

Key findings from the Commission's consultation with Ultrafast Fibre Limited about its equivalence obligations for UFB2

Public version

Date of publication: 25 June 2019



Confidential and related information has been removed from this report.

Purpose of this report

1. Ultrafast Fibre Limited (UFF) entered into a Deed of Open Access Undertakings for Fibre Services for UFB2¹ (Deed) under the Telecommunications Act 2001 (Act).
2. This report sets out the framework and key findings from the consultation undertaken with UFF under clause 6.1(b) of the Deed.²

Structure of this report

3. This report contains the following sections:

Key findings

Legal framework Background

Analysis

How UFF can design its Network to comply with clause 6 of the Deed

Next steps

Appendix A: Referenced provisions of the Deed

Appendix B: Questionnaire sent to UFF

4. Capitalised terms in this report are terms defined in the Deed unless otherwise defined or referenced in this report³.

Key findings

5. UFF has fulfilled its obligations to consult with the Commission under clause 6.1(b) of the Deed.
6. From 1 January 2026, UFF must offer and, if an Access Seeker requests, provide the Central Office and POI Service on an Equivalence basis, in accordance with clause 6.2 of the Deed. To meet these obligations UFF can:
 - 6.1. provide a larger cabinet with room for co-location; or
 - 6.2. provide an additional cabinet and tie-cable to allow for co-location.

Legal framework

The Telecommunications Act 2001

7. Section 156AD(2)(c) of the Act requires an LFC to enter into an undertaking to provide for, amongst other things, the LFC to design and build the LFC fibre network in a way

¹ See section 5 of the Act for the definition of UFB initiative and UFB2.

² We conducted a consultation for phase 1 of the UFB Initiative. Our report can be found on our [website](#).

³ https://comcom.govt.nz/data/assets/pdf_file/0026/90485/UFF-Fibre-Deed-for-UFB2.PDF

that enables equivalence, and achieves equivalence, in relation to the supply of, unbundled layer 1 services on and after a specified date.⁴

8. The Act contains the following definition of “equivalence”⁵:

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.

The Deed

9. Clause 6.1 of the Deed requires UFF to 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 2026. The Deed defines Equivalence in clause 6.⁶

10. The Input Services that must be provided on an Equivalence basis under the Deed are:

- 10.1. Direct Fibre Access Service;
- 10.2. PON Fibre Access Service;
- 10.3. Central Office and POI Co-location Service;
- 10.4. any other unbundled layer 1 service UFF is required to provide⁷.

11. Clause 6.1(b) of the Deed required UFF to consult with the Commission in July 2018. The consultation was on the design and build of the Network to inform the Commission how UFF and Crown Infrastructure Partners (CIP) have agreed to meet the Equivalence obligation under clause 6.1 of the Deed.

Wholesale Services Agreement

12. The Deed requires UFF to produce and publicly disclose a Reference Offer for the Input Services no later than 10 Working Days after the Input Service is available⁸. A Reference Offer is UFF’s standard offer in respect of the Input Services and must include a Wholesale Services Agreement (WSA).

Background

13. We sent UFF a series of questions on 2 July 2018 pursuant to clause 6.1(b) of the Deed. We used the same list of questions for the consultation that took place in July 2015 under the Deeds of Open Access Undertakings for phase 1 of the UFB initiative⁹.

⁴ LFC or local fibre company, and layer 1 services are defined in more detail in section 156AB of the Act.

⁵ Section 156AB of the Act.

⁶ See Appendix A of this report.

⁷ A detailed definition of the Input Services can be found in the definitions section of the Deed.

⁸ Clause 8 of the Deed.

⁹ *ibid* 2.

14. These questions were designed by the Commission to help UFF understand its Equivalence obligations for the design and build of its UFB2 Network under clause 6 of the Deed, and how compliance would be measured.

15. The list of questions we sent to UFF is set out in Appendix B.

Analysis

Our response to UFF's proposal

16. We conclude from the information UFF provided, that the design and build of the UFB2 Network, if retained, is likely to be capable of complying with the Equivalence obligations for all the Equivalence elements except for part of the "same input service" element of our questionnaire¹⁰.

17. The "same input service" element means the ability for UFF to provide capacity¹¹:

17.1. On fibre routes feeding fibre flexibility points (FFPs);

17.2. In FFPs for RSPs' splitters (including accessibility);

17.3. In central offices for co-location and termination (including accessibility).

18. UFF noted in its response that the key difference between the architecture of its UFB1 and UFB2 networks is that, in the UFB2 network the layer 2 equipment is housed in active cabinets instead of a "central office" building.

19. While active cabinets and central offices perform similar functions in the network, the difference in their size means their capabilities may differ in significant ways. For instance, central offices are generally capable of providing the co-location service without additions of space whereas active cabinets are often not.

20. Using active cabinets instead of central offices means there might not be enough capacity for co-location and termination (including accessibility) for Access Seekers who wish to unbundle a cabinet.

21. We questioned how UFF could provide the Central Office and POI Service while remaining compliant with its Equivalence obligations under the Deed, particularly, how it would show it was treating Access Seekers the same as itself.

22. We also asked UFF to confirm that the active cabinets will have the ability to provide sufficient capacity for co-location and termination (including accessibility) should an Access Seeker wish to unbundle a cabinet.

23. UFF explained that each cabinet will have space for at least one set of Access Seeker equipment for unbundling purposes.

¹⁰ See Appendix B of this report.

¹¹ "same input service" wording taken directly from the questionnaire at Appendix B.

