

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

Proposed amendment made under s156AN of the Telecommunications Act 2001

Draft Clarification

Date: 3 August 2018

Draft

Introduction

1. The Commission has received a joint application for clarification under section 156AN of the Telecommunications Act 2001 (Act) from the following local fibre companies (LFCs):
 - 1.1 Enable Networks Limited;
 - 1.2 Ultrafast Fibre Limited;
 - 1.3 Northpower Fibre Limited¹; and
 - 1.4 Northpower LFC2 Ltd,(together, the “Applicants”).
2. A copy of the joint application for clarification is attached in **Appendix A**.
3. Each of the Applicants executed a Deed of Open Access Undertakings for Fibre Services in favour of the Crown on 6 October 2011 (together, the Deeds). The Deeds were entered into pursuant to s156AD of the Act which required the Applicants to provide 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.
4. The Applicants have submitted a request for clarification of the definition of “Network” in their respective Deeds. The definition of Network in each of the Applicant’s Deeds is identical. The proposed clarification would amend the definition of “Network” in the Deeds, so that it becomes consistent with the scope of Part 4AA of the Act.
5. The Commission provisionally considers that the proposed clarification addresses an ambiguity within the text of the Deeds, and that the clarification is not material. Accordingly, the Commission’s preliminary view is that the clarification request should be approved and that the Deeds be amended accordingly.
6. The Commission seeks comment from interested parties by **5 p.m. on Friday, 17 August 2018**.
7. This draft clarification sets out:
 - 7.1 a summary of the relevant background on the Deeds;
 - 7.2 our analysis for why we consider that the proposed clarification meets the criteria set out in section 156AN of the Act; and
 - 7.3 the proposed amendments to the Deeds.

¹ Previously Whangarei Local Fibre Company Limited

Background

Deeds of Open Access Undertakings for Fibre Services

8. The Applicants entered into the Deeds in order to participate in the Government's UFB Initiative². 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.
9. 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.
10. Part 4AA of the Act "requires providers of wholesale telecommunication services that are provided using a fibre optic network that is constructed, in whole or part, with Crown investment funding provided as part of the UFB Initiative, or that provides 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."³
11. Non-discrimination and equivalence are defined in the Act:⁴

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

12. The Applicants have requested that the Commission clarifies their Deeds by amending the definition of "Network" in the Deeds as follows:
 - 12.1 Replacing the definition of "Network" currently in the Deeds with:

"Network means the Fibre-to-the-Premises Access Network which is, or will be, owned or operated by the LFC"; and
 - 12.2 Inserting into the Deeds a definition of "Fibre-to-the-Premises Access Network" as follows:

² 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 (see definition in section 156AB of the Act)

³ Section 156AA(1)(a) of the Act.

⁴ Section 156AB of the Act

“Fibre-to-the-Premises Access Network has the meaning given in Part 4AA of the Act”.

13. The proposed new definition is identical to the definition of “Network” contained in Chorus Limited’s equivalent Deed of Open Access Undertakings for Fibre Services.

Relevant definitions/provisions

14. “Network” is defined in the Deeds as:

“the fibre-optic communications network which is, or will be, owned or operated by the LFC”.

15. Section 156AD(2) of the Act provides that the Deeds must provide for the LFCs to:

15.1 supply unbundled layer 1 services on all parts of its *fibre-to-the-premises access network*⁵

15.2 achieve non-discrimination in relation to the supply of *relevant services*⁶

15.3 design and build the *LFC fibre network* in a way that enables equivalence in relation to the supply of unbundled layer 1 services⁷

16. Part 4AA of the Act⁸ defines “LFC fibre network” as:

“a fibre-to-the-premises access network that is owned or operated by an LFC”⁹.

17. “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*¹⁰

18. Section 156AD(5)(a) of the Act provides that:

“an undertaking must not provide for rules or obligations in respect of services that are not relevant services (including layer 1 services)”.

