

29 May 2020

Dear Stakeholder

Compliance assessment of PON Fibre Access Service non-price terms

1. The purpose of this letter is to inform stakeholders that the Commerce Commission (**Commission**) is commencing a compliance assessment of the non-price terms¹ of LFCs'² point-to-multipoint layer 1 fibre access services (**PON³ Fibre Access Service**).⁴ This assessment will consider whether the non-price terms on which these Services are offered are consistent with the equivalence and non-discrimination obligations applying to the LFCs.
2. Assessing compliance with regulatory requirements, including the undertakings that telecommunications companies have entered into as part of receiving government financial support for their network roll-out, is an enduring Commission priority.⁵
3. Stakeholders will be aware that we are currently developing guidance on our interpretation of equivalence and non-discrimination in telecommunications (**Guidance**). The Guidance covers both price and non-price terms, and will apply to the PON Fibre Access Service, as well as a range of other regulated telecommunications services. On 4 March, we published a draft version of the Guidance for consultation, and the deadline for submissions on the draft is 2 June (with cross-submissions due by 23 June). We hope to publish our final Guidance in Q3 2020.⁶

¹ Examples of non-price terms that could give rise to potential equivalence and non-discrimination issues are outlined in our draft of the Guidance, at paragraphs 3.19-3.20. They include: the pre-ordering/ordering process, the provisioning process, change control processes, data access, service assurance, governance and access to confidential information.

² The LFCs comprise Chorus Limited, Enable Networks Limited, Northpower Fibre Limited, Northpower LFC2 Limited and Ultrafast Fibre Limited.

³ Passive optical network.

⁴ The PON Fibre Access Service is defined in the Fibre Deeds.

⁵ https://comcom.govt.nz/data/assets/pdf_file/0018/162801/Our-Priorities-2019-2020.pdf

⁶ The project page for the Guidance project is on the Commission's website at: <https://comcom.govt.nz/regulated-industries/telecommunications/projects/unbundled-layer-1-fibre-service>

4. We will use and apply the Guidance in this compliance assessment once it has been finalised. This letter launches the information-gathering stage of the compliance assessment process; our assessment of any material submitted to us, and our engagement with LFCs on any issues that might arise, will only take place after publication of the final Guidance.
5. This letter sets out the context for the compliance assessment, and the process that the Commission intends to follow. It also provides stakeholders with an opportunity to submit examples of non-price terms for assessment and possible investigation.

The context for the compliance assessment

6. The Government's Ultra-Fast Broadband (**UFB**) initiative, which launched in 2009, aimed to provide fibre-to-the-premises to 75% of New Zealand's population by 2020 through the building of new fibre networks in major towns and cities throughout New Zealand. The programme was expanded twice in 2017, and now aims to achieve fibre-to-the-premises to 87% of the population by 2022.
7. The LFCs were successful in competitive government selection exercises, and have been receiving financial support from government to roll out new fibre networks. These new fibre networks enable faster and more reliable voice and broadband internet services to be supplied to consumers.
8. As a condition of their participation in the UFB initiatives, the LFCs entered into Deeds of Open Access Undertaking (**Fibre Deeds**) under section 156AD of the Telecommunications Act 2002 (**Act**).⁷ Amongst other things, the Fibre Deeds require each of the LFCs to offer a PON Fibre Access Service⁸ on a non-discriminatory and equivalent basis from 1 January 2020 for networks covered by UFB1.⁹ Mandating the offering of PON Fibre Access Services to access seekers is intended to promote competition and innovation in the provision of telecommunications services over fibre networks.
9. Purchasing the PON Fibre Access Service enables access seekers to buy access to just an LFC's fibre optic cables rather than buying access to the LFC's full network. This means the access seeker can install their own electronic equipment to deliver new broadband products and services.

⁷ All legislative references in this letter are to the Act, unless otherwise stated.

⁸ Defined in the Fibre Deeds as a point-to-multipoint layer 1 fibre access service, the specifications and terms of which will be contained in a Reference Offer that will be produced by the LFC prior to the date on which the LFC is required to provide the service.

⁹ Section 156AD(6)(a).

