in Appendix A, at the end of the original clarification request

Background

6. The Deeds were entered into pursuant to section 156AD of the Act which required the Applicants to enter into an undertaking that provided for various matters relating to the Government's ultrafast broadband initiative (*UFB Initiative*), including the supply of unbundled services, non-discrimination and equivalence of supply.⁶
7. On 13 July 2018 the Applicants submitted a joint application for clarification of the definition of "Network" in their respective Deeds. A copy of the joint application for clarification is attached in **Appendix A**.
8. The definition of "Network" in each of the Applicants' Deeds is identical. The Applicants requested that the definition of "Network" in the Deeds be amended, so that it becomes consistent with the scope of Part 4AA of the Act.
9. The Commission published a Draft Clarification on 3 August 2018 for consultation. We received a submission from Spark New Zealand Limited (*Spark*) and cross-submissions from the Applicants, Vodafone New Zealand Limited (*Vodafone*) and Two Degrees Mobile Limited (*Two Degrees*). Copies of these documents can be found on the Commission's [website](#).
10. On 18 September 2018, we received a request from the Applicants to extend their joint application, so that it included a request for clarification of the definition of "Network" in the Deeds entered into for the UFB2 programme (being the Deed of Open Access Undertakings for Fibre Services for Ultrafast Fibre Limited dated 19 May 2017 and effective on 22 June 2017, and the Deed of Open Access Undertakings for Fibre Services for Northpower LFC2 Limited dated 24 May 2017 and effective on 22 June 2017). A copy of the Applicants' extension request is also set out in Appendix A, at the end of the original clarification request.
11. We have decided that because the extension request raises the same issues as the original clarification application, it should be dealt with as part of this Decision. We have also concluded that the same amendment to the definition of "Network" should be made to the UFB2 programme Deeds, for the reasons outlined in this Decision. As such, all references to "Deeds" in this Decision should be read as references to both the UFB1 and the UFB2 Deeds.
12. The Commission has carefully considered all submissions before reaching its final Decision. The Commission maintains its view that the clarification requested by the Applicants addresses an ambiguity within the text of the Deeds, and that the clarification is not material. Accordingly, the Commission's final decision is that the clarification request is approved and that the Deeds be amended accordingly.

⁶ Defined in section 156AB of the Act

Deeds of Open Access Undertakings for Fibre Services

13. The Applicants entered into the Deeds in order to participate in the Government's UFB Initiative⁷. The Deeds were given in accordance with and for the purposes of Part 4AA of the Act, and specifically pursuant to section 156AD of the Act. Copies of the Deeds are available on the Applicants' websites.
14. The purpose of the Deeds is to set out enforceable obligations in relation to the supply of unbundled services, non-discrimination and equivalence of supply.
15. Part 4AA of the Act "requires providers of wholesale telecommunication services that are provided using a fibre optic communications network that is constructed, in whole or in part, with Crown investment funding provided as part of the Ultra-fast Broadband Initiative, or that provide access to unbundled elements of such a network, to give enforceable undertakings providing for non-discrimination, equivalence and other such matters in relation to the supply of those services."⁸
16. Non-discrimination and equivalence are defined in the Act:⁹

non-discrimination, in relation to the supply of a relevant service, means that the service provider must not treat access seekers differently, or, where the service provider supplies itself with a relevant service, must not treat itself differently from other access seekers, except to the extent that a particular difference in treatment is objectively justifiable and does not harm, and is unlikely to harm, competition in any telecommunications market.

equivalence, in relation to the supply of a relevant service, means equivalence of supply of the service and access to the service provider's network so that third-party access seekers are treated in the same way to the service provider's own business operations, including in relation to pricing, procedures, operational support, supply of information, and other relevant matters.

