

28 June 2023

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By e-mail only: ██████████

Tēnā koe ██████

## **Response to Enable Networks Limited's request for an amendment to the exemption relating to quality disclosure requirements under the Fibre Information Disclosure Determination 2021**

1. We write in response to Enable Networks Limited's (**Enable**) letter dated 2 June 2023 requesting that the Commerce Commission (**Commission**) grant a two-month extension to be applied to an existing exemption we granted on 15 July 2022 (the **2022 exemption**).<sup>1,2</sup>
2. The 2022 exemption provided Enable an exemption from complying with certain requirements under clause 2.4.4 of the Fibre Information Disclosure Determination 2021 (the **ID Determination**).
3. Having considered Enable's request, we have decided to amend the 2022 exemption by extending the reporting period covered by the exemption to include July and August 2023, subject to the conditions outlined at paragraph 17.<sup>3</sup>

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<sup>1</sup> Enable Networks Limited, *Request to extend exemption granted by the Commerce Commission under paragraph 2.10.1 of the Fibre Information Disclosure Determination 2021 [2021] NZCC 24 – Traffic Performance*, dated 2 June 2023.

<sup>2</sup> Details of the 2022 exemption can be found in the exemption notice, available [here](#) on our website.

<sup>3</sup> The 2022 exemption covered quality reporting with respect to the period ending 30 June 2023.

## Background

4. Clause 2.4.4 of the ID Determination sets out Enable's requirements for quality reporting. Clause 2.4.4(1) requires Enable, for each disclosure year, to:
  - 4.1 complete a Report on Quality under Schedule 20 of the ID Determination in respect of each month of the relevant disclosure year (except in respect of the first nine months following the commencement date);<sup>4</sup>
  - 4.2 when completing those reports, apply the methodologies for Calculating Port Utilisation and Traffic Performance within Schedule 22 of the ID Determination (**Schedule 22**); and
  - 4.3 publicly disclose the reports no later than 5 months after the end of the disclosure year.
5. Enable's disclosure year ends on the 30 June each year and, as such, the Reports on Quality are required to be disclosed:
  - 5.1 for disclosure year 2023, by 30 November 2023;<sup>5</sup> and
  - 5.2 for disclosure year 2024, by 30 November 2024.

### *The 2022 exemption*

6. On 19 April 2022, Commission staff received a letter from Enable requesting an exemption from certain quality reporting requirements, relating to the period 1 January 2022 to 30 June 2023.<sup>6</sup>
7. On 15 July 2022, we granted Enable a conditional exemption with respect to the reporting period ending 30 June 2023 (i.e., the 2022 exemption), which exempted it from:<sup>7,8</sup>
  - 7.1 reporting on low priority traffic within the Reports on Quality due by 30 November 2023; and
  - 7.2 applying certain aspects of Schedule 22 when completing those Reports on Quality.

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<sup>4</sup> The commencement date is 1 January 2022, as outlined in 1.2.1 of the ID Determination.

<sup>5</sup> Enable is not required to provide a Report on Quality for the first three months of disclosure year 2023 (i.e., July – September 2022) because they fall within the nine-month exclusion period noted in paragraph 4.1.

<sup>6</sup> Enable Networks Limited, *Application for exemption under paragraph 2.10.1 of the Fibre Information Disclosure Determination 2021 [2021] NZCC 24 – Traffic Performance*, dated 19 April 2022.

<sup>7</sup> *2022 exemption notice*, above n 2, at paragraph [8].

<sup>8</sup> Enable was also granted an exemption from reporting on low priority traffic in the Reports on Transitional Quality. However, the transitional reporting requirements are not relevant to Enable's current request as they only applied to the nine-month reporting period ending 30 September 2022.

8. The 2022 exemption was granted on the following basis:<sup>9</sup>
- 8.1 Enable was in the process of procuring and upgrading its Layer 2 access and aggregation equipment, and its Network Performance Management and Network Quality Assurance (**NPM/NQA**) platform. Enable's existing equipment (including its NPM/NQA platform) required upgrades to comply with the quality reporting requirements under ID Determination; and
- 8.2 we did not consider it reasonable or proportionate for Enable to invest any further resources into its existing equipment in order to comply with the quality reporting requirements. Given the circumstances of Enable's application, we believed the purpose of information disclosure (**ID**) and of Part 6 of the Telecommunications Act 2001 (the **Act**) would be best met if those resources were focused on the purchase and commissioning of replacement systems and equipment.
9. Enable expected to have fully operational equipment by 30 June 2023 and, thereafter, would be able to comply fully with the quality reporting requirements under the ID Determination.<sup>10</sup>