10. The Act gives the Commission a particular role in the context of the PON Fibre Access Service. Firstly, we are permitted to assess whether the LFCs' conduct in offering and supplying the services complies with their obligations under the Fibre Deeds. Secondly, if we consider that a breach of the Fibre Deeds is likely to occur or has occurred, we can decide whether to bring enforcement action under the Act.
11. The Fibre Deeds require the LFCs to offer the PON Fibre Access Service, including price and non-price terms, on an equivalent and non-discriminatory basis (see clauses 5 and 6 of the Fibre Deeds). However, the Fibre Deeds cannot specify the price or non-price terms of the PON Fibre Access Service,¹⁰ and the Commission is also not empowered to set terms (including a maximum price) for the PON Fibre Access Service.¹¹

Our process for the compliance assessment

12. The purpose of this compliance assessment is to ensure that LFCs are complying with their regulatory obligations in relation to the non-price terms of their PON Fibre Access Service offers.
13. Several access seekers have raised concerns with the Commission about the non-price terms of certain PON Fibre Access Services. In order to ensure that all such concerns on the part of access seekers are identified and addressed in an equitable manner, we are commencing this compliance assessment by providing the opportunity for all access seekers to provide evidence to us.
14. The first step of the compliance assessment will therefore involve information gathering from these stakeholders. This is being undertaken now so that once we have finalised the Guidance, we can expeditiously and efficiently analyse that information. If we have questions about any of the material that stakeholders submit to us, we will put those questions to stakeholders after the deadline for submissions has passed.

¹⁰ Section 156AD(5)(b).

¹¹ Section 211. Note that regulations could be made under s 229 on the recommendation of the Minister, declaring an unbundled fibre service and setting a maximum, cost-based, price. Such regulations would apply to any parties subject to price-quality regulation under Part 6 of the Act. After 1 January 2025, the Commission could commence a price-quality review, and one of the outcomes of that review might be a recommendation to the Minister on the content and scope of unbundling regulations under s 229.

15. We do not intend to conduct our analysis of that material until the Guidance is finalised. In the event that our analysis identifies issues that appear to require further investigation, we would engage at that point with LFCs and seek their views. We will not reach any adverse compliance findings as part of this assessment process without first having engaged with the LFCs. We consider that structuring the process in this way will result in us being able to analyse all relevant material at the same time and then to put any relevant matters to an LFC for its response in a single process. Our assessment might also involve further interaction with the access seeker who originally submitted the material.
16. It is important to emphasise that the fact that the Commission has launched this compliance assessment process should in no way be taken as implying that breaches of the Fibre Deeds have occurred or are occurring.
17. We are aware that access seekers have also raised concerns about the pricing of PON Fibre Access Services, and whether that pricing is consistent with LFCs' equivalence and non-discrimination obligations. We intend to consider whether to conduct a compliance assessment of pricing once the Guidance has been finalised.

Next steps

18. As the first part of our compliance assessment process, the Commission is seeking submissions from stakeholders on any issues they may have had with the non-price terms of PON Fibre Access Services, and any instances where they assert that an LFC has offered non-price terms in a discriminatory or non-equivalent manner.
19. To assist the Commission to ascertain whether the issue raised relates to compliance with the Fibre Deeds, an explanation of the scope of the issue(s) should be supplied in the submission. For each issue identified, we expect this to include:
 - 19.1 the relevant LFC(s) offering the non-price terms;
 - 19.2 full details of the non-price term(s) relevant to the issue;
 - 19.3 any documentary evidence of the issue; and
 - 19.4 an explanation of why the stakeholder considers that the Fibre Deeds may have been breached (for example, why the stakeholder asserts that an LFC has offered the PON Fibre Access Service in a discriminatory or non-equivalent manner).

If any of this information cannot be supplied, an explanation should be provided in the stakeholder's submission.

20. Please email your submission to Michael Callan, c/o regulation.branch@comcom.govt.nz by 5pm on Tuesday, 14 July 2020, with 'PONFAS non-price terms compliance assessment' in the subject line.

21. Your submission should be provided as an electronic file in an accessible form.
22. We anticipate that there may be important information of relevance to this compliance assessment that is commercially sensitive. If you wish to provide commercially sensitive information in your submission, we request that you clearly and specifically identify all information you consider to be confidential. Note that we reserve the right to use any information provided to us in submissions in any investigation or enforcement action we might take in relation to potential breaches of the Fibre Deeds, whether or not the information provided is marked as confidential. All information we receive is subject to the principle of availability under the Official Information Act 1982(OIA).¹² We recognise that much of the information we may receive could be of a private, commercially sensitive, or confidential nature. We take steps to preserve the confidentiality of such information and to provide the appropriate protections against disclosure.
23. The Commission expects to provide updates on this compliance assessment periodically.
24. We appreciate stakeholders' engagement in the development of our Guidance and we encourage stakeholders to continue to participate in that process as well.
25. Please direct any queries to Michael Callan, on (04) 924 3818 or at michael.callan@comcom.govt.nz.

Yours sincerely



Stephen Bass
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¹² Section 5 of the OIA, noting “the principle that the information shall be made available unless there is good reason for withholding it.”