⁵ Section 156AD (2)(b)

⁶ Section 156AD(2)(c)(i)

⁷ Section 156AD(2)(c)(ii)

⁸ 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

⁹ Section 156AB of the Act

¹⁰ Section 156AB of the Act

19. 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.”¹¹

The Applicants’ reasons for requesting the clarification

20. The Applicants are seeking a clarification of the Deeds as they 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.
21. The Applicants state that this was not the intention of the Deeds and is contrary to section 156AD(5(A) of the Act.

Clarification (section 156AN) under the Act

22. The Commission has been asked to consider this application under section 156AN of the Act.
23. Section 156AN of the Act provides that the Commission may amend an undertaking to clarify it if:
- 23.1 “The Commission, on the application of the LFC who gave the undertaking, considers that the undertaking requires clarification: and
- 23.2 The clarification is not material.”
24. We consider each limb of section 156AN of the Act in turn.

Limb 1 of section 156AN – Does the Commission consider the Deeds require clarification?

25. Our preliminary view is that the Applicants have raised compelling reasons in their joint application why the Deeds should be clarified.
26. “Network” contained in the Deeds refers to “the fibre-optic communications network”, and “LFC fibre network” contained in the Act refers to a “fibre-to-the-premises access network”.
27. It is arguable that “the fibre-optic communications network” can be interpreted to mean the same as “fibre-to-the-premises access network”. Ministers were referring to these terms interchangeably during the time Part 4AA of the Act was being considered by Parliament in 2011¹². For example, an early definition of “LFC fibre network” was “a fibre optic communications network that is owned or operated by an LFC”. The definition subsequently replaced “fibre optic communications network” with “fibre-to-the-premises access network”.

¹¹ Section 156AB of the Act

¹² Early version of the Telecommunications (TSO, Broadband, and Other Matters) Amendment Bill dated 16 May 2011 - Hansard

28. However, we also consider that “fibre-optic communications network” could likely be interpreted to be wider in scope than “fibre-to-the-premises access network”. This interpretation is different to that intended by the Act.
29. Part 4AA of the Act was introduced via the Telecommunication (TSO Broadband, and Other Matters) Amendment Bill 2011. The explanatory note in the General Policy Statement states:

“The new Part - enables the **providers of wholesale telecommunications services** that are provided using specified networks, or that provide access to unbundled elements of those networks, to **give enforceable undertakings to the Crown** providing for non-discrimination, equivalence, and other matters relating to the basis on which those services will be supplied. The effect of *new section 156AY*, which sets out requirements for a network to be specified by the Governor-General by Order in Council as a network for the purposes of the Part, is that ***new Part 4AA will apply only to networks that are fibre-to-the-premises access networks (as defined in new section 156AB)***, or are related to the construction of broadband infrastructure in non-urban areas, and that have been constructed with funding provided in whole or in part by the Crown or an entity specified in *new Schedule 3C...*”¹³ [*emphasis added*]

30. The above extract is a strong indication that it was always the intention of Parliament and the Act that the Applicants’ obligations should apply only to the fibre-to-the premises access networks, and not have a wider scope.
31. The 2011 Bill originally did not contain a definition of “LFC” or “local fibre company”. Instead the 2011 Bill contained a definition of “FTTP service provider” or “fibre-to-the-premises service provider” – which means:

“a service provider who...owns or operates an FTTP access network...”

32. This further strengthens this argument.
33. Overall, there is clearly some ambiguity in the definition of “Network” contained in the Deeds. Our preliminary view is that it is likely that the difference in terminology between “the fibre-optic communications network” and “fibre-to-the-premises access network” is inadvertent and the potential ambiguity should be clarified.
34. We provisionally agree with the arguments made by the Applicants that the ambiguity in the Deeds gives rise to the potential for them to be read inconsistently with the Act, and at the very least creates uncertainty.
35. Accordingly, our preliminary view is that the Deeds require clarification.

Limb 2 of section 156AN - Is the proposed clarification material?

