

UltraFast Broadband Limited
Open Access Undertakings

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BACKGROUND

These Undertakings are given by the LFC in accordance with, and are Undertakings for the purposes of [Determination/section of Telecommunications Act].

These Undertakings are binding on the LFC, are given in favour of the Crown and are enforceable by the Crown and the Commission.

DEFINITIONS AND INTERPRETATION

1. Definitions

1.1. In these Undertakings, unless the context requires otherwise:

Access Seeker means a person who is obtaining, or has indicated to the LFC a desire to contract for, Services from the LFC.

Access Seeker Confidential Information has the meaning in clause 11.5.

Act means the Telecommunications Act 2001.

Arms Length Terms has the meaning in clause 10.4

CFH means Crown Fibre Holdings Limited or any entity that inherits its legal rights and obligations.

Commencement Date means the date on which the Minister's approval is notified in accordance with section 166AK (3) of the Act.

Commission has the meaning given to that term in the Act.

Discriminate has the meaning in clause 5.2 and *discrimination* and *non-discrimination* have corresponding meanings.

Determination means the [name] determination issued by the Minister for the purposes of the Act.

End – User has the meaning given to that term in the Act.

Equivalence of Inputs has the meaning in clause 6.3.

Input Services means:

(1) all layer 1 Services and

(2) any other Services

that are both supplied by the LFC to itself, and supplied to Access Seekers.

LFC means UltraFast Broadband Limited.

LFC Related Party means any entity that is a Related Party of the LFC, and is deemed to include the Partner and any Related Party of the Partner.

Minister has the meaning given to that term in the Act.

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

Partner means UltraFast Fibre Limited.

Related Party means in relation to another person:

- Any company that is related within the meaning of section 4A(2)(a) of the Financial Reporting Act 1993;
- Any partner or joint venturer of that person.

Service means a wholesale telecommunications service that is provided using, or that provides access to unbundled elements of, a Network

Telecommunications Commissioner has the meaning given to that term in the Act.

Undertakings mean this deed.

Working Day has the meaning given to that term in the Act.

2. Interpretation

2.1. Examples used in these Undertakings are only illustrative of the clauses to which they relate. They do not limit those clauses. If an example and a clause are inconsistent, the clause prevails.

2.2. In these Undertakings, unless the context requires otherwise:

- (a) Clause headings are for convenience only, and are not part of these Undertakings;
- (b) References to clauses are references to clauses in these Undertakings;
- (c) The singular includes the plural and vice versa;
- (d) Words denoting natural persons include any legal entity or association of entities and vice versa;
- (e) Reference to a statute means that statute as amended and includes subordinate legislation;
- (f) Except where these Undertakings expressly provide otherwise, reference to a document means that document as amended;

- (g) Reference to the agreement of a party means written agreement;
- (h) Reference to approval, authorisation or consent means prior written approval authorisation or consent;
- (i) The words “including”, “for example” or “such as” when introducing an example, do not limit the meaning of the Clause of the Undertakings to which that example relates;

2.3 Communications to and from a party may, if that party so agrees, be provided in electronic form.

3. Scope and Application

3.1. These Undertakings are binding on the LFC, are given by the LFC in favour of the Crown and are enforceable by the Crown and the Commission.

3.2. If anything in these Undertakings and anything in any agreement or arrangement in respect of the LFC or between:

- (a) the LFC and CFH;
- (b) the LFC and any Access Seeker;
- (c) the LFC and any LFC Related Party,

are inconsistent, these Undertakings prevail in relation to the obligations of the LFC.

4. Commencement, Term and Variation

4.1. These Undertakings commence on the Commencement Date.

4.2. These Undertakings may be only varied in accordance with the process set out in sections 156AN and 156AO of the Act.

5. Obligation not to Discriminate

5.1. When doing or omitting to do anything in respect of a Service the LFC will not Discriminate:

- (a) between Access Seekers;
- (b) in favour of any LFC Related Party; or
- (c) where the LFC supplies a Service to itself, in favour of the LFC itself.

5.2. In these Undertakings, “to Discriminate” means to treat differently, except to the extent a particular difference in treatment is objectively justifiable and, does not harm competition in any telecommunications market.