Clarification requested by the Applicants

17. The Applicants requested that the Commission clarifies their Deeds by amending the definition of "Network" in the Deeds as follows:¹⁰
 - 17.1 Replacing the definition of "Network" currently in clause 1 of the Deeds with:

"Network means the Fibre-to-the-Premises Access Network which is, or will be, owned or operated by the LFC"; and
 - 17.2 Inserting into clause 1 of the Deeds a definition of "Fibre-to-the-Premises Access Network" as follows:

⁷ The UFB Initiative means the competitive tender programme, known as Ultra-Fast Broadband Initiative, to develop fibre-to-the-premises broadband networks connecting 75% of New Zealand households, with the support of \$1.5 billion of Crown investment funding and includes the extension to that programme known as UFB2, to develop fibre-to-the-premises networks connecting at least 80% of New Zealand households; and any other extension to that programme (see definition in section 156AB of the Act)

⁸ Section 156AA(1)(a) of the Act

⁹ Section 156AB of the Act

¹⁰ Paragraph 6.1 of the Applicants' clarification application

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

18. The proposed new definition is identical to the definition of “Network” contained in Chorus Limited’s equivalent Deeds of Open Access Undertakings for Fibre Services.¹¹

Relevant definitions/provisions

19. “Network” is currently defined in the Deeds as:

“the fibre-optic communications network which is, or will be, owned or operated by the LFC”.

20. Section 156AD(2) of the Act provides that the Deeds must provide for the LFCs to:

20.1 supply unbundled layer 1 services on all parts of its *fibre-to-the-premises access network*¹²

20.2 achieve non-discrimination in relation to the supply of *relevant services*¹³

20.3 design and build the *LFC fibre network* in a way that enables equivalence in relation to the supply of unbundled layer 1 services¹⁴

21. Part 4AA of the Act¹⁵ defines “LFC fibre network” as:

*“a fibre-to-the-premises access network that is owned or operated by an LFC”*¹⁶.

22. “Fibre-to-the-premises access network” is defined as:

a) *means 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; and*

b) *includes the powered node in the central office location; and*

c) *includes that part of the overall telecommunications link that connects to the end-user’s equipment*¹⁷

23. Section 156AD(5)(a) of the Act provides that an undertaking must not:

¹¹ Deed of Open Access Undertakings for Fibre Services dated 6 October 2011 and effective on 10 November 2011 and Deed of Open Access Undertakings for Fibre Services for UFB2 effective on 22 June 2017

¹² Section 156AD (2)(b)

¹³ Section 156AD(2)(c)(i)

¹⁴ Section 156AD(2)(c)(ii)

¹⁵ Part 4AA of the Act specifically deals with (amongst other matters) the undertakings to be provided as part of the UFB Initiative, and related issues

¹⁶ Section 156AB of the Act

¹⁷ Section 156AB of the Act

“provide for rules or obligations in respect of services that are not relevant services (including layer 1 services)”.

24. The Act defines “relevant service” as:

“...a wholesale telecommunication service that is provided using, or that provides access to unbundled elements of, an LFC fibre network.”¹⁸

The Applicants’ reasons for requesting the clarification

25. The Applicants consider that while it is clear that the Act requires the Applicants’ obligations to apply only in respect of the fibre-to-the-premises access network, the Deeds purport to extend the scope of the Applicants’ obligations to their entire fibre network.
26. The Applicants state that this was not the intention of the Deeds and is contrary to section 156AD(5)(a) of the Act.¹⁹

Clarification under the Act (section 156AN)

27. The Commission is amending the Deeds under section 156AN of the Act.
28. Section 156AN of the Act provides that the Commission may amend an undertaking to clarify it if:
- 28.1 *“The Commission, on the application of the LFC who gave the undertaking, considers that the undertaking requires clarification: and*
- 28.2 *The clarification is not material.”*
29. We consider that each limb of section 156AN of the Act has been satisfied.