24. UFF also stated that should additional Access Seekers wish to unbundle at the cabinet, a tie cable service to an Access Seeker cabinet will be provided.¹² The Access Seeker would bear the cost of building the additional cabinet.
25. It is our view that, if UFF's cabinet becomes full, UFF's proposal to provide a tie cable to a separate Access Seeker cabinet alone, without offering the Central Office and POI Service in a UFF central office or cabinet, is unlikely to satisfy the requirements of clause 6 of the Deed.

How UFF can design its Network to comply with clause 6 of the Deed

26. From 1 January 2026, UFF must offer and, if an Access Seeker requests, provide the Central Office and POI Service on an Equivalence basis, in accordance with clause 6.2 of the Deed.
27. There are two ways UFF can ensure the Central Office and POI Service is fully capable of meeting the Equivalence obligations. They are:
- 27.1. provide a larger cabinet with room for co-location;
 - 27.2. provide an additional cabinet and tie-cable to allow for co-location.

Next steps

28. This report constitutes our notice to UFF of our conclusions and the Commission's feedback to UFF in clause 6.1(b) of the Deed.
29. We ask UFF to provide confirmation to us by Thursday 11 July 2019 that it has taken "due notice" of our feedback.
30. We will continue to monitor whether UFF's UFB2 Network will be compliant with the Equivalence obligations under the Deed on and after 1 January 2026 as it completes the design and build of its Network.

¹² UFF's email to the Commission, 16 November 2018.

Appendix A: Referenced provisions of the Deed

1. Definitions

1.1 In these Undertakings, unless the context requires otherwise:

Input Services means the following Services:

- (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:
 - (i) as at 1 January 2026 under the UFB Contract or
 - (ii) under a Standard Terms Determination.

6. Equivalence

6.1 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 2026. In doing so;

- (a) It is acknowledged that the LFC and CFH have agreed to design and build a Network in a way that achieves the outcome described in clause 6.1; and
- (b) The LFC will consult with the Commission in July 2018 on the design and build of the Network for the purpose of informing the Commission as to how the LFC and CFH have agreed to meet the obligation in clause 6.1. The LFC will take due notice of any feedback received from the Commission.

6.2 Subject to clause 6.7, from 1 January 2026, the LFC must:

- (a) make available the Input Services; and
- (b) provide all Input Services to an Equivalence standard.

6.3 In this Undertaking "Equivalence" means that if the LFC is required to provide Access Seekers with an Input Service under clause 6.2, it must do so on an equivalence of inputs basis, meaning:

- (a) The LFC must provide itself and the Access Seekers with the same Input Service;
- (b) The LFC must deliver that Input Service to itself and the Access Seekers on the same timescales and on the same terms and conditions (including price and service levels);
- (c) The LFC must deliver the Input Service to itself and the Access Seekers by means of the same systems and processes (including operational support processes);
- (d) When providing that Input Service to its own business operations, the LFC must provide its own business operations and the Access Seekers with the same

Commercial Information about that Input Service, and those same systems and processes; and

- (e) When providing that Input Service to itself, the LFC must use systems and process that Access Seekers are able to use in the same way, and with the same degree of reliability and performance .

- 6.4 For the purposes of clause 6.3, "the same" means exactly the same, subject to:
- (a) Trivial differences;
 - (b) Differences that reflect the fact the LFC is a single business and is not required to maintain separate business units as more particularly set out in clause 3.4, including relating to:
 - (i) Credit requirements and vetting;
 - (ii) Payment;
 - (iii) Provisions relating to the termination of supply; and
 - (iv) Provisions relating to dispute resolution (to the extent necessary because the LFC is one company);
 - (c) Differences relating to:
 - (i) requirements for a safe working environment; and
 - (ii) matters of national and crime related security, physical security, security required to protect the operational integrity of the network, or any other security requirements agreed by the LFC and the Commission;
 - (d) Differences that are identified after the Commencement Date and that are agreed by the LFC and the Commission in writing where those differences are not inconsistent with "equivalence" (as that term is defined in Part 4AA of the Act) having regard to the purpose statement in section 156AC of the Act; and
 - (e) Differences relating to terms required by a residual terms determination under subpart 2A of Part 2 of the Act.
- 6.5 In this clause 6, "the LFC itself" includes any LFC Related Parties which acquire an Input Service from the LFC.
- 6.6 For the avoidance of doubt, clause 6.1 does not limit clause 6.2.
- 6.7 Where the LFC is required to provide a new Input Service to the Equivalence standard, to recognise the practical implementation issues associated with development of a new service the LFC and the Commission may agree a reasonable time period during which, and reasonable conditions on which, any failure by the LFC to deliver that new Input Service to the Equivalence standard will be treated as trivial or de minimis for the purposes of clause 16.1 in the context of the launch and ongoing provision of the new Input Service.

Appendix B: Questionnaire sent to UFF

(a) *Same Input service*

- Ability to provide capacity:
 - on fibre routes feeding fibre flexibility points (FFPs)
 - In FFPS for RSPs' splitters (including accessibility)
 - In central offices for co-location and termination (including accessibility)

(b) *Same terms and conditions:*

- Ability to report service performance by RSP (including self-supply)
- Ability to demonstrate price non-discrimination

(c) *Same systems and processes:*

- Ability of ordering/inventory/faults systems to allow B to B operation
- A plan for how equivalence will be managed given the carve-out in clause 3.4 (a)¹³

(d) *Same commercial information:*

- A plan for how commercial information will be managed to ensure that this requirement can be demonstrated to have been met

(e) *Same reliability and performance:*

- Ability to report service performance by RSP (including self-supply)

¹³ Clause 3.4 (a) of the Deed provides that:
because the LFC will have no separate entities to place or receive internal orders or to issue or receive internal bills, the LFC is not required to put in place written arrangements or implement any Internal Ordering, charging or billing (creation of the billing record, sending a bill and making payment) related to the internal supply of any service.