5.3. For the avoidance of doubt, nothing in this clause 5 prevents an LFC from providing Services to an LFC Related Party for the purposes of the LFC Related Party providing supervisory control and data acquisition services or services relating to remote monitoring of electricity distribution or electricity transmission networks to itself or Transpower New Zealand Limited.

6. Equivalence of Inputs

6.1. The LFCs must design and build its Network so as to ensure Access Seekers can purchase Input Services from the LFC on an Equivalence of Inputs basis after 1 January 2020. For example the LFC must ensure that by 1 January 2020:

- (a) there is sufficient space in ducts (or additional dark fibres) to enable Equivalence of Inputs;
- (b) the LFCs Operational and Business Support Systems (OSS & BSS) are capable of supporting Equivalence of Inputs on implementation.

6.2. From 1 January 2020, the LFC must provide all Input Services on an Equivalence of Inputs basis.

6.3. In this Undertaking "*Equivalence of Inputs*" means LFC must:

- (c) Provide each Access Seeker and the LFC itself with the same Service;
- (d) Deliver that Service to each Access Seeker and to the LFC itself on the same timescales and on the same terms and conditions (including price and service levels);
- (e) Use the same systems and processes (including operational support processes) to deliver the Services to each Access Seeker and the LFC itself;
- (f) Provide the Access Seeker and the LFC itself with the same information about the Services, systems and processes; and
- (g) Ensure each Access Seeker is able to use in the same way, and with the same degree of reliability and performance as the LFC itself, the systems and processes that are used by the LFC.

6.4. In clause 6.3, the same means exactly the same, subject only to:

- (a) Trivial differences;
- (b) Reasonable differences relating to:
 - (i) Credit rating and vetting procedures;
 - (ii) Payment procedures;

- (iii) 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 Commission;
- (iv) Provisions relating to the termination of supply;
- (v) Contractual provisions relating to dispute resolution (to the extent necessary because the LFC is one company);
- (vi) Requirements for a safe working environment; or
- (vii) Differences that are agreed by the LFC and the Commission.

6.5. In this clause 6, "LFC itself" includes any LFC Related Parties which acquire a Service from the LFC.

6.6. For the avoidance of doubt, clause 6.1 does not limit clause 6.2.

7. Supply of service

7.1. On and from the Commencement Date the LFC must offer and provide Services to Access Seekers in accordance with these Undertakings.

7.2. For the avoidance of doubt, further terms and conditions of supply, including any eligibility requirements or other obligations of the Access Seeker, may be provided for in agreements between the LFC and CFH, and the LFC and each Access Seeker.

7.3. Other than as provided in clause 7.4, the LFC will not supply Services to End Users.

7.4. Nothing in this clause 7 prevents an LFC from providing Services to an LFC Related Party for the purposes of the LFC Related Party providing supervisory control and data acquisition services, services relating to remote monitoring of electricity distribution or electricity transmission networks to itself or Transpower New Zealand Limited.

8. Information disclosure

8.1. The LFC must publicly disclose (including on a website owned or controlled by the LFC) all of the terms and conditions on which it agrees to provide Services (whether standard or non standard, and including any related or linked agreements or arrangements) not later than 10 working days after it offers or provides Services on those terms and conditions.

8.2. Any variations or additions to those terms and conditions will likewise be publicly disclosed within 10 working days.

8.3. The LFC may withhold public disclosure of terms and conditions under clause 8.1 with the consent of the Commission:

- (a) At the request of an Access Seeker which is not a LFC Related Party; or
- (b) Which the LFC considers on reasonable grounds to be commercially sensitive or confidential.

8.4. The LFC will disclose to the Commission within 30 working days of the end of each LFC financial year all transactions in that year with LFC Related Parties involving the supply of Services with a value above 1% of the LFC's net assets or annual revenue, whichever is less.

8.5. The LFC will disclose any material breach of these Undertakings to the Commission as soon as is reasonably practicable (but in any event not later than 20 working days) after LFC becomes aware of that breach. The LFC will disclose to the Commission within 10 working days of the end of each quarter any other breach of these Undertakings in that quarter. All disclosures under this clause will be in sufficient detail to reasonably inform the Commission of the nature, cause and extent of the breach.