*The exemption request*

10. On 2 June 2023, Enable requested an extension of two months to the reporting period covered by the 2022 exemption (ending 30 June 2023).
11. The request was made as a result of technical issues relating to a device required for its NPM/NQA solution. Enable stated it recently got its new aggregation equipment to a stage where it could test the NPM/NQA solution, which revealed that its solution did not support tagged traffic as required under Schedule 22.
12. Enable has assured us that it has since been able to identify an alternative device through its NPM/NQA vendor which supports tagged traffic. That device was to be tested in the vendor's lab in Australia and if successful, the equipment and an engineer would be flown to New Zealand to commission the revised solution.<sup>11</sup>
13. Enable now expects to have fully operational equipment in place by 31 August 2023. Within its exemption request, Enable provided a list of remaining steps to be taken (and their approximate completion dates) before the NPM/NQA solution is implemented.

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<sup>9</sup> 2022 exemption notice, above n 2, at paragraphs [11] and [12].

<sup>10</sup> Meeting between staff from Enable and the Commission, 23 June 2022.

<sup>11</sup> Enable has since informed Commission staff that the vendor sent an engineer to Christchurch along with the replacement device (which has now been installed).

### *Legal framework*

14. Clause 2.10.1(1) of the ID Determination allows the Commission to, by written notice to an ID-regulated fibre provider, grant an exemption from any requirement of the ID Determination, for a period and on such terms and conditions as the Commission specifies in that notice. Furthermore, clause 2.10.1(2) gives the Commission the power to amend or revoke any such exemption.

### **Exemption decision**

15. Having considered Enable's request and the information it has provided to the Commission in support of its request, by this notice, under clause 2.10.1(2) of the ID Determination, we have decided to amend the 2022 exemption by:
- 15.1 extending it to cover the Reports on Quality for July and August 2023, which are required to be disclosed by 30 November 2024; and
- 15.2 adding new conditions, as outlined in paragraph 17 below.
16. In effect, the amendment provides Enable with an additional two months to ready itself to comply with the quality reporting requirements under clause 2.4.4 of the ID Determination (including the requirement to comply with Schedule 22).
17. The exemption amendment is made subject to the following conditions:
- 17.1 by Friday 6 July 2023, Enable must provide Commission staff with a more detailed timeline of milestones through to 31 August 2023, and the approximate dates it expects to reach each of those milestones. The milestones should include:
- 17.1.1 Schedule 22 complaint equipment installed, and test traffic generated;
- 17.1.2 the successful completion of security testing;
- 17.1.3 data validation completed;
- 17.1.4 test generation of Schedule 22 compliant reports;
- 17.1.5 upgraded equipment is fully operational and Enable is ready to disclose reporting compliant with Schedule 22; and
- 17.2 Enable must provide progress updates on a weekly basis to Commission staff, noting progress against the list of milestones outlined in paragraph 17.1.<sup>12</sup>

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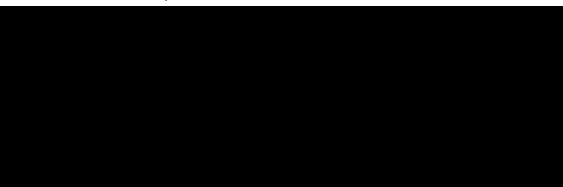
<sup>12</sup> We note Enable is providing Commission staff with weekly updates and offered to continue to do this as part of its exemption request.

18. The reasons for granting the 2022 exemption are outlined in paragraph 8 and still apply to this amendment. For the additional two months covered by this amendment, we have added conditions for Enable to provide more regular and detailed reporting to us so we can monitor its progress more closely.
19. We have considered the impact of the exemption amendment on the purpose of ID under section 186 of the Act and have concluded that the purpose will still be met if this exemption is granted.
20. As a condition of the 2022 exemption, Enable is required to publicly disclose the methodology it uses for calculating traffic performance where it cannot comply with the Schedule 22 methodology, which we consider will support an interested person to reasonably assess traffic performance.

#### **Further information**

21. The Commission is not minded to grant any further exemptions in relation to this matter and may choose to pursue non-compliance if Enable is not in a position to comply with its quality reporting requirements from 1 September 2023.
22. When considering non-compliance, the Commission makes an assessment in alignment with our enforcement criteria, which are extent of harm, seriousness of conduct, and public interest.<sup>13</sup>
23. This exemption may be revoked or further amended by the Commission at any time in accordance with clause 2.10.1(2) of the ID Determination.
24. A copy of this exemption response letter will be published on the Commission's website.
25. If you have any questions regarding this matter, please contact Rhys Williams at [infrastructure.regulation@comcom.govt.nz](mailto:infrastructure.regulation@comcom.govt.nz).

Nāku iti noa, nā



**Tristan Gilbertson**  
Telecommunications Commissioner

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<sup>13</sup> More information about the Enforcement Criteria can be found [here](#) on our website.