

4 June 2019

Dear Jason and Mark

Fibre unbundling price

1. Thank you for your letter dated 11 April 2019, setting out your concerns about the proposed layer 1 fibre unbundling price and pricing approach from Chorus, and supplying us with an expert report by Network Strategies. You have asked the Commission to consider intervening in the dispute between Chorus and your companies regarding the terms on which a layer 1 fibre unbundling service would be provided.
2. This letter outlines the Commission's initial response and our considerations in relation to your letter.

The context for the unbundling obligation

3. Chorus and the Local Fibre Companies' (**LFCs**) have Deeds of Open Access Undertakings (**Fibre Deeds**) given under section 156AD of the Telecommunications Act 2001 (**Act**) which requires them to provide a point-to-multipoint layer 1 fibre access service (**PON Fibre Access Service**) from 1 January 2020 for UFB1.
4. The Fibre Deeds require Chorus and the LFCs to provide the PON Fibre Access Service on an equivalent and non-discriminatory basis (see clauses 5 and 6 of the Fibre Deeds). The Fibre Deeds do not stipulate the price that Chorus and the LFCs charge for the PON Fibre Access Service¹ and the Commission is not empowered to set a price.
5. The Commission expects that Chorus will release its final pricing offer and its response to the submissions on its pricing proposal for the PON Fibre Access Service in the coming weeks. We are interested in hearing your views when Chorus publishes its final pricing offer (and in any views that you might have on pricing proposals or offers from the LFCs).

¹ Section 156AD(5)(b)

6. In addition to the Fibre Deeds, section 229 of the Act provides for the Governor-General, by Order in Council made on the recommendation of the Minister, to make regulations declaring a point-to-multipoint layer 1 service supplied to end-users' premises or buildings to be an unbundled fibre service, and allows for those regulations to set a maximum cost-based price for the service. Under section 200 of the Act, a regulated fibre service provider who is subject to price-quality regulation must provide an unbundled fibre service if declared.

Commission's initial response and our considerations in relation to your letter

7. The Commission understands Vocus' and Vodafone's view that unbundling will be key to unlocking the future potential of New Zealand's fibre network.
8. The Act gives the Commission a particular role in the context of the PON Fibre Access Service. Firstly, we are permitted to assess whether offers made by Chorus and the LFCs comply with their respective obligations under the Fibre Deeds, and, secondly, if we consider that a breach of the Fibre Deeds is likely to occur or has occurred, we will decide whether to bring enforcement action. When exercising our powers to enforce compliance with the Fibre Deeds, we consider the purposes outlined in section 156AC of the Act.
9. Under the Act, there are various enforcement routes available if parties are unable to reach commercial agreement on the PON Fibre Access Service under the Fibre Deeds. The obligations in Chorus' and the LFCs' respective Fibre Deeds to offer the PON Fibre Access Service on an equivalent and non-discriminatory basis are enforceable by access seekers at their own initiative (see section 156P of the Act), as well as by the Commission (see sections 156AR, 156L, and 156P of the Act). However, the decision-maker on what the obligations in the Fibre Deeds actually require would be the High Court.
10. Given the range of parties potentially involved in the enforcement of the Fibre Deeds, we believe that there would be clear public benefit in the Commission developing, in a transparent way, our views on what the equivalence and non-discrimination obligations in the Fibre Deeds (and other deeds) involve. We have therefore begun developing guidance on our interpretation of these provisions.
11. We plan to consult on this guidance in the third quarter of this year. Until we finalise the guidance, we do not expect to be in a position to form a view on whether Chorus' proposed PON Fibre Access Service offer is likely in our view to comply with its obligations in the Fibre Deeds, let alone reach a decision on whether any enforcement action would be appropriate. We understand that the development of guidance will likely go beyond the time at which Chorus releases its final offer; however, we expect you to continue engaging with Chorus in relation to its PON Fibre Access Service proposal.

12. If the parties have specific concerns about the appropriate pricing of an unbundled fibre service outside the ambit of enforcement of the Fibre Deeds, we recommend these concerns be taken directly to MBIE on behalf of the Minister. As noted above, there is scope for the Minister to recommend section 229 regulations to introduce direct price regulation of a point-to-multipoint layer 1 service supplied to end-users' premises or buildings. Moreover, section 209 of the Act limits the Commission's ability to launch a review of any declaration of an unbundled fibre service until 2025.

13. In order to provide transparency regarding our correspondence with you, and to facilitate broader industry discussion regarding unbundling, I propose in the coming days to publish this response on the Commission's website, as well as publishing your letter and the public version of the Network Strategies report.

14. Simon Thomson, our Head of Telecommunications, is coordinating our response in relation to Chorus' PON Fibre Access Service proposal, and should be your point of contact for unbundling queries. He can be contacted at simon.thomson@comcom.govt.nz or on 04 9243791.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S. Gale', with a large, stylized initial 'S' and a trailing flourish.

Stephen Gale
Telecommunications Commissioner