Limb 1 of section 156AN – The Commission considers the Deeds require clarification

30. The definition of “Network” contained in the Deeds refers to “the fibre-optic communications network”, and the definition of “LFC fibre network” contained in the Act refers to a “fibre-to-the-premises access network”.
31. We consider that “fibre-optic communications network” could be interpreted to be wider in scope than “fibre-to-the-premises access network”. This interpretation is different to that provided for by Part 4AA of the Act.
32. We consider that there is clearly some ambiguity in the definition of “Network” contained in the Deeds and that it is likely that the difference in terminology between “the fibre-optic communications network” and “fibre-to-the-premises access network” is inadvertent.

¹⁸ Section 156AB of the Act

¹⁹ Paragraph 4.3 of the Applicants’ clarification application

33. We agree with the arguments made by the Applicants that the ambiguity in the Deeds gives rise to the potential for them to be read inconsistently with the Act, and this creates uncertainty.
34. Accordingly, we consider that the Deeds require clarification to remove this potential ambiguity.

Limb 2 of section 156AN – The clarification is not material

35. We consider that the clarification is not material because:
 - 35.1 it gives effect to the true intent of each of the Deeds (the Deeds state in the first sentence that *“The Undertakings are given by the LFC in accordance with, and are Undertakings for the purposes of Part 4AA of the...Act”*);
 - 35.2 it ensures that the Deeds are aligned with the scope of the Act (the primary enabling legislation);
 - 35.3 it makes the Deeds consistent with Part 4AA of the Act and accordingly with what would ultimately be legally enforceable;
 - 35.4 we consider that the difference in wording between the Deeds and the Act was unintentional and merely an inadvertent error. The scope of the Act is clear, and the purposes and intent of the Act should prevail; and
 - 35.5 the clarification will put it beyond doubt that the Deeds comply with the Act, including the requirements of section 156AD of the Act.
36. We consider that the clarification procedure is appropriate in these circumstances and available to the Commission to ensure that there is no ambiguity as to the scope of the Deeds.

Consultation

37. The Commission issued a Draft Clarification for consultation on 3 August 2018.
38. We received a submission from Spark and cross-submissions from the Applicants, Vodafone and Two Degrees.
39. We set out below a summary of the key points made by each of the submitters and our response to these points.

Spark’s views

40. Spark noted a number of concerns, which we respond to below.

Intention and effects of the clarification

41. Spark commented that the Commission and the Applicants have not provided any analysis on the intended and potential effects of the clarification and that it is not

clear what outcomes the Applicants are seeking to achieve from amending the Deeds.²⁰

Our response

42. We noted in our Draft Clarification that there is clearly some ambiguity in the definition of “Network” contained in the Deeds; and that it is likely that the difference in terminology between “fibre-optic communications network” and “fibre-to-the-premises access network” could give rise to these terms being read inconsistently with the Act and creating uncertainty. Accordingly, the clarification is intended to remove that ambiguity and ensure that the Deeds are consistent with the Act.²¹

43. The clarification does not alter the Deeds in any other way.

44. The Applicants in their cross-submission reiterate that their concerns are:

“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”²²

Is clarification possible under the Act?

45. Spark also noted that it is not clear whether the clarification is possible under the Act.²³

Our response

46. We disagree. The Commission can make the clarification under section 156AN of the Act. We consider both limbs of section 156AN have been satisfied, as outlined in paragraphs 29 to 36 above.

Clarification narrowing scope of obligations

47. Spark is concerned that the clarification would have the effect of narrowing the obligations in the Deeds so that these potentially only applied to a subset of LFC services, whereas it submits that the Act requires a wider set of commitments relating to an LFC’s overall business²⁴.

Our response

48. We disagree. The clarification is simply amending the Deeds to ensure consistency with the Act. Section 156AD(5)(a) provides that the Deeds *must not* provide for rules or obligations in respect of services that are *not relevant services* (including layer 1 services). The definition of relevant services in the Act provides that this effectively

²⁰ Paragraph 4 of Spark’s submission dated 17 August 2018

²¹ Paragraphs 33 and 34 of the Draft Clarification

²² Paragraph 5 of the Applicants’ cross-submission dated 31 August 2018. Also set out in paragraph 4.6 of the Applicants’ request letter

²³ Paragraph 4 of Spark’s submission dated 17 August 2018

²⁴ Paragraph 4 of Spark’s submission dated 17 August 2018

means the fibre-to-the-premises access network that is owned or operated by an LFC.²⁵ Accordingly the clarification is not amending the Deeds to have a narrower scope than the Act already requires.

