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Too whom it may concern,

Local Fibre Company and Rural Broadband Initiative partners' open access deeds of undertaking

1. Vector welcomes the opportunity to submit on the Local Fibre Company and Rural Broadband Initiative partners' open access deeds of undertaking (Open Access Deeds).
2. No part of our submission is confidential and we are happy for it to be publicly released.

General comments

3. Vector believes there are changes that could be made to the Open Access Deeds to provide better surety that they will provide genuine, non-discriminatory, open access in a timely manner, and promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand.
4. Vector observes the Local Fibre Open Access Deed of Chorus is substantially identical to that of Enable, Ultra-fast Broadband Limited and Northpower.¹ The access arrangements that may best suit Enable, Ultra-fast Broadband Limited and Northpower, however, need not be the same as that for Chorus. Enable, Ultra-fast Broadband Limited and Northpower are essentially in the same situation as Vector Communications. Absent a retail customer base, the success of our respective networks depends on open access and utilisation by potential access seekers. This may include going beyond that required by legislation and the UFB agreements with the Government to maximise use of their fibre networks at the expense of the incumbent copper network.
5. In contrast, Chorus has an incumbent legacy copper network to preserve, which will also be in competition with Enable, Ultra-fast Broadband Limited and Northpower's fibre networks.
6. Telecom and Chorus are still operating as a single entity under common ownership. Until ownership separation has taken place Telecom will continue to have incentives to establish arrangements to maximise the joint value of Telecom and Chorus. This includes protection of its incumbency copper infrastructure and retail base.
7. One consequence of these legacy arrangements, for example, is that it may suit Chorus to follow the minimum legal requirements in terms of non-discrimination

¹ A comparison of the Deeds is provided below.

and wait until 2020 before adopting Equivalence of Inputs. It is unclear that this would best suit Enable, Ultra-fast Broadband Limited and Northpower interests.

Comparison of the Deeds

8. The Enable, Ultra-fast Broadband Limited and Northpower Deeds are identical, and substantially identical to that of Chorus. Notable differences with Chorus' Open Access Deed include:

- a. There are restrictions on Chorus' use of commercial information, with a notable exemption that "For the purposes of these Undertakings, information is not "provided" or "disclosed" by Chorus2 to ServiceTel [Telecom] where the information is provided to ServiceTel in accordance with an arm's length Sharing Arrangement." No such clause exists in relation to Enable Networks, UltraFast Broadband and Northpower.
- b. Enable Networks, UltraFast Broadband and Northpower Open Access Deeds contain arms-length dealings provisions that Chorus' does not.

Comment: All of the Open Access Deeds should contain arms-length arrangements. The arms-length clauses could be strengthened by drawing on the arms-length provisions that were contained in the Electricity Industry Reform Act 1998.

This is particularly important in relation to Chorus, as Telecom and Chorus are yet to go through a structural separation and plan to have sharing arrangements in place for some assets after the separation. Telecom will have incentives to lock in arrangements with Chorus which suits its **own interests, but not necessarily that of other access seekers.**

- c. Chorus' Open Access Deed includes an Internal Compliance and Audit provisions that the others do not.

Comment: All of the Open Access Deeds should include this.

- d. Enable Networks, UltraFast Broadband and Northpower Open Access Deeds adopt a narrower definition of Commercial Information than Chorus (they exclude reference to marketing strategies, costs and projected sales volumes).

Comment: Vector considers that the Chorus Open Access Deed's definition is more appropriate.

- e. Chorus precludes grandfathered services (mobile services, services involved in provision of space in exchanges etc and an input service to allow continued provision of One office) from the non-discrimination clauses.

Comment: Vector does not support this.

- f. Chorus' Open Access Deed includes a clause (7.5) that "... Chorus2 will not supply any Access Seeker with a Downstream Service [Layer 3 or above] except where Chorus2 is expressly permitted or required to supply a Downstream Service by any law or regulation".

Some potential enhancements to the Open Access Deeds

9. Vector has a number of suggestions about how the Open Access Deeds could be enhanced, which we detail below.

Purpose statement

10. The Open Access Deeds could be enhanced by including a purpose statement (based on subpart 2A, section 4AA of the Telecommunications Act 2001) along the lines of:

The purpose of this Deed is to:

- (a) promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand; and
- (b) require transparency, non-discrimination, and equivalence of supply in relation to certain telecommunications services; and
- (c) facilitate efficient investment in telecommunications infrastructure and services.

11. This could be complemented by a duty not to defeat the purpose, based on the Electricity Industry Reform Act:

[Chorus2] will not at any time do anything to defeat the purpose of this Deed.

Open Access Principles

12. The Open Access Deeds could be enhanced by inclusion of open access principles. These could, subject to some modification for applicability, be based on the provisions in clauses 5 and 6 of Subpart 2, Part 1, Schedule 1 of the Telecommunications Act.

Independent audits

13. The Open Access Deeds should contain a provision requiring that independent audits will be undertaken to confirm that the Open Access Deed requirements have not been breached.

Dispute resolution

14. The Open Access Deeds should contain dispute resolution provisions.
15. Section 156AY(3) of the Telecommunications Act requires that undertakings relating to networks developed with Crown funding as part of the Rural Broadband initiative requires that "An undertaking may specify a mechanism for resolution, by a suitably qualified and experienced independent person, of any disputes that arise between the service provider and access seekers after the undertaking is approved." Vector considers this should also be adopted for UFB undertakings.

Reference Offers

16. The Open Access Deeds could adopt some of the Standard Terms requirements in the Telecommunications Act. For example, the Telecommunications Act requires that Standard Terms "(a) specify sufficient terms to allow, without the need for the access seeker to enter into an agreement with the access provider, the ... service to be made available within the time frames specified under paragraph (c); and ... (b) provide an explanation of, and reasons for, those terms; and ... (c) state the time frames within which the access provider must make the service

available to ... (i) every person who is already an access seeker ...; and (ii) every person who becomes an access seeker ..."

Other

17. Other potential improvements could include:

- a. Remove clause 11.3 in relation to Commercial Information which exempts Chorus2 from the restrictions on how it can use commercial information obtained from access seekers if the information is provided to ServiceTel (Telecom) according to arm's length Sharing Arrangements.
- b. Replace "take reasonable care to" with "will" in clauses 12.1(c) and (d).
- c. Widen clause 12.1(b) to state that "[Chorus2] will not use the Access Seeker Confidential Information for any purpose other than that which it was provided for, and will delete any such Confidential Information when it is no longer needed for that purpose."

Concluding remarks

18. If the Ministry has any queries regarding our submission or would like further information please contact Robert Allen, Senior Regulatory Advisor, on 04 803 9036 or robert.allen@vector.co.nz.

Kind regards



Bruce Girdwood

Regulatory Affairs Manager