36. We consider the Applicants’ reasons why the proposed clarification is not material to be persuasive. These reasons include that the proposed clarification:

¹³ Pages 10-11

- 36.1 gives effect to the true intent of each of the Deeds (The Deeds state in the first sentence - "The Undertakings are given by the LFC in accordance with, and are Undertakings for the purposes of Part 4AA of the...Act");
- 36.2 brings the Deeds within the scope of the Act ("the primary enabling legislation"); and
- 36.3 makes the Applicants' obligations consistent with Chorus Limited's obligations under its equivalent deed of undertaking.
37. The Commission's provisional view is that the proposed clarification will put it beyond doubt that the Deeds comply with the Act, including the requirements of section 156AD of the Act.
38. Our preliminary view is that the difference in wording between the Deeds and the Act was unintentional and merely an inadvertent error. On that basis, we do not believe that the proposed clarification is material. The scope of the Act is clear, and the purposes and intent of the Act should prevail.
39. The proposed clarification is making the Deeds consistent with Part 4AA of the Act and accordingly with what could ultimately be legally enforceable. We therefore regard the proposed clarification as not material.
40. We consider that clarification procedure is appropriate in these circumstances and available to the Commission to make clear the original intention of the parties to the Deeds.

Proposed Amendment

41. We consider the new definition of "Network" proposed by the Applicants to be appropriate, as it is consistent with the Act including section 156AD of the Act. It is also consistent with the intention of the parties to the Deeds.
42. Accordingly, we propose amending the Deeds in accordance with the wording requested by the Applicants:
- 42.1 Replacing the definition of "Network" in the Deeds with:
- "Network means the Fibre-to-the-Premises Access Network which is, or will be, owned or operated by the LFC"; and*
- 42.2 Inserting into the Deeds a definition of "Fibre-to-the-Premises Access Network" as follows:
- "Fibre-to-the-Premises Access Network has the meaning given in Part 4AA of the Act".*
43. We consider that it is in the best interests of the Applicants, the Crown and consumers to clarify the Deeds to ensure the legal position is clear and unambiguous.

The submission process

44. Submissions are invited on the Commission's proposed approach as set out in this draft clarification by no later than **5pm on Friday, 17 August 2018**.
45. You should send your submissions with the subject heading "Submission on Draft Clarification of Deeds of Open Access Undertakings" to the Commission's Wellington office at Level 9, 44 The Terrace, Wellington Central 6011, marked for the attention of Robin Meaclem, or by email to regulation.branch@comcom.govt.nz.
46. We intend to publish all submissions on our website. Submitters should provide a clearly labelled 'public version' of their submissions if submissions contain confidential information.
47. Once we have considered all submissions, we will publish our final decision.

Draft

Appendix A

**ENABLE NETWORKS LIMITED
ULTRAFast FIBRE LIMITED
NORTHPOWER FIBRE LIMITED
NORTHPOWER LFC2 LIMITED**

**REQUEST FOR CLARIFICATION OF UNDERTAKING PURSUANT TO SECTION 156AN OF THE
TELECOMMUNICATIONS ACT 2001**

1. The Applicants

- 1.1 Enable Networks Limited (**Enable**), Ultrafast Fibre Limited (**Ultrafast Fibre**) Northpower Fibre Limited and Northpower LFC Limited (**Northpower**) (collectively referred to as **Applicants**) are local fibre companies that have each invested in building the Ultrafast Broadband (**UFB**) network, in the greater Christchurch, central North Island and Northland areas respectively.
- 1.2 The Applicants are accordingly subject to Part 4AA of the Telecommunications Act 2001 (**Act**), have each entered into an undertaking in accordance with subpart 2 of Part 4AA, and are each entitled to make this request pursuant to section 156AN of the Act for clarification of their respective undertaking.