Other issues

49. Spark also raises whether the clarification is intended to:
- 49.1 preclude wavelength unbundling;²⁶
 - 49.2 exclude inter-exchange fibre from undertaking obligations;²⁷ and
 - 49.3 provide relief in respect of line of business restrictions.²⁸

Our response

50. As noted above, the intention of the clarification is simply to ensure that the Deeds are consistent with section 156AD(5)(a) of the Act. Issues relating to wavelength unbundling, inter-exchange fibre and line of business restrictions are outside the scope of this clarification.

Deeds are already consistent with the Act

51. Spark also comments that the current Deeds are consistent with Part 4AA and s156AD and that there is nothing to suggest that the drafting of the current Deeds was a mistake.²⁹

Our response

52. As the Applicants have observed in their cross-submission, Spark's submission does not refer to section 156AD(5)(a) of the Act.³⁰ As noted above, the definition of "Network" in the Deeds could be interpreted to be wider than "relevant services" and therefore potentially inconsistent with the Act. Accordingly we consider that the clarification is necessary to ensure the Deeds are consistent with the Act.

Materiality

53. Spark also submits that the clarification is a material change to the regulatory framework and therefore the clarification route is not available.³¹

Our response

54. As set out above in paragraph 35, we consider that the clarification is not material.

²⁵ See paragraphs 24 and 21 above for the definitions of "relevant service" and "LFC fibre network" in section 156AB of the Act

²⁶ Paragraphs 7(a) of Spark's submission dated 17 August 2018

²⁷ Paragraphs 7(b) of Spark's submission dated 17 August 2018

²⁸ Paragraphs 7(c) of Spark's submission dated 17 August 2018

²⁹ Paragraphs 12 and 14 of Spark's submission dated 17 August 2018

³⁰ Paragraph 3 of the Applicants' cross-submission dated 31 August 2018

³¹ Paragraph 19 of Spark's submission dated 17 August 2018

55. The Applicants in their cross-submission also respond to this point in support of the clarification being not material.³²
56. The clarification is ensuring that the Deeds are consistent with the Act and accordingly with what could ultimately be legally enforceable. We therefore regard the clarification as not material.

Vodafone's views

57. In its cross-submission, Vodafone notes:

"While in principle we support aligning the requirements on the LFC with the Telecommunications Act 2001, in this case there is a risk of unintended consequences".³³

58. Vodafone recommends retaining the current definition of "Network" until the LFCs are able to identify a specific problem that the current definition creates for them.³⁴

59. Vodafone also requests that the Commission confirms the following if the definition of "Network" is changed:

- 59.1 the clarification has no impact on the non-discrimination obligations on Direct Fibre Access Service or any other service used for the purposes of mobile backhaul;
- 59.2 the meaning of "building" in the definition of "fibre-to-the-premises access network";
- 59.3 the clarification has no material impact on the non-discrimination or equivalence obligations as they currently stand.³⁵

Our response

60. As noted above in paragraph 44, the Applicants in their cross-submission have reiterated the specific problem they identify with the current definition.³⁶ We agree that the clarification is required.
61. The clarification is not changing the obligations of the Applicants under the Deeds. The clarification is reflecting what could ultimately be legally enforceable.
62. It is outside the scope of this clarification and the Commission's powers under section 156AN of the Act to comment on the issues noted in paragraph 59 above. The clarification is only amending the Deeds to ensure they are consistent with the Act.

