

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