2. Telecommunications Act obligations

- 2.1 Subpart 2 of Part 4AA of the Act establishes a regime for “*Undertakings relating to networks developed with Crown funding as part of UFB initiative*”.
- 2.2 The regime applies to every local fibre company (**LFC**), which is defined in the Act as “*a company through which the investment of the Crown and a UFB partner in relation to a fibre optic communications network is effected*”.¹⁴
- 2.3 LFCs were required to enter into an undertaking in accordance with subpart 2 of Part 4AA of the Act.¹⁵ That undertaking was required to provide for LFCs to:
- (a) supply unbundled layer 1 services on all parts of its fibre-to-the-premises access network on and after 1 January 2020¹⁶ (**Unbundling Obligation**);
 - (b) achieve non-discrimination in relation to the supply of relevant services¹⁷ (**Non-discrimination Obligation**);
 - (c) design and build the LFC fibre network in a way that enables equivalence in relation to the supply of unbundled layer 1 services to be achieved on and after 1 January 2020¹⁸ (**EOI-ready Obligation**); and
 - (d) achieve equivalence in relation to the supply of unbundled layer 1 services on and after 1 January 2020¹⁹ (**Equivalence Obligation**).

¹⁴ Telecommunications Act 2001, section 156AB.

¹⁵ Section 156AD(1).

¹⁶ Section 156AD(2)(b).

¹⁷ Section 156AD(2)(c)(i).

¹⁸ Section 156AD(2)(c)(ii).

- 2.4 **LFC fibre network** is defined in section 156AB of the Act as “a fibre-to-the-premises access network that is owned or operated by an LFC”.
- 2.5 **Fibre-to-the-premises access network** is in turn defined (relevantly) as “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”.
- 2.6 **Relevant service** is defined as “a wholesale telecommunications service that is provided using, or that provides access to unbundled elements of, an LFC fibre network”.
- 2.7 As is clear from these definitions in section 156AB, and the wording of the Unbundling, Non-discrimination, EOI-ready, and Equivalence Obligations, the regulatory framework set out in subpart 2 of Part 4AA applies only to services provided over that part of the fibre network which connects an end-user’s premises or building to the LFC’s exchange or central office.

3. Deed of Open Access Undertaking

- 3.1 On 6 October 2011 each of Enable, Ultrafast Fibre and Northpower executed a Deed of Open Access Undertakings for Fibre Services (**Applicant’s Undertaking**) to comply with its obligations under Part 4AA of the Act.
- 3.2 Each Applicant’s Undertaking was prepared by the Crown, and recorded, by way of background, that “these Undertakings are given by the LFC in accordance with, and are Undertakings for the purposes of, Part 4AA of the Telecommunications Act 2001.”²⁰
- 3.3 The Unbundling, Non-discrimination, EOI-ready and Equivalence Obligations are described in each Applicant’s Undertaking as:
- (a) **Unbundling Obligation:**²¹ from 1 January 2020, the LFC must (i) make available the Input Services;
 - (b) **Non-discrimination Obligation:**²² When doing or omitting to do anything in respect of a Service the LFC will not discriminate:
 - (i) between Access Seekers;
 - (ii) in favour of any LFC Related Party; or
 - (iii) where the LFC supplies a Service to itself, in favour of the LFC itself.
 - (c) **EOI-ready Obligation:**²³ 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 2020; and
 - (d) **Equivalence Obligation:**²⁴ from 1 January 2020, the LFC must (ii) provide all Input Services to an Equivalence standard.
- 3.4 **Input Services** are defined in each Applicant’s Undertaking as:²⁵

¹⁹ Section 156AD(2)(c)(iii).

²⁰ Enable Networks Limited, Deed of Open Access Undertakings for Fibre Services (6 October 2011) (**Undertaking**) at page 3. The Undertakings of the other Applicants follow the same format.

²¹ Undertaking, clause 6.2(a).

²² Above, clause 5.1.

²³ Above, clause 6.1.

²⁴ Above, clause 6.2(b).