³² Paragraph 6 of the Applicants' cross-submission dated 31 August 2018

³³ Paragraph 2 of Vodafone's cross-submission dated 31 August 2018

³⁴ Paragraph 3 of Vodafone's cross-submission dated 31 August 2018

³⁵ Paragraph 4 of Vodafone's cross-submission dated 31 August 2018

³⁶ Paragraph 5 of the Applicants' cross submission dated 31 August 2018. Also set out in paragraph 4.6 of the Applicants' request letter

Two Degrees' views

63. Two Degrees submitted as follows:

*"We are concerned that the proposal, which has been positioned as a non-material change in the Commerce Commission's preliminary view, has the actual effect of significantly narrowing existing LFC obligations, which do not apply just to certain access services, but to the whole LFC business."*³⁷

64. Two Degrees agrees with Spark's submission that the Commission must understand the actual and potential effect of the change (including unintended consequences) and that this analysis has not been undertaken.³⁸

65. Similar to Spark's submission, Two Degrees submits that the clarification to the Deeds would be a material change to the current regulatory framework for LFCs, impacting both non-discrimination obligations and line of business restrictions.³⁹ It also questions whether the clarification is appropriate under the Act.⁴⁰

66. Two Degrees raised whether a more "targeted clarification" is more appropriate.⁴¹

Our response

67. We refer to our comments in:

67.1 paragraphs 42 to 44 above in response to the issues of the effect of the clarification;

67.2 paragraph 35 above setting out why the clarification is not material; and

67.3 paragraphs 29 to 36 above with regards to why the clarification is appropriate under section 156AN of the Act.

68. Two Degrees has not elaborated on what it considers will constitute a more "targeted clarification". The clarification is specifically intended to remove any ambiguity with the definition of "Network" in the Deeds and to ensure the Deeds are consistent with section 156AD(5)(a) of the Act. We are not clear how the clarification could be more targeted.

Applicants' views

69. The Applicants in their cross submission respond to Spark's submission by highlighting section 156AD(5) of the Act. They note:

*"It follows that the Act does not, as argued in the [Spark] Submission, anticipate "undertakings that relate to an LFC's wider fibre optic communications network", but to the contrary, specifically prohibits such undertakings".*⁴²

³⁷ Paragraph 3 of Two Degrees' cross-submission dated 31 August 2018

³⁸ Paragraphs 4 and 6 of Two Degrees' cross-submission dated 31 August 2018

³⁹ Paragraph 6 of Two Degrees' cross-submission dated 31 August 2018

⁴⁰ Paragraph 6 of Two Degrees' cross-submission dated 31 August 2018

⁴¹ Paragraph 6 of Two Degrees' cross-submission dated 31 August 2018

70. The Applicants also reiterate their concerns with the Deeds as they are currently drafted,⁴³ and why they consider the clarification is not material.⁴⁴

Our response

71. We agree with the points made by the Applicants in their cross-submission.

Concluding comments

72. The Commission considers the clarification is appropriate as it is simply amending the Deeds to ensure consistency with the Act, and specifically section 156AD(5)(a) of the Act. The clear effect of Section 156AD(5)(a) is that the Deeds will only apply to an LFC's fibre-to-the-premises access network.
73. We consider the clarification is possible under section 156AN of the Act and that the two limbs of section 156AN have been satisfied. We do not consider that the clarification is a material change.
74. Some of the issues raised by the submitters relate to interpretation issues under the Act. These issues are outside the scope of this clarification.
75. We consider that it is in the best interests of the Applicants, the Crown and consumers to clarify the Deeds to ensure the legal position is clear and unambiguous.

Commission Decision

76. The Commission agrees to amend each of the Deeds by:
- 76.1 Deleting the definition of "Network" in clause 1 of the current Deeds and replacing it with the following:
- "Network means the Fibre-to-the-Premises Access Network which is, or will be, owned or operated by the LFC"; and*
- 76.2 Inserting in clause 1 of the Deeds a definition of "Fibre-to-the-Premises Access Network" as follows:
- "Fibre-to-the-Premises Access Network has the meaning given in Part 4AA of the Act".*
77. An updated copy of the Deeds must be posted by each of the Applicants on a public website in accordance with section 156AK(1) of the Act. Each of the Applicants must also make a copy of the updated Deeds available for inspection free of charge at its respective registered office, in accordance with section 156AK(2) of the Act.