8.6. Where the Commission has received a complaint from any Access Seeker concerning the LFC's non-compliance with these Undertakings, the Commission may request, and the LFC will provide, any information reasonably requested by the Commission related to that complaint. The Commission may request information under this clause without revealing the identity of any complainant.

8.7. The Commission may require any information or report required pursuant to these Undertakings to be provided by the LFC by a time, in a form and manner as reasonably required by the Commission.

9. Certification

9.1. No later than 20 Working Days following the end of each LFC financial year the Board of the LFC must certify to the Commission annually on behalf of the LFC that, to the best of the directors' knowledge after making reasonable inquiry, LFC has complied with these Undertakings (except for any breaches that have been reported to the Commission or are reported with the certificate).

10. Arms length dealings

10.1. All dealings between the LFC and LFC Related Parties relating to the supply of Services to LFC Related Parties must be on Arms Length Terms.

10.2. All dealings between the LFC and LFC Related Parties relating to the supply of Services to LFC Related Parties must be recorded in writing, including any terms of supply and price or other

transfers, and those records must be retained by the LFC in a form that can be audited and/or disclosed to the Commission under clause 8.

10.3. From 1 January 2020, where the LFC supplies Input Services to itself it must do so on Arms Length Terms.

10.4. In these Undertakings, *Arms Length Terms* means having relationships, dealings and transactions that do not include elements that parties in their respective positions would usually omit, and do not omit elements that parties in their respective positions would usually include, if:

- a. The parties were independent and acting independently;
- b. The parties were unrelated and acting at arms length.

11. Confidentiality

11.1. The LFC will keep all Access Seeker Confidential Information in confidence and will not disclose Access Seeker Confidential Information to any third party or use any of that information other than as necessary for the provision of the Services to that Access Seeker.

11.2. LFC will make and enforce internal rules and policies to ensure compliance with the obligation in this clause 11.

11.3. A disclosure of Access Seeker Confidential Information will not constitute a breach of these Undertakings where it is:

- (a) In confidence, to an emergency organisation that reasonably needs that information;
- (b) Properly made pursuant to a relevant legal or regulatory obligation;
- (c) To the Commission;
- (d) In confidence to CFH as required by a written agreement between the LFC and CFH that has been disclosed to the Commission ;
- (e) Properly and reasonably made to a court.

11.4. A disclosure or use of Access Seeker Confidential Information will not constitute a breach of these Undertakings where and to the extent that such disclosure or use is authorised by the Access Seeker.

11.5. In these Undertakings *Access Seeker Confidential Information* means any information that:

- (a) An Access Seeker provides to the LFC in relation to the provision of a Service; or
- (b) LFC otherwise holds or obtains in relation to the provision of a Service to an Access Seeker

that is by its nature confidential or proprietary, is disclosed in confidence or which the LFC knows or ought reasonably to know is confidential to that Access Seeker, or that concerns a person that is, or intends to become, a customer or End User of that Access seeker; but does not include:

- (c) Information that was publicly available or known to the LFC at the time of receipt, or that becomes publicly available other than as a result of a breach of confidentiality;
- (d) Information that was obtained by the LFC from sources that are independent of the Access Seeker;
- (e) Information that is required to be disclosed by the LFC by law;
- (f) Information, or types of information, that the LFC and the Commission agree is not Access Seeker Confidential Information; and
- (g) Information, or types of information, that an Access Seeker agrees is not Access Seeker Confidential Information.

12. Breach of these Undertakings

[Drafting note: This clause will refer to the relevant sections of the Telecommunications Act 2001 as amended by the Telecommunications (TSO, Broadband and Other Matters) Amendment Bill once enacted.]

13. Miscellaneous

13.1. The LFC will establish arrangements to ensure that it, and any subsidiaries, and all of their officers, employees, agents and contractors comply with these Undertakings and with any documents or procedures that are necessary to give effect to these Undertakings. These will include internal assurance systems to monitor compliance with these Undertakings.

13.2. The LFC will not be in breach of these Undertakings if it fails to meet a requirement of these Undertakings and the failure to comply is trivial or de minimis.