- 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 as at 31 December 2019 under the UFB Contract.*

3.5 **Network** is defined in each Applicant's Undertaking as "*the fibre-optic communications network which is, or will be, owned or operated by the LFC.*"²⁶

3.6 **Service** is defined in each Applicant's Undertaking as "*a wholesale Telecommunications service that is provided using, or that provides access to unbundled elements of, a Network.*"²⁷

4. Error in Definition of Network in each Applicant's Undertaking

4.1 While Part 4AA of the Act is clear (as we summarise at 2.7) that the Unbundling, Non-discrimination, EOI-ready, and Equivalence Obligations apply only to services provided over that part of the fibre network which connects an end-user's premises or building to the LFC's exchange or central office, Network is defined in each Applicant's Undertaking as "*the fibre-optic communications network which is, or will be, owned or operated by the LFC.*"

4.2 The consequence of this definitional error is to extend the scope of each Applicant's Undertaking to the entire fibre network, thereby imposing obligations on the Applicants in respect of services which are not delivered over the fibre-to-the-premises access network.

4.3 This was not the intention of the Applicant's Undertaking, which, as each states, was entered into in accordance with and for the purposes of Part 4AA of the Act.

4.4 Section 156L of the Act provides for a pecuniary penalty of up to \$10 million if a person has failed, without reasonable excuse, to comply with an undertaking under Part 4AA. The error in the definition of Network has the effect of creating a wider exposure to penalty than is provided for in the Act.

4.5 Section 156AD(5)(a) of the Act provides that "*an undertaking **must not** provide for rules or obligations in respect of services that are not relevant services (including layer 1 services).*" Relevant service is defined as "*a wholesale telecommunications service that is provided using, or that provides access to unbundled elements of, an LFC fibre network*", and LFC fibre network is defined as "*a fibre-to-the-premises access network that is owned or operated by an LFC*".

4.6 Each Applicant's Undertaking, by purporting to provide for rules or obligations in respect of services which are not relevant services, breaches section 156AD(5)(a) of the Act. As a consequence, those rules or obligations are *ultra vires* and of no effect.

5. Correct Definition of Network in the Chorus Undertaking

5.1 In contrast to the Applicant's Undertaking, Network is correctly defined in clause 1.1 of the undertaking given by Chorus Limited on 6 October 2011 under section 156AH of the Act (**Chorus Undertaking**):

- (a) "*Network means the Fibre-to-the Premises Access Network which is, or will be, owned or operated by Chorus*"; and

²⁵ Above, clause 1.1. As no unbundled layer 1 service is required to be provided under a Standard Terms Determination, that part of the definition is not relevant.

²⁶ Above, clause 1.1

²⁷ Above, clause 1.1.

(b) *“Fibre-to-the-Premises Access Network has the meaning given in Part 4AA of the Act”.*

5.2 These definitions reflect those contained in Part 4AA, as noted at 2.5 above.

6. Request for clarification of Applicant’s Undertaking under section 156AN of the Act

6.1 The Applicants request that the Commission amend each Applicant’s Undertaking to clarify it by adopting the relevant definitions from the Chorus Undertaking, namely:

(a) replacing the definition of Network currently in each Applicant’s Undertaking with the following definition which is consistent with the definition of Network in the Chorus Undertaking:

“Network means the Fibre-to-the-Premises Access Network which is, or will be, owned or operated by the LFC”; and

(b) adding to each Applicant’s Undertaking the definition of Fibre-to-the-Premises Access Network set out in the Chorus Undertaking:

“Fibre-to-the-Premises Access Network has the meaning given in Part 4AA of the Act.”

6.2 This change would:

(a) give effect to the true intent of each Applicant’s Undertaking (as evidenced by the first sentence in each of them);

(b) bring each Applicant’s Undertaking within the scope of its primary enabling legislation and create enforceable obligations; and

(c) make the Applicants’ obligations consistent with Chorus’ obligations.

6.3 For these reasons, the requested change is not a material change, and the Commission is not precluded by section 156AN(b) of the Act from amending each undertaking to clarify it in the manner requested.

6.4 All correspondence and notices in respect of this request should be directed in the first instance to:

MinterEllisonRuddWatts
Lumley Centre
88 Shortland Street
Auckland 1010
Attn: Dr Ross Patterson



R.H. Patterson
Counsel for the applicants
T: +64 9 353 9864 E: ross.patterson@minterellison.co.nz