⁴² Paragraph 4 of the Applicants' cross-submission dated 31 August 2018

⁴³ Paragraph 5 of the Applicants' cross-submission dated 31 August 2018

⁴⁴ Paragraph 6 of the Applicants' cross-submission dated 31 August 2018



Dr. Stephen Gale

Telecommunications Commissioner

Dated at Wellington this 26th day of September 2018

COMMERCE COMMISSION

Appendix A

**ENABLE NETWORKS LIMITED
ULTRAFASST FIBRE 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*".⁴⁵
- 2.3 LFCs were required to enter into an undertaking in accordance with subpart 2 of Part 4AA of the Act.⁴⁶ 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 2020⁴⁷ (**Unbundling Obligation**);
 - (b) achieve non-discrimination in relation to the supply of relevant services⁴⁸ (**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 2020⁴⁹ (**EOI-ready Obligation**); and
 - (d) achieve equivalence in relation to the supply of unbundled layer 1 services on and after 1 January 2020⁵⁰ (**Equivalence Obligation**).

⁴⁵ Telecommunications Act 2001, section 156AB.

⁴⁶ Section 156AD(1).

⁴⁷ Section 156AD(2)(b).

⁴⁸ Section 156AD(2)(c)(i).

⁴⁹ Section 156AD(2)(c)(ii).

- 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”.
- 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.”⁵¹
- 3.3 The Unbundling, Non-discrimination, EOI-ready and Equivalence Obligations are described in each Applicant’s Undertaking as:
- (a) **Unbundling Obligation:**⁵² from 1 January 2020, the LFC must (i) make available the Input Services;
 - (b) **Non-discrimination Obligation:**⁵³ 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:**⁵⁴ 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:**⁵⁵ 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:⁵⁶

⁵⁰ Section 156AD(2)(c)(iii).

⁵¹ 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.

⁵² Undertaking, clause 6.2(a).

⁵³ Above, clause 5.1.

⁵⁴ Above, clause 6.1.

⁵⁵ Above, clause 6.2(b).

- 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 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.*"⁵⁷

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.*"⁵⁸

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

⁵⁶ 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.

⁵⁷ Above, clause 1.1

⁵⁸ Above, clause 1.1.

(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.

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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88 Shortland Street
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Attn: Dr Ross Patterson



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Counsel for the applicants

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MinterEllisonRuddWatts

18 September 2018

BY EMAIL: robin.meaclem@comcom.govt.nz

Robin Meaclem
Chief Adviser
Regulation Branch
Commerce Commission

Dear Robin

Request for Clarification of Undertakings

1. I refer to our telephone conversation this afternoon in relation to the Request for Clarification of Undertakings pursuant to section 156AN of the Telecommunications Act 2001 filed on 13 July 2018 on behalf of Enable Networks Limited (**Enable**), Ultrafast Fibre Limited (**Ultrafast Fibre**) Northpower Fibre Limited and Northpower LFC2 Limited (**Northpower**) and advise:
 - (a) while the original Deeds of Open Access Undertakings for Fibre Services Undertakings signed by Ultrafast Fibre and Northpower (then known as Whangerei Local Fibre Company Limited) were signed on or about 6 October 2011, the Deeds themselves are undated;
 - (b) Northpower LFC2 Limited entered into a Deed of Open Access Undertakings for Fibre Services Undertakings on 19 May 2017; and
 - (c) Ultrafast Fibre entered into a second Deed of Open Access Undertakings for Fibre Services Undertakings for UFB2 on 24 May 2017.
2. The two 2017 deeds are in materially identical terms to the 2011 deeds, and the Request for Clarification filed on 13 July 2018 should be read as applying also to these additional deeds.

Yours faithfully
MinterEllisonRuddWatts



Dr Ross Patterson
Partner

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